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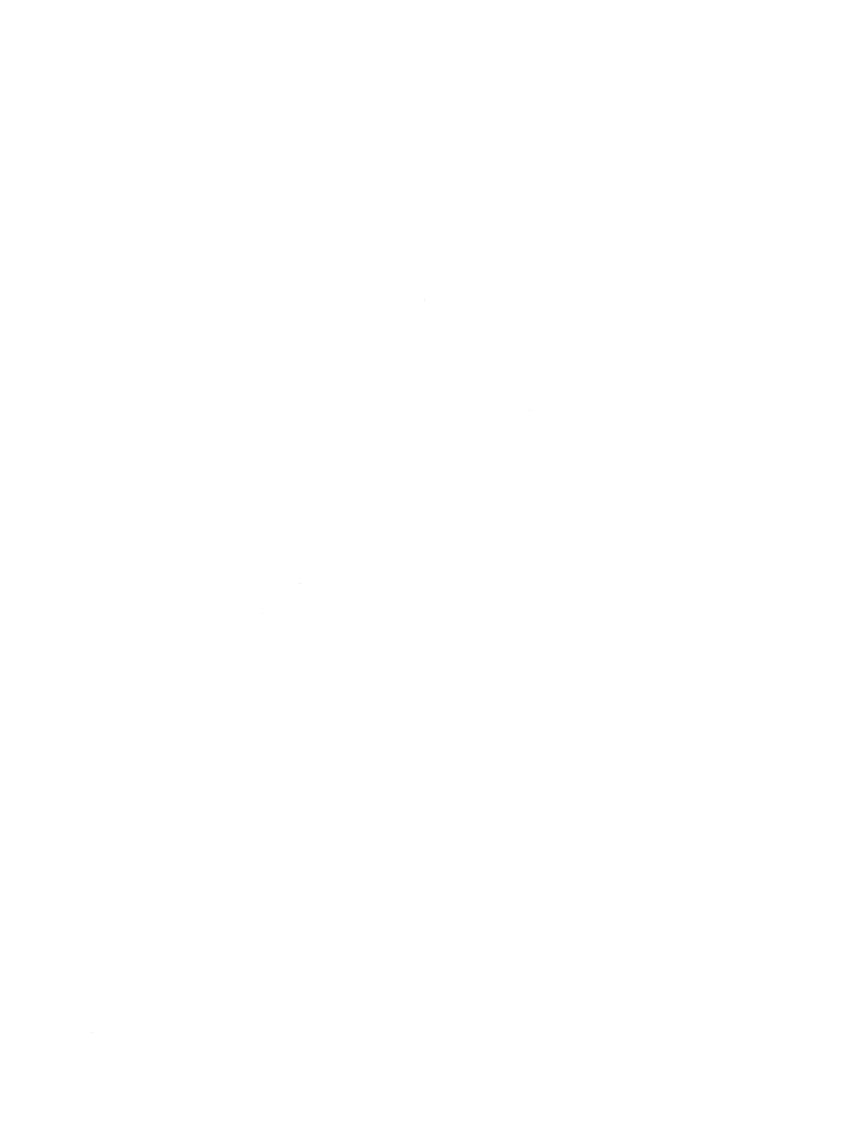
CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS OF THE UNITED STATES

NOVEMBER, 1918

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OF THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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# CASES

#### ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

In re STITT.

#### In re ROSENBAUM.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3139.

1. BANKRUPTCY \$\infty 400(3)\$—EXEMPTION—APPLICATIONS.

Gen. Code Ohio, § 11738, contemplates that exemptions be claimed by way of selection before sale of specific articles of personal property, but the manner and time of claiming exemptions in bankruptcy proceedings is matter of procedure, and the District Court had power, under the facts presented, to permit a bankrupt who had been depending for an exemption out of the proceeds of sale of a homestead under section 11737, the proceeds of which did not cover mortgage debts, to make a claim for exemption out of the proceeds of personalty after sale.

2. Bankruptcy \$\infty 400(1)\$—Exemptions—Burden of Proof.

Where bankrupt proved he was a married man, living with wife and not owner of homestead, when filing claim for exemption under Gen. Code Ohio, \\$ 11738, burden was on trustee under the case presented, to affirmatively show that there was not \\$500 worth of personalty belonging to the estate paid for, and so not subject to prior claims for purchase price.

3. Bankruptcy \$\sim 395(1)\$—Exemptions—"Owner of Homestead."

A bankrupt, who had title to a homestead which did not sell in the bankruptcy proceedings for enough to satisfy mortgages against it, was not the owner of the homestead, within Gen. Code Ohio, § 11738, as to allowances from personalty.

4. BANKRUPTCY \$\infty 446-APPEAL-QUESTIONS OF FACT.

In proceeding in Circuit Court of Appeals to revise order of District Court allowing exemptions to a bankrupt, questions of fact cannot be determined or reviewed, when there is any evidence to support them; nor, in the absence of the testimony, can a finding that there is no such evidence be reviewed.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Ohio, in Bankruptcy; D. C. Westenhaver, Judge.

In the matter of the petition of W. C. Stitt, trustee in bankruptcy of the estate of Max B. Rosenbaum, bankrupt, to revise an order of

 $<sup>\</sup>Longrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  $252~\mathrm{F.}{-}1$ 

the District Court of the United States for the Northern District of Ohio allowing statutory exemptions. Order affirmed.

Guy Ohl and Walter C. McKain, both of Youngstown, Ohio, for petitioner.

Horace T. Smith, George Edwards, and David Steiner, all of Youngstown, Ohio, for respondent.

Before KNAPPEN and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

KNAPPEN, Circuit Judge. Petition under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]) to revise an order allowing statutory exemptions. The bankrupt was adjudged such on his voluntary petition December 4, 1915. He had two parcels of real estate, on one of which he then resided with his wife, Lena Rosenbaum, and their children. In the course of bankruptcy administration the real estate was sold, bringing a trifle less than the amount of two mortgages thereon. The personal estate realized a considerable amount.

Section 11737 of the General Code of Ohio, then in force, gave to the head of a family or to the wife upon the sale on execution of an incumbered homestead an exemption, in lieu of homestead, to the extent of \$500, out of the net proceeds of the sale above prior liens; and section 11738 provides that:

"Husband and wife living together \* \* and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale real or personal property to be selected by such person, his agent or attorney, before sale, not exceeding \$500 in value, in addition to the amount of chattel property otherwise by law exempted."

Application was duly made for the payment of the exemption, as well as for dower in the real estate. The referee denied all claims for exemption, as well as the wife's claim of dower. The District Judge, on review, affirmed the action of the referee in denying the wife's claim to dower, but allowed the claim to the \$500 exemptions out of the proceeds of the sale of personalty. The wife acquiesces in the denial of her claimed dower. The trustee seeks review of the allowance of exemptions. The case thus involves only the propriety of their allowance from personalty. The grounds of the objection thereto are these.

[1] 1. That the Ohio statute requires that the exemptions be claimed by way of selection, before sale, of specific articles of personal property, that by failing to so select and demand the right to exemptions was waived, and that the bankruptcy court had no power to award exemptions in cash out of the proceeds of the sale.

We accept the construction of the Ohio statute adopted by the Ohio courts, as contemplating a selection of specific articles of personalty before execution sale. In re Baker (C. C. A. 6) 182 Fed. 392, 104 C. C. A. 602. But the question is whether, by departing, in the course of bankruptcy administration, from the specific method of selection provided by the Ohio statute with reference to sales on execution, the

right to exemptions is irrevocably lost. It is true that the right to exemptions is a personal privilege, and may be waived by the debtor; but the Bankruptcy Act aims to assure to him the exemptions given by the statutes of the state. Section 6a of the act (Comp. St. 1916, § 9590) expressly gives the benefit of the statutory exemptions, whatever they may prove to be. In re National Grocer Co. (C. C. A. 6) 181 Fed. 33, 35, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982. Section 2, subd. 11, (Comp. St. 1916, § 9586), expressly authorizes courts of bankruptcy to "determine all claims of bankrupts to their exemptions"; and General Order No. 17 (89 Fed. viii, 32 C. C. A. xix) requires the trustee to report to the court "the articles set off to the bankrupt by him,"

The record in this case effectually repels any inference of waiver, actual or intended, unless the mere failure to demand specific articles of personalty before sale inflexibly works such waiver as matter of law. By the schedules filed with the petition for adjudication in bankruptcy the \$500 exemption was expressly claimed in cash out of the proceeds of the sale of real estate, "or the proceeds of the sale of his personal property, as provided in sections 11737 and 11738 of the General Code of Ohio." The referee has found as a fact that "there was no cash in this estate at the time of the adjudication," whose date was that of the petition therefor. As early as January 14, 1916, the bankrupt's wife also filed a claim to exemptions from the homestead, and on July 19, 1916, she demanded exemption from the personalty in lieu of real estate. Up to this time the trustee had not refused to set aside exemptions from personalty. Both the bankrupt and his wife had apparently at first expected that the real estate would bring enough to leave a surplus available for dower and homestead exemptions above the one mortgage admitted to be an antecedent lien. sale of the real estate on July 12, 1916, failed to bring the amount of the two mortgages thereon. Whether on July 19th it had been definitely determined that the other mortgage was also a valid antecedent lien is not clear, but presumably the small price realized at the sale of the realty made the necessity of resort to personalty seem more probable. Until it appeared that the exemptions could not be had from real estate, the personalty could not be resorted to. Meanwhile the personalty (largely a merchandise stock) had been partly sold at retail. The last of it was sold in bulk in June or July, 1916; the precise time does not appear.

Under these circumstances, we think the bankrupt cannot be said, as matter of law, to have waived the right of exemptions in personal property. It is not suggested that the estate has suffered or will suffer from the failure to select, as exempt, before sale, specific articles at their appraised valuation. In such a case it would be proper to diminish the award of exemptions by a proper proportion of the costs of sale and by the difference between sale price and appraised valuation. In re Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. Rep. 586. But that question is not here. We agree with the District Judge, that the manner and time of making, in the course of bankruptcy administration, the statutory claims for exemptions is matter of procedure only, and that under the circumstances presented here it would have been the

plain duty of the court below to permit an amendment to the claim so as to call for the application of proceeds of personalty sold. These conclusions are fortified by a prior decision of Judge Westenhaver (In re Radcliffe, Bankrupt [D. C.] 243 Fed. 716, 39 Am. Bankr. Rep. 612), and the opinion of Judge Tayler (In re Berman [D. C.] 140 Fed. 761), and are not inconsistent with In re Stern, 30 Am. Bankr. Rep. 694. To hold otherwise would be to permit the exemption statutes to be emasculated through a narrow and purely technical construction. We find nothing in the cited decisions of the Ohio state courts compelling such construction. The action of the District Judge must be treated as in effect permitting such amendment. We think his action right.

[2] 2. The trustee's second ground of objection is that the bank-rupt has not shown that any of the personal property belonging to the estate has been paid for. This objection rests on the fact that the concluding clause of section 11738, above cited, provides that:

"No personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof."

There is no affirmative claim that there was not in fact more than \$500 of personal property paid for, and thus not subject to prior claims for the purchase price. The fact that the debtor's property was less in value than his debts has no tendency to show that no portion of the stock on hand, and represented by the \$500 exemption, was paid for. The question is, at the best, merely one of burden of proof. We think that, under the case presented, the District Judge rightly held that the burden was on the trustee to show that there was not on hand \$500 of personalty not subject to prior claims for purchase price. True, it is the general rule that one claiming exemptions must show himself to be within the terms of the statute. The bankrupt did this when he proved that he was a married man, living with his wife, and not the owner of a homestead. The later clause, relating to executions for purchase price, was not, strictly speaking, a statutory condition of his general right to exemption from personal estate. It would naturally prevent the debtor claiming as part of his exemptions specific articles of property then subject to execution for purchase price: but that would seem to be its only effect. It is also true that the trustee in bankruptcy has the same rights as a creditor holding execution. But (and this is all we need decide) we think that, under the case as it stood below, the trustee was fairly called upon to show that there was not \$500 worth of personalty belonging to the estate paid for. The record, so far from supporting an inference that the personal estate was all unpaid for, tends rather to the contrary. The retail sales of the stock of merchandise had covered a considerable period; the amount thereof is not shown, but it affirmatively appears that the net profit therefrom was about \$1,750, and that the bulk sale of the remainder brought \$8,925. The natural presumption would be that the estate had at least \$500 of personalty not represented by goods unpaid for. We think this ground of objection not good.

[3] 3. Section 11738 of the General Code of Ohio permits the al-

lowance of exemptions from personalty only in case the debtor is "not the owner of a homestead." The trustee contends that the bankrupt was in fact the owner of a homestead at the time of the adjudication, and that his status as to right to exemptions must be taken as of that date.

It is true that, while the bankrupt's real estate generally passed to his trustee, his homestead rights therein did not so pass (In re National Grocer Co., supra, 181 Fed. at page 35, 104 C. C. A. 47, 30 L. R. A. [N. S.] 982, and cases there cited); and it is also true, broadly stated, that the bankrupt's status at the time of the adjudication governs. But to carry this reasoning, under the facts of this case, to the extent of denying the right of exemptions, is to "stick in the bark." The homestead right turned out to be one in form only; from the beginning, it utterly lacked substance, except to the extent of a few months' occupancy prior to its sale in bankruptcy; and for reasons which seemed to the District Judge good, the trustee's claim for rent during this occupancy, as against the claimed exemptions, was rejected; and the trustee does not complain. The recognition of the shadowy nature of the homestead right doubtless prompted the twofold claim as to method of payment, not only included in the debtor's schedules, but in the later claims presented by the bankrupt's wife. homestead right disappeared in the actual course of the bankruptcy administration, by the sale of the real estate at less than the amount of the mortgages thereon, and by the adjudication that both mortgages were antecedent to homestead and dower rights. The disappearance was as effectual as if the right had not been claimed. In fact, the estate got the benefit of one of the mortgages in question. The history of the exemption claims already given brings the case directly within the spirit of the statute. We think the third objection equally without merit.

4. The referee found that the bankrupt had failed to account to the trustee for merchandise in his possession, and under his exclusive control, during the 11 months preceding the date of the adjudication, in the value of \$37,630.89. The District Judge expressed the opinion that "the fraudulent conduct and the loss by mismanagement of the bankrupt prior to the adjudication does not affect either his right or his wife's right to the exemptions allowed by law," and that unlers the bankrupt had the merchandise in question in his possession and under his control at the date of the adjudication his prior possession and control furnished no reason for denying the right to exemptions.

We find it unnecessary to consider whether or not this view is correct, for the District Judge expressly stated not only that he found no evidence to support the referee's finding that the amount of the property in the bankrupt's possession prior to adjudication was the amount already stated, "except a comparison between the condition shown in the bankrupt proceedings and the credit statement of the bankrupt furnished a year before"; but he had already said, "Neither do I find any evidence that the bankrupt failed to account to the trustee for merchandise in his possession and under his exclusive control." This apparently refers to the referee's finding No. 7, invoked by the trustee,

and which we have cited above. The District Judge apparently meant not only that the fact found by the referee would not defeat the claim for exemption, but that there was no evidence to support that find-

ing of fact.

[4] On this proceeding to revise we are limited to a review in matter of law, and cannot determine questions of fact involved in the finding or order sought to be reviewed, when there is any evidence to support them; nor in the absence of testimony can we review a finding that there is no such evidence. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 302, 31 Sup. Ct. 25, 54 L. Ed. 1047; In re Stewart (C. C. A. 6) 179 Fed. 222, 228, 102 C. C. A. 348; In re Holden (C. C. A. 6) 203 Fed. 229, 233, 121 C. C. A. 435; In re Wood (C. C. A. 6) 248 Fed. 246, 249, — C. C. A. —. The evidence taken by the referee was all before the District Judge; none of it is before us. The judge's statements regarding the lack of evidence must, upon this record, be treated as findings of fact, and are binding on us as such. In re Wood, supra.

We have considered all the grounds of objection to the order below, so far as discussed in this court on behalf of the trustee. We find no prejudicial error in respect to either of them, and the order com-

plained of is accordingly affirmed, with costs.

#### THE ALLEGHENY. THE EMILY MARIE. THE LIGHTER NO. 17.

(Circuit Court of Appeals, Third Circuit. May 25, 1918.)

Nos. 2378, 2379.

1. Towage 5-15(2)—Injury to Tow-Presumption of Fault.

When, in passing through the span of a bridge 500 feet wide, under favorable weather conditions, two of eight barges making up a tow were seriously damaged by striking one of the piers, the burden rests on the tug to exonerate herself from presumed fault.

- 2. Towage \$\iiint 11(1)\$—Duty of Tug to Keep Tow in Proper Condition.

  It is not sufficient for the master of a towing tug to see that his tow is properly made up; but it is his duty to keep it under constant observation, and to see that it remains in proper condition.
- 3. Towage \$\infty 11(7)\to Injury to Tow-Liability of Tug.

A tug held not exonerated from fault for permitting its tow to swing against a bridge pier by the fact that the tow was disarranged by another tug, which without its knowledge removed one of the boats while moving, where this occurred an hour before the collision and could have been readily discovered.

4. Towage \$\infty\$ 11(1)--Duty of Tug-Knowledge of Currents.

It is the duty of the master of a tug, towing on a tidal river, to know the set of the tides and currents.

Appeal from the District Court of the United States for the Dis-

trict of New Jersey; Thos. G. Haight, Judge.

Suits in admiralty by Harry W. Whiteman, owner of the lighter Allegheny, and by the Hainesport Mining & Transportation Company, owner of Lighter No. 17, against the steam tug Emily Marie, Nelson

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

H. Gildersleeve, John McAteer, and Anna P. Ganer, claimants. Decree for respondents, and libelants appeal. Reversed.

Lewis, Adler & Laws, of Philadelphia, Pa. (J. Frank Staley, of Philadelphia, Pa., of counsel), for appellants.

Willard M. Harris, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the lighters Allegheny and No. 17 each filed libels against the steam tug Emily Marie for damages resulting from their collision, while in tow of such tug, with the pier of a bridge spanning the Delaware river. On hearing, the court, in an opinion dismissed the libels. Thereupon the lighters each took an appeal, and as such appeals involve the same question we consider them both in this opinion. The pertinent facts of the case are well summarized in the opinion of the court below as follows:

"On the afternoon of November 8, 1915, the Hainesport Company engaged the tug Emily Marie to do some towing for it during the balance of that day. The tug was under the control of her own master and crew, and subject to the directions of the Hainesport Company only to the extent that she was to do such work as the company might direct her to do. She was, in fact, ordered to take a flotilla of lighters from a point on the Delaware river, above Philadelphia, to another point further down the same river. The flotilla consisted of nine lighters, eight of which were arranged in tiers of two each, thus making four tiers. The ninth lighter, the Allegheny, was at the extreme rear of the flotilla, made fast to each of the lighters in the fourth tier, so that she was approximately in the center of their sterns. The flotilla was made up under the directions of the master of the tug in the way it was, so that it would tow most advantageously. The Allegheny at the time was under charter to the Hainesport Company. In the first tier were lighters No. 24 and the Wilson Allen; in the second tier, lighters No. 22 and the Willie; in the third tiers, lighters No. 20 and No. 23; and in the fourth tier, lighters No. 17 and No. 14. The length of the flotilla as thus made up, including the Allegheny, and the length of the hawsers from the tug to the lighters of the first tier, was approximately 730 feet. In order to reach her destination, the tug had to pass under a bridge of the Pennsylvania Railroad, which spans the Delaware river, about a mile above Bridesburg. When the flotilla was about opposite the latter place, the tug Hainesport, which also belonged to the Hainesport Company, came alongside and removed the lighter No. 14, and directed the captain of the Allegheny to fasten the latter to the stern of No. 17, which was also owned by the Hainesport Company. This was done without the knowledge of the master of the tug and without his consent. After the No. 14 was removed and made fast to the tow of the Hainesport, the latter proceeded down the river, passing the Emily Marie on the starboard shortly before she reached the Pennsylvania bridge. The tide at the time was on the ebb, and the flotilla was making from four to five miles an hour. The Pennsylvania bridge was reached, the tug and the lighters in the first two tiers passed through safely, but the No. 23 scraped, fairly well aft, against the first abutment of the bridge toward the Pennsylvania side of the river. the No. 17 collided with it so violently that she was overturned, and the Allegheny hit it, head on, 3 or 4 feet from the starboard bow. It was dark, but clear, at the time of the accident, as it had been for some time previous. The width of the span of the bridge through which the flotilla was passing was about 500 feet, and the set of the current was toward the Pennsylvania shore. That an accident was likely was not discovered by those in charge of the tug until just before the collision, and when it was too late to avoid it. Both the No. 17 and the Allegheny were quite substantially damaged. It is the object of these suits to recover for such damages."

- [1] Under such facts—a broad, open roadway; the lashings of the tow secure; the wind and water conditions favorable—it is clear that the passage through the span of the bridge in safety was one that should have been made, and the sinking of the two lighters, without any concurring fault on their part, against the pier, was so incompatible with the safe passage to be expected under such conditions that the burden rested upon the tug to exculpate herself from presumed fault. In The Steamer Webb, 81 U. S. (14 Wall.) 414, 20 L. Ed. 774, it was said: "There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." And we think this is a case of that kind.
- [2, 3] This collision could not have occurred without the fault of some one, and, the lighters being without fault, it follows the fault is presumptively that of the tug, which was in exclusive control, unless she has shown the collision was the result of inevitable accident, or was caused by some agency other than the tug or tow. The W. G. Mason, 142 Fed. 915, 74 C. C. A. 83, and cases there cited. This the tug attempts to do by placing the blame on the tug Hainesport, which, as noted above, removed lighter No. 14 from the tow somewhat more than a mile above the bridge and nearly an hour before the collision. But assuming, for present purposes, the taking of No. 14 did endanger the tow's safety, the attempted exculpation, namely, that the Emily Marie did not know No. 14 had been removed and the safety of the tow thus endangered, far from exculpating it, only serves to make more glaring the fault of the Emily Marie. Moreover, it shows a course of ignorance of, or indifference to, the duty of a tug to a tow made up of nine powerless lighters. That the tug could simply take such a tow in draft, and then proceed without keeping it under observation, seems to have been the master's conception of his duty toward the tow. In that respect, he testified:

"Well, you can handle them better; they handle more like one boat, the shorter and closer, the better you handle them; you can swing them, and do most anything you want with them. Wherever the head boat goes, the rest must follow; that's all you have to look out for."

To this standard of towage duty we cannot give our approval. That the master did not know the Hainesport had taken No. 14 from the tow the answer admits and the captain testified. That he could have seen the position of the two which struck the pier later, had he looked, is clear. The lighters had the regulation lights. A deck hand who was in the pilot house of the Emily Marie testified that he looked back and saw the Hainesport, and "she was right close to our tow, and I said she must be helping us"; and that the captain could have seen the condition of the tow, had he looked earlier, is shown by his own testimony that he did see its threatening condition when he looked just as the tug was approaching the bridge, and that he at once recognized the condition in which the tow had gotten. In that regard he says:

"Q. Before you entered the bridge under the span, did you look back at your tow? A. We always —. Q. What did you do on this occasion? A. When I entered the draw I looked back. Q. What did you see as you looked back? A. I was surprised to see the two hind boats in the condition they

were in; it looked to me as if they were going sideways. Q. If they continued, what would they do? A. I noticed it, and knew they would run the first two boats into the bridge; about that time the engineer opened her wide open, and I threw my wheel hard to port-threw the two head boats over to the abutinent, to throw the tail end of the tow away from the abutment towards Jersey. Q. How long before that had you seen the condition of the tow? A. I looked back right then. Q. Before you noticed these barges sheering crosswise, how long had you looked back before, and what condition did you find it in? As you entered the bridge channel you saw then that you had to pull the tow over; now how soon before that had you looked back, and then how had you seen them towing? A. Three or five minutes. Q. How were they going? A. Going all right. Q. And as you were about approaching the bridge channel you looked back and saw the barges in that condition, these stern barges? A Yes. Q. What condition were they in as you looked at them before? A. The Allegheny, the hind boat, was heading right for the Pennsylvania shore; I thought their lines had parted; I knew there was something wrong. Q. Could you see between the barge Allegheny and the barge ahead that there was a width there, a distance that you didn't observe before; is that what you mean? A. Yes. Q. When you saw these barges sheering in, what did you do with the tug boat? A. Pulled right for the Pennsylvania shore. Q. In an effort to do what? A. In an effort to pull the two head barges in tow to the abutment, to get a swing to swing the tail end over. Q. What was done with your engine? A. Wide open. Q. Did your wheel and your engine have any effect in stopping the sheer of the last barges? A. No; they didn't. Q. What did they continue doing? A. They kept on and hit the abutment."

It will thus be seen that, if the Hainesport's taking lighter No. 14 from the tow and rearranging the Allegheny caused the two hind boats to turn sideways, as the captain of the Emily Marie testified, the failure of the captain to keep an oversight of the tow would still charge the tug with fault. Indeed, these heavily laden lighters must have been getting into this threatening position very slowly—a fact which shows the length of time the captain failed to look.

[4] But, in addition to this, the proofs tend strongly to show there was another fault of his, which we find contributed largely to the collision. The duty of the captain to know the flow of currents, tides, and like navigation conditions is clear under the decisions: The Webb, supra; Vessel Owners Co. v. Wilson, 63 Fed. 630, 11 C. C. A. 366; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100. But the proof is that he did not, and was laboring under a mistake. After the accident, the explanation he gave of the collision was:

"Capt. Ganer was speaking to me about it, and I says, 'Captain, how did it occur?' and he says, 'I thought the tide set the other way from what it did.' He kept pretty well over to the Pennsylvania side, thinking the tide would carry him over, but unfortunately for him the tide didn't set that way. Q. When he conversed with you, did he say that he was in charge on the night of the accident? A. He said the tide set the other way, and that's the reason it happened."

Had the tug captain known the set of the tide toward the pier with which his tow collided, proper navigation would have kept him from passing in such dangerously close proximity to the pier as the tow was when it did pass. Without entering upon a discussion of other faults of navigation alleged against the tug, we are clear that the two faults charged against the tug, namely, failure to watch the

tow and failure to note the set of the tide, are sustained, and therefore the Emily Marie must be adjudged responsible to the libelants.

The decree below will therefore be reversed, and the cause remanded, with instructions to enter decree in favor of the libelants.

#### IRWIN v. MAPLE.

#### In re GASKILL.

(Circuit Court of Appeals, Sixth Circuit. May 16, 1918.)

#### No. 2852.

1. BANKRUPTCY \$\infty 342\foralle{4}-Claims-Objections.

Where two creditors had made formal objection to a claim, contested it before the referee, and reserved exception to its allowance, it was not necessary for the creditors to present their objection in writing as a condition to a review of the referee's action.

- 2. BANKRUPTCY \$\ightharpoonup 342\forall Review of Orders of Referee-Petition.
  - Under General Orders in Bankruptcy No. 27 (18 Sup. Ct. viii, 89 Fed. xi, 32 C. C. A. xxvii), no particular formality is required to secure review of orders or other proceedings of the referee apart from the filing of the petition.
- 3. BANKRUPTCY \$\infty 9(2)\$—STATE STATUTES—SUSPENSION.

Ohio statutes relating to preferential transfers (Gen. Code Ohio, § 11104) are not in effect bankruptcy laws themselves, and so were not suspended by the national Bankruptcy Act.

4. BANKRUPTCY \$\infty\$185-Trustee-Right of.

Under Bankruptcy Act, § 70e, a trustee in bankruptcy may recover for the benefit of the estate property transferred in violation of the state law.

5. COVENANTS \$\instructure 130(4) -Breach of Warranty-Measure of Damages.

Under the Ohio rule, where land conveyed under a general warranty is recovered by the owner of a paramount title, the purchaser's measure of damages is the amount of the consideration received by the warrantor, with interest.

6. BANKRUPTCY \$\sim 303(3)\$—Preferences—Mortgages—Evidence.

Evidence *held* to show that a mortgage, under which a creditor of the bankrupt claimed priority, was made in contemplation of insolvency, and with the design, known to the creditor, as well as to the bankrupt, to directly prefer the creditor to the exclusion of other creditors.

7. Fraudulent Conveyances 3-Transfers-Preferences.

Ohio statutes (Gen. Code Ohio, § 11104 et seq.), prohibiting preferential transfers, etc., made in contemplation of insolvency, are valid.

8. Fraudulent Conveyances == 122(2)—Preferential Transfers—Invalid-

A mortgage by which a debtor in contemplation of insolvency intended to prefer one creditor and indirectly to prefer another creditor by providing for the mortgagee's payment of that creditor's claim, is invalid under Gen. Code Ohio, §§ 11104, 11105.

9. Fraudulent Conveyances \$\infty 122(2)\$—Statutes—Exceptions.

Gen. Code Ohlo, § 11105, providing that nothing in section 11104 invalidating preferential transfers, etc., shall vitiate any mortgage made in good faith to secure a debt or liability created simultaneously with the mortgage, etc., is but declaratory of a settled rule of judicial decision, and effect should be given thereto as far as may be done consistently with the rest of the enactment.

10. Fraudulent Conveyances \$\infty\$ 154(1)—Preferences—Validity.

A mortgage, though not recorded within three days, held valid in so far as it secured an advance to be made to cover the expense of repairing the mortgaged premises, for as to that item it was not preferential, within Gen. Code Ohio, § 11104, and recordation within three days, as required by section 11105, to take it without the provisions of the first section was unnecessary.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of the bankruptcy of Edson M. Gaskill. The claim of Augustus C. Irwin, which was allowed by the referee as a secured debt was reversed on appeal by W. Chester Maple, trustee in bankruptcy, and claimant appeals. Reversed, with directions.

Cobb, Howard & Bailey and Oliver G. Bailey, all of Cincinnati, Ohio, and George E. Young, of Lebanon, Ohio, for appellant.

Wm. R. Collins and Edwin W. Kemper, both of Cincinnati, Ohio,

for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from a decree reversing an order of a referee in which the claim of Irwin, appellant, was allowed as a secured debt. Involuntary proceedings in bankruptcy were commenced against Edson M. Gaskill, June 4, 1914, and he was adjudicated a bankrupt on the 25th of the month. The claim in dispute, verified by Irwin and stating that the bankrupt was indebted to him therefor, consists of a promissory note of the bankrupt, dated at Cincinnati June 25, 1913, payable on or before two years from date, to the order of Louis C. Cordes, for \$2,500, with interest at 6 per cent. per annum. On the same date and to secure this note a mortgage was given to Cordes by the bankrupt upon all his real estate, his home, which is situated near Lebanon, Warren county, Ohio. The claim was filed with the referee July 21, and allowed October 22, 1914. Two creditors of the bankrupt, by their counsel, objected to allowance of the claim, or to any finding that the mortgage was valid, or constituted a lien upon the real estate. Upon hearing, the referee found that the promissory note was indorsed by Cordes to Irwin, and that both instruments were "presented to and filed with the referee" by Irwin, and further, in substance, that the claim was good, and that the mortgage constituted a "valid lien" on the real estate to secure payment of the claim, subject, however, to a prior mortgage lien given by the bankrupt to the Lebanon Loan & Building Association.

[1, 2] Therepon the trustee in bankruptcy filed with the referee a petition for review, stating among other things that allowance of the claim "as a secured claim" was error, praying that this error and the "questions of law and fact raised before" the referee and "decided by him" be certified to the District Judge, and that the order be re-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

viewed, the mortgage declared "to be illegal, fraudulent, and void," etc. The referee filed his certificate, attaching a transcript of the evidence in full. Contention is made, though it cannot be sustained, that the trustee was not entitled to a review. True, as counsel say, it does not appear that prior to filing the petition for review the trustee had made formal objection to the claim; but the two creditors mentioned seasonably appeared by counsel, and not only objected to the claim, but also contested it before the referee, and reserved exception to his action. In these circumstances it was not necessary for the creditors to present their objection in writing (Embry v. Bennett, 162 Fed. 139, 140, 89 C. C. A. 163 [C. C. A. 6]), nor, apart from filing the petition, were any particular formalities required to secure a review of the orders or other proceedings of the referee (General Order in Bankruptcy 27, 210 U. S. 578, 18 Sup. Ct. viii; 89 Fed. xi, 32 C. C. A. xxvii); In re Swift [D. C.] 118 Fed. 348, 349, by Judge Lowell; In re People's Department Store Co. [D. C.] 159 Fed. 286, 287).

In the court below, upon consideration of the proceedings in review "with the testimony as presented to the referee," an order was entered finding that the mortgage is "not a valid lien" against the bankrupt's real estate, and directing the referee to disallow the mortgage, finding further, however, that Irwin "holds an unsecured claim against the bankrupt herein in the sum of \$2,500, with interest from June 25, 1913, to the date of adjudication," and directing its allowance "as

an unsecured claim."

[3, 4] Plainly the important issue is whether Irwin has a valid mortgage. The determination of this issue must depend upon the stat-ute law of Ohio, and the right of the trustee under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) to challenge the transaction for the common benefit of the bankrupt's creditors. promissory note and mortgage were executed, as we have seen, nearly a year before the bankruptcy proceeding was begun. It was claimed in Irwin's behalf in the court below, and also here until recently, that the applicable statutes of Ohio are in effect bankruptcy laws themselves, and are suspended by operation of the Bankruptcy Act of Congress, and hence that the contention of the trustee must fail, since the transaction did not occur within the four months period of the Bankruptcy Act. By reason of this contention the hearing of the instant case was postponed through consent of counsel until the question of conflict between the Ohio statutes and the Bankruptcy Act should be determined by the Supreme Court, where upon certificate of this court the question was pending in Stellwagen v. Clum. It was there settled, February 4th last, that the Bankruptcy Act does not operate to suspend the Ohio statutes in question. 245 U.S. 605, 611, 618, 38 Sup. Ct. 215, 62 L. Ed. 507. The decision also sustains the right of the trustee in virtue of section 70e of the Bankruptcy act (Comp. St. 1916, § 9654) to recover property transferred in violation of state law. 245 U. S. 613, 615, 38 Sup. Ct. 215, 62 L. Ed. 507. The right of action so given is enforceable at any time within the period prescribed by the applicable state statutes (Id.); and in Ohio this period is fixed at four years (218 Fed. at page 733, 134 C. C. A. 408, and citations

[C. C. A. 6]). It follows that, if any creditor of the bankrupt might have avoided the mortgage, the trustee may avoid it and recover the bankrupt's interest in the mortgaged property, or in the proceeds de-

rived from its sale.

[5, 6] The question of validity of the mortgage cannot be rightly understood without further statement of some of the facts-some that are scarcely open to serious dispute, concerning the origin, delivery, and transfer of the instrument. Gaskill, the bankrupt, is the father-in-law of Irwin, and to the extent of \$2,000, including accrued interest, Irwin's claim against him was a matter of long standing. Gaskill could not pay the claim, and until the note and mortgage were given did not undertake to secure it. Besides, his financial condition was at that time threatened by obligations of somewhat remote origin. As early at least as 1879, Gaskill had by deeds of general warranty conveyed real estate situated in Clermont county, one portion to John D. Randall, and another to Edward Conover, who in turn conveyed it by like deed to David Grossnickle. A claim concerning these lands had recently developed, which, if valid, would directly affect Gaskill upon his covenants of general warranty; indeed, suits had been brought by the owner of what proved to be an outstanding and paramount title to all this land; and judgments were recovered therein against Randall and Grossnickle in May, 1911. These judgments were affirmed by the circuit court in November, 1911, and by the Supreme Court of Ohio May 27, 1913. Gaskill knew of the pendency of these suits, and attended the session of the circuit court when the decision was rendered against Grossnickle; the subject of compromise was then considered in Gaskill's presence, but he advised that the decision of the Supreme Court be obtained; and he testifies that on June 4 or 5, 1913, shortly after the decision of the Supreme Court, a compromise was talked about "in my place," inferentially at his home. Suits were subsequently brought against him by Grossnickle and Randall in the Warren common pleas to recover damages for breach of his covenants of warranty; and in May, 1914, judgment was recovered by the former for \$1,619.03 and by the latter for \$1,606.96. judgments, of course, operated to fix the amount of Gaskill's liability under each of his covenants of warranty; but the amount in each instance could be readily ascertained in advance of judgment.

The Ohio rule of damages in such cases is the amount of the consideration received by the warrantor for the premises, and interest. King v. Kerr, Adm'r, 5 Ohio, 155, 160, 22 Am. Dec. 777; Lloyd v. Quimby, 5 Ohio St. 262, 266; Wetzell v. Richcreek, 53 Ohio St. 62, 73, 74, 40 N. E. 1004. In view, then, of his manifest liability under the covenants, it is clear, and is not disputed, that the practical effect of the earlier judgments establishing the paramount title to the lands Gaskill had conveyed was to render him insolvent at the date of the mortgage now under review. Thus within less than one month after the Supreme Court affirmed the judgments, indeed within 20 days after the discussion of their compromise, the mortgage now in issue, as well as the note it was given to secure, was executed and delivered. It is not clear, nor perhaps important, whether Irwin or Gaskill in-

itiated the subject of the loan, but in one part of his testimony Gaskill states:

"I was the one that requested my son-in-law [Irwin] to borrow the money. I do not know whether he mentioned it first, or me; but I am pretty sure I did. \* \* \* Mr. Irwin did not think he wanted to be secured, nor was he anxious previous to that time; but he got so he wanted his money."

Gaskill wanted \$500 more than the sum he owed Irwin. He says, in substance, that he wished to use \$300 to pay a note of his in a bank at Loveland. Ohio, and \$200 for repairs of buildings on his home premises. The method adopted to secure Irwin's claim and the additional \$500 was this: Through arrangement of Irwin and Louis Cordes (who lived at Wyoming and was engaged in business at Carthage, Hamilton county) the note and mortgage were executed at Cincinnati, and, in the presence of Irwin, were delivered by Gaskill to Cordes at Carthage. Cordes had known Gaskill for 20 years and was an intimate friend of Irwin. Cordes was at the time in no financial condition to loan the money for the time called for by the note; he negotiated a loan at a bank in Carthage through pledge of collaterals; he obtained a certified check of the bank for \$2,500, payable to Gaskill, delivered it to him, and received the note and mortgage; Gaskill at once cashed the check at the bank, and turned over all the money to Irwin, saying to him that he (Gaskill) had no present opportunity to deposit the \$500, that he would not need it for some time, and that Irwin could pay it to him as called for. Irwin thereupon returned all the money to Cordes, who paid it back to the bank with one day's interest. Not a farthing of this money was retained by either Irwin or Gaskill. Cordes indorsed and delivered the note to Irwin; and, through some means not shown, the mortgage was placed of record at Lebanon, Warren county, July 1, 1913. The mortgage was not formally assigned to Irwin until after it had been returned from the recorder's office to Cordes; the assignment bears date October 21, 1913, but as between Cordes and Irwin it seems to have been understood at the time the \$2,500 was turned back to Cordes the mortgage, as well as the note, was to be assigned to Irwin. Still it hardly could have been the purpose to have the assignment entered of record, since that has not been done at all; if the assignment had been presented for record, it would have been copied "upon the margin of the record of the mortgage" (4 O. G. C. § 8546), and, of course, would have disclosed Irwin's interest in the instrument.

It resulted that, outside of the immediate parties to the transaction, Irwin's relation to the note and mortgage was not known until he presented his verified claim to the referee; nor were the facts and circumstances underlying the transaction known until the proofs were offered on the creditors' objections to the claim. Discussion of the evidence is unnecessary; the transaction speaks through Gaskill's financial condition and the method resorted to for securing Irwin and benefiting himself. The conclusion is unavoidable that the mortgage was made in contemplation of insolvency, and with a design, known to Irwin as well as Gaskill, directly to prefer Irwin, and indirectly to prefer the Loveland bank, to the exclusion of Randall and Gross-

nickle; indeed, there were no other unsecured creditors of consequence to consider. We reach this conclusion in view of the Ohio statutory provision denouncing preferences, and regardless of the one concerning "intent to hinder, delay or defraud creditors"; for while a transaction may be invalid only as a preference, or only as a fraudulent transfer, or as both (Dean v. Davis, 242 U. S. 438, 444, 37 Sup. Ct. 130, 61 L. Ed. 419; Fifth-Third Nat. Bank v. Johnson, 219 Fed. 89, 92, 134 C. C. A. 529 [C. C. A. 6]), we do not find it necessary to pass upon any question of actual fraud. Judge Hollister concluded in the course of his opinion:

"At the time the mortgage was made, Gaskill's assets and ascertained liabilities showed a small balance in his favor. The potential indebtedness, growing out of his obligations to Grossnickle and Randall, made a sum much greater than his assets, and if Grossnickle and Randall, or either of them, should seek to make his warranties good, as he knew, and said he knew, they had the legal right to do, he was insolvent when the mortgage was made.

\* \* It is quite significant that after the decision in the Supreme Court, and before the mortgage was made, Gaskill had resumed negotiations for a compromise and Irwin renewed his request for security. One cannot escape the conviction that the mortgage was given to secure Irwin against the impending demands of Grossnickle and Randall and to obtain for Gaskill \$500 for his own purposes."

The learned trial judge was of opinion that, in view of a line of Ohio decisions, a debtor in failing circumstances may in good faith pay or secure one or more creditors in preference to others; but he believed that the transaction was lacking in the standard of good faith required. He regarded the \$500 arrangement as a secret trust created in favor of Gaskill, and held that this was fatal to the validity of the

mortgage.1

[7,8] Does the rule just alluded to in respect of preferences still prevail in Ohio? It is to be observed that this rule, as, for example, Judge Ranney expressed it in 1854, permitted a creditor of an insolvent debtor, or one having assumed liabilities for him as surety, to take from him a mortgage to secure the debt or to save him harmless from such liability; and, as the reward of his diligence, he would be protected in the priority so obtained. Bloom v. Noggle, 4 Ohio St. 45, 57. The rule as thus stated implies, as the decision itself shows, that the transaction must have been made in good faith; and Judge Spear stated the rule in Cross v. Carstens, 49 Ohio St. 569, 31 N. E. 508, in 1892, as follows:

"This court has not omitted to affirm the right of a debtor, in falling circumstances, in good faith, to pay or secure one or more creditors in preference to others."

<sup>&</sup>lt;sup>1</sup> The decisions referred to in support of the opinion that a debtor may make a preference as stated were Cross v. Carstens, 49 Ohio St. 548, 569, 31 N. E. 506, and citations; Walker v. Walker, 4 Ohio N. P. 324. And the cases relied on as to the effect of the secret trust found were Dickson v. Rawson, 5 Ohio St. 218, 224; Loudenback v. Foster, 39 Ohio St. 203; Hegler v. Grove, 63 Ohio St. 404, 59 N. E. 162; Schultz v. Brown, 3 Ohio Cir. Ct. R. 609, 611; Lukins v. Aird, 6 Wall. 78, 18 L. Ed. 750; Huntley v. Kingman, 152 U. S. 527, 533, 14 Sup. Ct. 688, 38 L. Ed. 540.

It cannot be questioned that the rule, as thus in substance pointed out, was uniformly maintained in Ohio for more than half a century; and yet it would seem that the General Assembly of Ohio has introduced certain statutory alterations which were meant to work a distinct change of the rule.<sup>2</sup> It is true that in Bank v. Gettinger, 68 Ohio St. 389, 67 N. E. 739, reversing the decision of the Lucas circuit court (13-23 O. C. C. 77), it was held that under sections 6343 and 6344 of the Ohio Revised Statutes, as amended April 26, 1898 (93 O. L. 290), certain creditors who in effect had been preferred could not be compelled to repay money which they had received from their debtor while he was insolvent, although he made the payments in contemplation of insolvency and with a design to prefer these creditors to the exclusion of the others, or with intent to hinder, delay, or defraud his creditors, even though he made an assignment which was filed within 90 days after such payments.<sup>3</sup> The reasons for this ruling are important, and are to be found in the opinion (pages 399, 400); they may be stated thus: (1) That the creditors were conceded to have "acted in good faith, and without notice, in receiving" the payments; and (2) that payment was not, while "sale, conveyance, transfer, mortgage, or assignment" was, prohibited by the statute. The first reason clearly implies that, if the creditor is cognizant of his debtor's purpose, the preference must fail. The second reason we think finds apt illustration in the Ohio Supreme Court's affirmance, without opinion, of Brewing Co. v. Peltz, 81 Ohio St. 566, 91 N. E. 1136, decision below 17 Ohio Cir. Ct. R. (N. S.) 1, appearing there as Pabst Brewing Co. v. Johnson. Examination of the record in that case, to which attention has been called by counsel, shows that the circuit court in substance found that when the creditor Pelitz (Peltz) and two other named creditors received payment of their claims they "knew of the insolvency" of their debtor, Johnson, and of his intention to secure the payment of their claims by an instrument previously signed by Johnson. This instrument provided for payment to Peltz of sufficient money to cover his claim and the claims of the two other creditors, and was executed with the understanding that Peltz was to apply the money accordingly; but the instrument appears at last to have been canceled, and the three claims were in fact paid in cash by Johnson's attorney at his direction. It is to be inferred that the original design to make Peltz a trustee under the instrument was abandoned, and direct payment in cash to each of the creditors resorted to, for the very purpose of avoiding the statute.

<sup>&</sup>lt;sup>2</sup> The statutory changes thus referred to may be readily seen by comparison of sections 6343 and 6344 (2 Ohio Rev. Stat., Ed. 1880, in force when Cross v. Carstens was decided) with the same sections as amended April 26, 1898 (93 Ohio Laws, 290), and as later amended and renumbered (3 O. G. C., §§ 11102 to 11107; and see sections set out in Stellwagen v. Clum, 218 Fed. 733, 735, 134 C. C. A. 408 and in same case, 245 U. S. 609, 611, 38 Sup. Ct. 215, 62 L. Ed. 507).

<sup>3</sup> Under section 6343 as it then stood, every "sale, conveyance, transfer, mortgage or assignment" made by a debtor with such design or intent as above stated, was to be "conclusively deemed and held to be fraudulent" in the event of the debtor making and filing an assignment within ninety days thereafter. 93 Ohio Laws, 290. This provision however was repealed as early as 1902, and has not appeared in any enactment since.

This inference is in accord with the second reason stated, as we have seen, in Bank v. Gettinger, 68 Ohio St. at page 400, 67 N. E. 739, and the reason itself points to a distinct ground, and the only satisfactory one we can discover, for the affirmance of Brewing Co. v. Peltz. It is to be observed, moreover, that the reason for treating payment as not falling within the inhibition of the statute, as held in Bank v. Gettinger, was in accord with earlier rulings of the same court. Thus, under the statute of 1838 (36 O. L. 56, § 3), a bill of sale, in effect a mortgage of chattels, was held not to fall within the provision forbidding "assignments" of debtors to trustees "in contemplation of insolvency with the design to prefer one or more creditors," etc. (Atkinson v. Tomlinson, 1 Ohio St. 237, 240, 241). Again, in speaking of the scope of the statute considered in Cross v. Carstens (set out in 49 Ohio St. at page 565, 31 N. E. 506), which in terms made "assignments" to a trustee, etc., to prefer particular creditors "inure to the equal benefit of all creditors," it was said (49 Ohio St. 566, 31 N. E. 507):

"The language does not include all transfers, nor all conveyances, made in contemplation of insolvency, but assignments, and it is assignments by the failing debtor in trust to a trustee, which the Legislature has declared must inure to the benefit of all creditors."

We may now direct attention to the language of the present statute. Section 11104, 5 O. G. C., provides:

"A sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors and every judgment suffered by him or them against himself or themselves in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion in whole or in part of others and a sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner with intent to hinder, delay, or defraud creditors shall be void as to creditors of such debtor, or debtors at the suit of any creditor or creditors. In a suit brought by a creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, and also administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

Section 11105 provides that the foregoing section—

"shall not apply unless the person \* \* \* to whom such sale, conveyance, transfer, mortgage or assignment is made, knew of such fraudulent intent on the part of such debtor \* \* \* nor shall anything in such section contained vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record \* \* \* within three days after its execution. \* \* \*"

Section 11106 provides:

"Any creditor \* \* \* whether the claim of such creditor \* \* \* has matured or will thereafter mature, may commence an action \* \* \* to have such acts or things declared void. \* \* \* " 4

<sup>&</sup>lt;sup>4</sup> It is important here to observe the contrast between the language of the first full sentence of section 11104, above quoted, commencing with "a sale, conveyance," etc., and ending with "at the suit of any creditor or creditors" (enacted April 30, 1908, 99 O. L. 241), and that of section 6343 and the first

These provisions disclose some legislative purposes that cannot well be mistaken. A number of transactions are now denounced as preferences in addition to the one forbidden by the old statute. It is worthy of notice that this change originated in 1898 (93 O. L. 290), the year in which the federal bankruptcy statute was enacted; and in view of some features of resemblance between the two enactments, as, for instance, those in relation to preferences, it is not too much to say that the two legislative bodies were in these respects moved by the same considerations; nor can well-considered interpretations that have been placed upon the federal or the state provisions of kindred character be safely ignored, when passing upon either the one or the other. Considering the statutory changes made in Ohio, they serve to show the purpose of the new statute, and also to differentiate Ohio decisions like Cross v. Carstens, which involve only the old statute, from decisions like Bank v. Gettinger, which construe the new one. As regards preferences, the old statute was limited to "assignments in trust to a trustee or trustees," while the new one is extended to a "sale, conveyance, transfer, mortgage or assignment made in trust or otherwise, by a debtor," and to "every judgment suffered by him \* \* \* against himself." This enlargement in scope discloses a legislative purpose to establish a comprehensive rule of equality in place of the old system of inequality in the distribution of an insolvent's assets among his creditors.

The inevitable effect of enumerating transactions—"sale, conveyance, transfer, mortgage"—in addition to the old one, "assignment," was to meet the decisions before mentioned, which held that transactions like the newly added ones were not included in "assignments," and was thus greatly to expand the rule of equal distribution. But this was not all. The transactions so added, as also the old one of assignment, were under the conditions named all expressly denounced as preferences, whether made in trust or otherwise. Surely such an extension of objects, and regardless of the presence or not of a trust, cannot be treated as meaningless; its significance is plain. Still another scheme of preference was condemned; it was the old practice of debtors in failing circumstances to permit judgments to be taken against them, and so to

three lines of section 6344, as those sections stood when considered in Cross v. Carstens, and as they appeared in 2 Ohio Rev. Stat., Ed. 1880, and in 1 Ohio Rev. Stat., Smith & Benedict's Edition: "Sec. 6343. All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter"—and "Sec. 6344. All transfers, conveyances, or assignments made by a debtor or procured by him to be made with intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor. \* \* \* " The remaining portion of section 6344 furnished a mode for division of the property involved, or its proceeds, in a transaction had under either of the sections, among all the creditors alike or among such as might institute suit to set aside the transaction and through publication, etc., secure division among themselves. These provisions were of course repealed in 1898, and they are now replaced by the presently subsisting act of 1908, above cited.

invest favored creditors with prior liens. We find effective illustration of the scope and object of this legislation in the transaction here in issue. The transaction, involving as it does a mortgage, is distinctly named in the statute; and such an instrument, when made in contemplation of insolvency and with the forbidden design, is characterized as a preference, whether made in trust or otherwise. It would be difficult to devise language more specific than this to describe and forbid the transaction. This is made even more clear through comparison of the language of this statute with that of sections 60a and 60b of the bankruptcy statute (Comp. St. 1916, § 9644).

Another feature of the Ohio statute gives emphasis to the legislative purpose. The consequence of preferences is changed. Provision is made in section 11104 to take possession of all the assets of the debtor, not merely such as are embraced in the preference, and the receiver is required to administer the debtor's entire assets for the equal benefit of the creditors. This provision was relied on by counsel in the Stellwagen Case as distinctly supporting the claim that section 6343 offended against the Bankruptcy Act, especially sections 60 and 67, 218 Fed. 734, 736, 134 C. C. A. 408. True, this claim failed; yet the departure so made in the state legislation is in harmony with the purpose already pointed out to break up the old rule and practice of preference wherever both parties to the transaction were aware of its design. This is shown by the modification made in section 11105 in favor of an innocent beneficiary of a preference, and also by Bank v. Gettinger, 68 Ohio St. at 400, top, 67 N. E. 739, and the Bobilya Case, 68 Ohio St. 373, 67 N. E. 736, there referred to.

It may be added that there is no suggestion of lack of power in the state Legislature to enact the sections of the statute here involved; nor is it perceived how such an objection could rationally be urged. It is true that the Ohio courts have treated the right of preference as resting upon the natural right to acquire and control property (Cross v. Carstens, 49 Ohio St. at page 573, 31 N. E. 506); yet no one questions the constitutional validity of old section 6343, prohibiting preferences by "assignments in trust to a trustee" when made in contemplation of insolvency, and the present sections are well within this principle.

How, then, is the mortgage under review to be treated? We have seen that the mortgage was given to secure a past-due debt of Gaskill to Irwin for \$2,000, and also an additional sum of \$500, which on the date of delivery of the mortgage Irwin in effect promised to pay to Gaskill later and as Gaskill should call for it. Irwin knew that the object of providing this additional sum was to enable Gaskill (1) to pay a debt of \$300 owing by him to a bank in Loveland, and (2) to use the remainder, \$200, for repairing certain buildings on the property so to be mortgaged. Several months after delivery of the mortgage and its assignment Irwin paid the \$500 to Gaskill and the latter used the money

<sup>&</sup>lt;sup>5</sup> It scarcely need be said that this conclusion is in no wise affected by the decision in Williams & Thomas Co. v. Preslo, 84 Ohio St. 328, 95 N. E. 990, Ann. Cas. 1912C, 704, declaring another portion of the statute (section 11102), which related exclusively to sales in bulk of stocks of merchandise, to be constitutionally invalid.

for these purposes. Thus \$2,300 of the sum in terms secured by the mortgage represents old obligations of Gaskill, and the remainder new improvements of the mortgaged property. Giving to the portion of the statute denouncing preferences the natural and ordinary meaning of its language, we think it condemns the mortgage, certainly to the extent of Gaskill's indebtedness to Irwin and the Loveland bank, as an unlawful preference. There can be no difference in principle between the parts of this indebtedness; each was an existing and unsecured obligation. It is true that the Irwin debt was past due and that the bank debt had not matured at the date of the mortgage. Gaskill testifies as to the latter:

"I let the \$500 remain in Mr. Irwin's hands for several months for the purpose of paying a certain note off in the bank which was not due. \* \* \*"

This was to create through Irwin and Gaskill a trust obligation in favor of the subsisting creditor, the bank. Whether the bank had knowledge or not of the arrangement, forbidden as it was under the old and the new statute alike, is unimportant, since in either event the effect upon the excluded creditors was the same. Assuming that the bank is not amenable to an action for recovery of the money, yet to permit Irwin, as against the other creditors, both to take part and recover in such a transaction, would be to suffer him to take advantage of his own wrong. Indeed, it must be remembered throughout that Gaskill and Irwin were cognizant of the purpose of every feature of the transaction from the beginning and were actuated alike by the very design the statute condemns. Further, the case is fairly within the plain implication arising, as before pointed out, from the first of the two grounds upon which the judgment in Bank v. Gettinger, 68 Ohio St. at page 400, 67 N. E. 739, was rested. We therefore hold that, so far as the effect of the mortgage was to secure Gaskill's pre-existing indebtedness, \$2,300, to Irwin and the Loveland bank, the mortgage is void as to creditors.

[9, 10] As respects the remaining sum secured by the mortgage a different question arises. Section 11105, as we have seen, provides that nothing in section 11104 shall "vitiate or affect any mortgage made in good faith, to secure any debt or liability created simultaneously with such mortgage," if the mortgage be recorded within three days. Literally this provision of itself would seem to render the mortgage unavailable for any purpose, since it was not recorded within the three-day period. The substance of the provision, however, is but declaratory of a settled rule of judicial decision; and, of course, effect should be given to the statutory exception, so far as this may be done consistently with the rest of the enactment. In a sense the \$300 represented a "debt or liability created simultaneously with" the mortgage. Yet there is a broad distinction between that debt and the one created at the same time in reference to repairs upon the debtor's buildings. The one was to meet an existing and unsecured obligation, and the other to provide, through obligations not then created, for the improvement of the mortgaged property. The repairs, both as contemplated and carried out. were such as to entitle unpaid materialmen and mechanics alike to statutory liens on the property. Title 7, div. 4, c. 1, 3 O. G. C. p. 1081 et seq. To all intents and purposes then a present and fair exchange in values was made of Irwin's promise to furnish money, \$200, and Gaskill's promise to repair the mortgaged property; the result of Gaskill's application of the money was at once to obtain the improvements and avoid liens on the part of materialmen and mechanics; it therefore cannot be said that this part of the transaction offended against the provision forbidding a preference, nor, in the absence of intentional fraud, that the mortgage may not be enforced, except as it was designed to operate as a preference. Corbett v. Woodward, Case No. 3,223, 6 Fed. Cas. 531, 537, 538.

It results that the decree must be reversed, and the cause remanded, with direction to modify the decree, so far as to sustain Irwin's claim as a secured claim, as well as the mortgage, to the extent of \$200, with interest from the time such sum was advanced, and also to diminish Irwin's unsecured claim accordingly. The costs of this appeal, including the expense of preparing as well as printing the transcript, will be equally divided.

#### REED et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)
No. 215.

1. Army and Navy \$\sim 38\text{-"Deserter"}\text{--"Straggler."}

Under the regulations of the Navy Department, a "deserter" is one who is absent without leave and with a manifest intention not to return, while a "straggler" is one absent without leave, with the probability that he does not intend to desert, but, if his absence continues for 10 days, he becomes a deserter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deserter.]

2. Army and Navy \$\infty 40-Personation of Officer-Evidence.

In a prosecution under Criminal Code, § 32, for falsely assuming and pretending to be officers of the Navy Department, evidence *held* sufficient to carry the case to the jury.

3. Army and Navy \$\infty 40-Personation of Officer-Offense.

Under Criminal Code, § 32, declaring that whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer, etc., shall be punished, defendants, who were detectives engaged in arresting naval deserters and stragglers for the reward prescribed by the regulations, must be deemed guilty of the offense denounced, where they represented to enlisted men arrested as stragglers that they were naval officers.

4. CRIMINAL LAW \$\infty\$1160-Review--Finding.

A finding by the jury as to the weight of the evidence, which was supported by the trial court in denying the application to set aside the verdict, is conclusive on the appellate court.

5. ARMY AND NAVY \$\infty 40-Offenses-Principals.

Where defendants, who were detectives engaged in apprehending naval stragglers and deserters for the rewards prescribed by the regulations, in pursuance of a common design, represented to enlisted men, arrested as stragglers, that one of the defendants was a naval captain, etc., each were principals.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. WITNESSES 48(2)—Competency—Conviction.

Conviction of a military offense by court-martial does not make a witness incompetent to testify in the civil courts in a criminal prosecution.

Appeal from the District Court of the United States for the Southern District of New York.

Harry A. Reed and James E. Eaton were convicted of violating Criminal Code, § 32 (Comp. St. 1916, § 10196), by falsely assuming and pretending to be officers acting under the authority of the United States, and they appeal. Affirmed.

George W. Whiteside and Robert Oliver, both of New York City, for appellants.

Francis G. Caffey, U. S. Atty., of New York City (Ralph W. Horne, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, HOUGH and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellants have been generally indicted in five indictments, charged with violating section 32 of the United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1095 [Comp. St. 1916, § 10196]), in that they falsely assumed and pretended to be officers acting under the authority of the United States and a department thereof, to wit, the Navy Department, and did take upon themselves to act as such.

The misrepresentations and false assumption or pretension of office was substantially the same in form, but occurred as to five different arrests made of stragglers or deserters from the United States Navy, and five separate indictments have been returned; each charging a specific violation involving a separate transaction on the date herein mentioned. Both defendants were connected with the Hamilton Detective Agency of the city of New York in the month of August, 1917, in charge of a department known as the "desertion department." Reed was an inside man, and was known as "captain" in charge of this department, whereas Eaton was an outside man, engaged in apprehending deserters and stragglers. In the rooms of the detective agency there were files marked "Captain," "Apprehension of Deserters," "Sent for Stragglers," and on the door was the name "Captain Reed." In the room were night sticks, revolvers, and handcuffs.

[1] It is provided, by a regulation for the government of the Navy, that a reward not exceeding \$50 be offered by a commanding officer for the delivery of a deserter, and not exceeding \$25 for the delivery of a straggler, into the custody of the naval authorities at such place and within such time as may be prescribed in general or specific instructions issued by the department's Bureau of Navigation, or, in the case of a marine, by the commandant of the corps.

The appellants had a method of ascertaining what men of the Navy were stragglers or deserters, and would then seek the apprehension of such person and telegraph to the Bureau of Navigation of the department, and ultimately deliver up to the department the person so apprehended and receive the reward. Under the regulations of the depart-

ment, a deserter is one who is absent without leave and with a manifest intention not to return, while a straggler is one absent without leave with the probability that the person does not intend to desert, but, if his absence continued for a period of 10 days, he then becomes a deserter. In each case mentioned in each of the indictments, a member of the Navy so apprehended was brought to the detective agency's offices and there was introduced to or met Reed.

The first indictment dealt with an enlisted man, Harry Maxwell, of the United States Navy. He was arrested by Eaton, who represented that he was a skipper, a government man, and a Secret Service man. After being taken to the detective agency, he met Reed, who said he

was a "captain from the Navy Yard."

The second indictment dealt with one Gunderman, an enlisted man in the Navy. On this occasion, Eaton represented himself as a "government detective," flashed a badge, and, when Gunderman was arrested and met Reed, the latter stated that he was a "captain in the Navy and entitled to four stripes."

The third indictment dealt with Roy Edward Davidson. Upon arrest, Eaton represented himself as a "federal officer in the government service and a lieutenant," and brought him before Reed. Reed represented himself as a "captain in the navy service" and "head of the Navy

and Army Desertion Bureau."

The fourth indictment dealt with one Phillips, who was not an enlisted man, but who was wearing a naval uniform. At the time of the arrest, Eaton said he was a "federal officer," and, when brought before Reed, the latter stated that he was a "navy man," and directed the prisoner to stand up when he (Reed) spoke to him.

The fifth indictment dealt with the arrest of one King, an enlisted man in the Navy. Eaton, in making this arrest, represented himself as a "federal officer," and again Reed represented to the prisoner that he had been appointed a "captain of the federal government," and that

he had had 16 years' service in the United States Navy.

#### [2, 3] The statute provides that:

"Whoever with intent to defraud either the United States or any person shall falsely assume or pretend to be an officer or employe acting under authority of the United States, or any department or any officer of the government thereof shall take upon himself to act as such or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the government thereof, any money, paper, document, or other valuable thing shall be fined not more than one thousand dollars or imprisonment not more than three years or both."

The evidence clearly required the District Judge to submit to the jury the question of false assumption or pretension of being an officer or employé acting under the authority of the United States or any department or any officer of the government thereof. While it may be said that the defendants had the right to apprehend and arrest deserters and stragglers of the United States Navy, and were entitled to compensation by way of reward as provided by the regulations of the department, it is the false assumption and pretension to be an officer of the United States Navy or of the government, the false impersonation, that is the gist of the offense, not demanding or obtaining money. The

statute is intended as prohibiting any false assumption or pretension to be an officer or employé acting under the authority of the United States or any department or officer of the government, if done with an intent to defraud and accompanied by any specific acts on the part of the pretended character. United States v. Barnow, 239 U. S. 78, 36 Sup. Ct. 19, 60 L. Ed. 155.

The fraud was committed against the enlisted men, and consisted in telling these enlisted men of the Navy that Reed was a "captain of the Navy" and Eaton a "lieutenant" or other employé of the federal government. In United States v. Barnow, supra, Justice Pitney says:

"It is the aim of the section, not merely to protect innocent persons from actual loss through reliance upon false assumptions of federal authority, but to maintain the general good repute and dignity of the service itself."

In Littell v. United States, 169 Fed. 620, 95 C. C. A. 148, it was said: "The gist of the offense is the false impersonation of an officer of the United States."

[4, 5] The jury's finding as to the weight of evidence was supported by the trial judge in denying the application to set aside the verdict. This finding is binding upon us. Nor is there variance between the proof and the indictment. The charge is fairly and concisely enough stated in the indictment. Each of the defendants took part in the arrest of each of the deserters or stragglers, and each committed an offense in this common undertaking, although their representations may have been made in different places and not at the same time. Under the law, all present at the time of the commitment of the offense are principals, although only one acts, if they are confederates engaged in a common design of which the offense is a part. The action of Reed was dependent upon Eaton's part in the arrest of the straggler or deserter, and so Eaton's actions are connected, in the commission of each offense, with Reed's. They were employed by the same agency, engaged in a common design and purpose. Reed acted in all cases in the presence of Eaton, assuming the rank of captain of the Navy. The offense is sufficiently proved as to each indictment.

[6] The testimony of Maxwell, Gunderman, and Davidson was properly received, as each was a competent witness, even though they had theretofore suffered conviction in court-martial proceedings. This did not disqualify them from being called as witnesses. Rosen v. United States, 237 Fed. 810, 151 C. C. A. 52; Pakas v. United States, 240

Fed. 350, 153 C. C. A. 276.

We can find no error in the admission or exclusion of evidence which requires a reversal.

Judgment of conviction affirmed.

CINCINNATI, N. O. & T. P. R. CO. v. McGUFFEY.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1918.)

No. 3121.

1. MASTER AND SERVANT \$\infty 286(34)\to Master's Liability for Injury to Serv-ANT-SWITCHMAN.

A switchman, riding two cars at night down a repair track about 1,000 feet long, the first half of which was downgrade, before reaching the bottom of the grade was killed by collision with a loaded car standing on the track. It was customary to place cars standing on the track near the other end on the level. Why this car was left where it was did not appear. Held, that whether the company was negligent in so doing was a question for the jury.

2. MASTER AND SERVANT \$\infty 222(1)\$—MASTER'S LIABILITY FOR INJURY TO SERV-

ANT-ASSUMPTION OF RISK.

A switchman, working under orders of a foreman, in "kicking" cars upon a switch track at night, did not, as matter of law, assume the responsibility or risk of such movement, although in immediate charge of the operation.

3. Master and Servant €=286(40)—Action for Injury to Servant—Ques-

TIONS FOR JURY.

Whether a switching foreman was negligent in failing to warn a switchman, who at night was riding cars which had been kicked on a downgrade switch track, of the presence of a car standing on the track ahead, held, under the evidence, a question for the jury.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action at law by Lena McGuffey, administratrix of the estate of A. B. McGuffey, deceased, against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff and defendant brings error. Affirmed.

Wright, Jones & Saxton, of Knoxville, Tenn., and George Hoadly, of Cincinnati, Ohio (Edward Colston, of Cincinnati, Ohio, of counsel), for plaintiff in error.

W. Y. Boswell, of Oakdale, Tenn., and Turner, Kennerly & Cate. of Knoxville, Tenn., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. The parties will be designated here as in the trial court. McGuffey, the deceased, was killed in the course of his employment as member of a switching crew in the railway company's yards at Oakdale, Tenn. His administratrix recovered judgment under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), which concededly applies.

East of and parallel with the repair or "rip" track in the northern section of the yards was a series of other tracks, the westerly of which was No. 6. From the frog of the switch connecting with track No. 6 the "rip" track descends to the northerly at a grade of about 1 per

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cent. for about 415 feet, when it reaches a level which is maintained for a further distance of at least 550 feet. The deceased, at between 4:30 and 5 o'clock in the morning of October 28th, when it was "just getting daylight" (there being a light fog), was riding a cut of two bad-order cars kicked from track No. 6 onto and down the repair tracks; the kicked cars collided with a loaded scrap-iron car standing on the westerly of the repair tracks, about 50 feet before the level was reached, and thus about 400 feet from the point of the switch where the shunting movement began.

Against a general motion by defendant for a directed verdict, and in denial of the requests later referred to, the trial court submitted to the jury three asserted grounds of defendant's negligence: (1) In respect of placing and leaving the loaded scrap-iron car on the repair track at the time and in the location in question; (2) in respect of the alleged speed at which the switched cars were kicked onto and down the repair track; and (3) in that the foreman of the switching crew, after learning of the position of the scrap-iron car, and that the switched cars were going rapidly down the repair track, failed to effectually warn deceased of the impending collision and to give him opportunity to escape.

That deceased was on one of the switched cars when they collided with the scrap-iron car, and was killed by that collision, must, for the purposes of this review, be taken as established. It is necessarily so found by the verdict, in view of the court's charge; and, although there was substantial evidence to the contrary, the verdict in that respect is sustained by substantial testimony. As the record is made up, the judgment should be affirmed, provided defendant's requests to exclude from consideration both the first and third submitted grounds

of negligence were properly denied.

The testimony relating to each of these questions was in sharp conflict; upon either it would support a verdict in defendant's favor. But it scarcely need be said that on the motion for an instructed verdict, wholly or in part, the trial court was bound to take the view of the evidence, and of the inferences deducible therefrom, most favorable to the plaintiff, and that we cannot reverse merely because we may entertain a different view or draw different inferences than accepted by the jury.

[1] 1. The presence of the scrap-iron car on the repair track. Construing the testimony most favorably to plaintiff, it was open to the jury to conclude that it was defendant's rule and custom in putting cars on that track to place them, in the interest at least of easy handling, at the far end of it, and thus past the grade therein and well down in the level part, which, as already said, extended about 550 feet beyond the foot of the grade; that independently of such rule or custom, and in view of the fact that the repair track was to be used by switching crews in the nighttime, when the track was not well lighted, in either pushing or kicking cars thereon, due care for the switchmen's protection required the spotting of the cars well beyond the foot of the grade; that the scrap-iron car in question was not in bad order, but had been brought onto the repair track on the day before tor pur-

poses of loading, and at 4 or 5 o'clock on the afternoon of that day was stationed near a scrap-bin, about 350 feet north of the place where it was at the time of the collision (how or why moved to its later position, about 50 feet up the grade, does not appear); and that there was enough unoccupied space north of this later position to per-

mit keeping it beyond danger of the collision in question.

[2] It appeared, however, that the repair track was frequently full of cars at night, that just before the movement in question Hutson, the switching foreman, had followed down the main track the first two cars of a cut of seven then being distributed, and that thereupon the deceased, who was a switchman under the foreman, took charge of the kicking onto the repair track of the next two cars (an empty box car followed by a loaded gondola); and defendant contends that deceased thus took the sole responsibility for the movement, and not only assumed the risk of collision with the other cars, but was negligent in not looking out for his own protection by ascertaining the presence of the scrap-iron car on the repair track, as well as by kicking the cars down the grade instead of shoving them down, as the company's rules required, and that the negligence of deceased was the sole proximate cause of the collision and accident, thereby preventing recovery under the rule of Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732.

But this contention fails to give due weight to the facts which there was evidence tending to sustain: First, that although the deceased, in Hutson's temporary absence with the cars previously kicked on the other track, was in *immediate* charge of the movement of the two cars here in question, yet his charge was subject to the direction of Hutson. The evidence, indeed, would warrant an inference (perhaps natural enough without express testimony) that the foreman had himself instructed the kicking of the two cars down the repair track; for, while another member of the crew testified that "McGuffey was lining up the cars" and that it was the same "for McGuffey to tell me as it was for Hutson to tell me, and McGuffey knew where the cars were going as well as Hutson did," he added, "By the line-up of the cars is meant instructions as to where they are to go; that Hutson had told him where." And, second, that deceased could see the scrapiron car for but 5 to 7 car lengths (approximately 235 feet), while the scrap-iron car, when the switching movement began, was more than 100 feet still further distant. The fact that in its prudent use the repair track might have been so full as to make it proper to place the scrap-iron car where it was encountered would not be enough to bar recovery on account of a negligent location thereof. We think it was open to the jury to conclude that the alleged negligence of deceased was not the sole proximate cause of the collision. It thus did

¹ This witness, who was yard foreman "off and on" for several years, partly before and partly after the accident, and was regular yard foreman at the time of the trial, testified that "it was customary there at the time to kick cars into this rip track at night, but sometimes they would be shoved in," and that "we were handling these two cars that night just as we were always accustomed to handle them, and just as McGuffey was accustomed to handle them, and he was riding them just as he had rode them many times before."

not, as matter of law, bar recovery. Pennsylvania Co. v. Cole (C. C. A. 6) 214 Fed. 948, 131 C. C. A. 244; N. Y., C. & St. L. R. R. Co. v. Niebel (C. C. A. 6) 214 Fed. 952, 131 C. C. A. 248.

[3] 2. The alleged negligent failure to warn deceased of the danger of collision with the scrap-iron car. There were two witnesses to the accident. According to the testimony of one of them, when the box car which deceased was riding was "two or three car lengths [perhaps 100 feet] in the rip track," and still south of where the foreman on track 6 was standing (at such point the two tracks would be about 18 feet apart), the foreman, in an ordinary tone of voice, but without indicating alarm, called out to the deceased to "Get off, Mac!" or "Look out, Mac!" "like one who would want a man to get off and come on and help"; that deceased started to "holler something," appeared confused, first started north, and then turned and came down the ladder of the box car and stepped across to the platform of the gondola (in this position he presumably could not see the scrap-iron car on account of the greater height of the box car in front of him); that at this time, when he was "probably five or six car lengths [which would be perhaps 200 feet] from the point of the rip track switch" (at such point the two tracks would be about 32 feet apart), the foreman called to deceased a second time, the noise made by another engine preventing the witness hearing what was said; that meanwhile the foreman "might have walked a little farther north," how far does not appear, but not over to the side of the car deceased was on; that soon after "hollering" the second time the foreman started to the rip track. It would seem a proper, although not a necessary, inference that the car which deceased was riding passed the foreman (although on the other track) at some time after the foreman had first called According to the other witness, when the foreman first called out to deceased, the switched cars were at a point which would seem to be not more than 100 feet south of the scrap-iron car; and this witness, who was at the time 40 to 50 feet southerly of the foreman, and 150 to 200 feet from the point of collision, then saw the scrapiron car. At this point the foreman would be perhaps 70 feet from deceased and about 116 feet from the point of collision. According to this witness the foreman ran down immediately after the one call testified to; the collision seems to have occurred before he reached its location. The testimony as to the speed of the kicked cars varies from 2 to 3 miles (when they left the switch), according to the one witness to 6 to 8 miles, according to the other witness, at least when seen nearer the point of collision. The speed would naturally increase somewhat as the grade was descended. There was testimony that at much more than a 3-mile speed the switchman could safely have iumped from the moving car.

The inference that the foreman saw the scrap-iron car and called to deceased to get off, or look out, as far back as 100 feet from the rip track switch, is perhaps not the more natural one; and if the car was not seen until deceased was but 100 feet from the point of collision a negligent failure to warn could scarcely be inferred. But we are constrained to the view that it was open to the jury to draw the

inference that the foreman saw the car in time to give effective warning, and that he negligently failed to give it, upon a consideration of all the evidence, including a harmonizing of the conflicting testimony as to the relative distances and rates of speed, and having in mind that no explanation other than the discovery of the scrap-iron car is given for the foreman's first call to deceased; for the foreman, who was still in the employ of the defendant at the time of the trial, and had been called by plaintiff to testify to facts showing the interstate character of the movement, was not called by defendant to testify as to his knowledge of the presence of the scrap-iron car, or his attempts to warn deceased thereof, or to any of the facts directly relating to the collision. We are the better content with this conclusion from the fact that the trial judge, whose opportunities for weighing the testimony were better than ours, and who did not hesitate to set aside the verdict on a former trial because of an opinion that the deceased more probably fell off the car before the collision, and who expressed to the jury on the second trial his opinion that deceased was guilty of contributory negligence, yet refused, without opinion, a motion for a new trial following the second verdict, presumably for the reason that in his judgment it was sustained by substantial evidence, as it certainly was upon the point for which the first verdict was set aside. The size of the present verdict is consistent with a finding of and due allowance for contributory negligence.

Without reference, therefore, to the question of alleged excessive speed of the kicked cars, the judgment below should be affirmed.

# LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

#### No. 3136.

1. APPEAL AND ERROR \$\infty\$954(1)-REVIEW-INJUNCTIONS.

The appellate court will overrule or reverse an order granting a preliminary injunction only when satisfied that there was error of law in the action of the trial court, or that upon the facts there was no reasonable field for discretionary action.

2. Injunction \$\iff 38\$—Restraining Interference with Telegraph Lines Pending Condemnation.

Where a telegraph company, which maintained interstate lines on a railroad right of way, terminated its agreement with the railroad company, and after the Alabama courts have adjudged that the telegraph company had no right to condemn an easement on that part of the railroad right of way located in Alabama, the federal courts for Kentucky will not, on the theory that the telegraph system was unitary and that the company had an easement over part of the right of way in Alabama, enjoin interference with the lines covered by the Alabama decision.

3. Injunction \$\infty\$ 136(3)—Preliminary Injunction—Issuance.

Preliminary injunctions should not issue, unless a reasonably clear case of necessity and otherwise irreparable injury is made out.

4. Injunction \$\infty 38-Preliminary Injunction-Continuance.

A telegraph company, which maintained interstate lines on a railroad right of way, terminated its agreement with the railroad company and

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sought to condemn easements in the several states, but condemnation was refused in Alabama. Held, that the federal court for Kentucky, which had enjoined the railroad company from interfering with the existing lines pending condemnation, will not continue the injunction as to the Alabama lines, particularly where the courts of that state granted an injunction covering telegraph lines on that part of the right of way wherein the telegraph company asserted an existing easement.

5. Injunction \$\leftharpoonup 137(1)\$—Preliminary Injunction—Governmental Assumption of Control of Railboads—Telegraph Line on Right of Way.

Where a telegraph company, after terminating the arrangement under which it maintained lines on a railroad right of way, was denied right of condemnation in Alabama, held, that preliminary injunction against the railroad company's interference with telegraph lines will not be granted, because the government has assumed control of railroads, etc., where the railroad company agreed not to take any action interfering with the telegraph system without governmental approval.

Appeal from the District Court of the United States for the West-

ern District of Kentucky; Walter Evans, Judge.

Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. From a decree denying a motion to dissolve an injunction, defendant appeals. Reversed in part and in part affirmed.

See, also, 201 Fed. 946.

For 27 years before 1911, the telegraph company had occupied the railroad right of way, in several states, with a line of poles and wires, pursuant to a contract in the nature of a lease. Eventually the telegraph company exercised its elective right to terminate this contract. Falling in agreement upon terms for a renewal contract, the railroad company threatened to evict the telegraph company. The latter filed its bill in the court below, and procured a preliminary injunction restraining any interference with the existing pole and wire line, pending the result of condemnation proceedings which the telegraph company had begun in each of the different states. One of these states was Alabama. An appeal was taken to this court from the order awarding preliminary injunction, and the order was sustained. Louisville Co. v. Western Union Co., 207 Fed. 1, 124 C. C. A. 573. This court approved the general theory that equity should maintain the existing condition until there was opportunity to prosecute to a conclusion any condemnation proceedings authorized by the statutes of the various states, and held that there was jurisdiction to enjoin such interference in other states, as well as in the districts of the state where the bill was filed. Accordingly any such interference in Alabama continued to be prohibited by this injunction. The Kentucky condemnation proceeding has been recently reviewed by this court. Louisville Co. v. Western Union Co., 249 Fed. 385, — C. C. A. —, opinion filed May 8, 1918. Further details of the general situation need not be stated, but will be found recited in one or the other of these former opinions.

The condemnation proceeding in Alabama, after varying results, was ended by the decision of the Supreme Court of that state (Western Union Co. v. Louisville Co., 74 South. 946, 1006), holding that the power to condemn did not exist. As to any right claimed under the laws of the United States, this judgment was affirmed by the Supreme Court; and as to any other questions, certiorari was refused. Western Union Co. v. Louisville Co., 244 U. S. 649, 37 Sup. Ct. 743, 61 L. Ed. 1371. Thereupon the railroad company applied to the court below for dissolution of the existing injunction, so far as it affected proceedings in Alabama. By way of answer to this application, the telegraph company applied for and obtained leave to file an amended bill. From these amendments, and other sources, it appeared without dispute that the telegraph company occupied about 1,000 miles of the railroad company's right of way in Alabama; that as to about 600 miles the situation continued

as it had formerly appeared to be, and the telegraph company no longer claimed any right to occupy or any right to condemn; but as to the remaining approximately 400 miles the telegraph company claimed an easement for its poles and wires, resulting from condemnation proceedings prosecuted by the predecessor of the telegraph company against the predecessor of the railroad company. The telegraph company alleged that this easement had been so acquired "long prior to June 18, 1884," the date of the contract the termination of which in 1911 precipitated the controversy; that this easement over the 400 miles was partly on the same side of the tracks as the telegraph company's existing line and partly on the opposite side; that the easement had never been actually taken possession of and enjoyed, because this had not been necessary, but it had never been abandoned. It further appeared that the telegraph company had filed a bill against the railroad company in the proper trial court in Alabama to obtain a decree establishing such rights of easement and to enjoin the railroad company from denying the right to exercise the same and from interfering with existing lines until the railroad company should permit the telegraph company to remove the poles and wires from the existing line to the old easement line, and that an injunction to this effect, granted by the appropriate Alabama court, is now in force. This amended bill further alleges "that the easements so shown to belong to this complainant are a part of the system of complainant; that the remainder of the right of way of the railroad company in Alabama occupied by the complainant is likewise necessary to the operation of its general system." Upon these facts and allegations, the court below refused the motion to dissolve the injunction as to Alabama, and from the order of refusal, and the order permitting the filing of this amended bill, the railroad company appeals.

Henry L. Stone, Edward S. Jouett, and Helm Bruce, all of Louis-

ville, Ky., for appellant.

Humphrey, Middleton & Humphrey and Richards & Harris, all of Louisville, Ky. (Albert T. Benedict, of New York City, of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. This appeal must be governed by the settled rule that the appellate court will overrule or reverse an order granting a preliminary injunction only when satisfied that there was error of law in the action of the trial court, or that, upon the facts, there was no reasonable field for discretionary action. Louisville Co. v. Western Union Co., 207 Fed. 1, 4, 124 C. C. A. 573.

[2] 2. As to the 600 miles, it is practically conceded (and we suppose it was in the court below) that the injunction should be dissolved, unless the contrary result is to be justified by what counsel call the "unitary theory." The telegraph company's lines in Alabama along this railroad, while serving local and independent purposes, are at the same time an integral part of its general system extending over the country and exercising a quasi public function important to the general public interest. These Alabama lines act as roots or branches for trunks in other states, and serve as the main stem for branches and roots in other states. An injury to any one of these members is an injury to the whole; hence it is argued that, as incidental to the protection of that part of the system in Kentucky, the court should

also protect that part of the system in Alabama, pending the Kentucky condemnation, or indeed—we think the argument must go so far—until condemnation is finished in every state in which it may be attempted. This conclusion is thought to be supported by what this court said upon the former appeal, reported in 207 Fed. 8, 124 C. C. A. 573.

We do not so view that opinion, and we cannot accede to the position now taken. What we there said regarding the unitary character of the whole system had to do mainly with the jurisdiction of the District Court in Kentucky to order an injunction having extraterritorial effect, but also had some bearing on the question whether the discretion to enjoin was rightly exercised. However, the bill of complaint and the argument and our opinion all rested upon the existence of local right as an essential foundation. It was alleged, and at that time we were required to assume, that the telegraph company had the right to condemn in Georgia and in Alabama and in the other states named, as well as in Kentucky, and the relief granted was solely for the preservation of the body of the property in its existing condition until the legal right could be adjudicated in due course. Unless there had been a legal right to condemn in Kentucky, there would have been nothing for equity to protect in Kentucky; and the same thing is true of Alabama. It is self-evident that a defendant cannot be enjoined from a proposed act, unless that act will work an unlawful injury to a plaintiff; and it now appears that the telegraph company, not only has no interest, but claims none, in the 600 miles of right of way, and that the railroad company has the unquestioned right to take possession of its own property and evict the telegraph company therefrom. The harm resulting to the Kentucky lines from the destruction of the Alabama lines is damnum absque injuria. If I lease three fields from three several lessees, and operate them as one unitary farm, and the lease of one expires, its loss impairs the value of the other two; but that does not entitle me to keep it—not even until I can settle a dispute as to the lease of one of the others. We are clear that there is no foundation, in law or in fact, upon which the injunction as to the 600 miles can rest.

[3, 4] 3. There is a different situation as to the 400 miles. If the claim as to the old easement, set up in the amended bill, had been made in the original bill, it would then have afforded a basis, both of jurisdiction and of discretion, for the award of a temporary injunction, not different, except in degree, from the basis given by the condemnation suit. This was not done. The telegraph company planted its request for equitable assistance solely on its alleged right to condemn. This right to condemn rested upon the existence of necessity, to be proved or to be presumed. As to that part of the Alabama right of way where the old easement was on the same side as the existing line (sought to be condemned), it is not easy to see how there was any necessity whatever. As to that portion where the easement lay on the other side of the tracks, the necessity, for condemnation was, to say the least, less probable, if there was an existing easement, than if there was none. For five years the telegraph company prosecuted and maintained this litigation in the court below, and maintained and had the benefit of its preliminary injunction, upon the faith of its express and implied representations to the court below that this condemnation was necessary in order to prevent irreparable injury. Though the substantial effect of this proceeding was to trifle with the court and its process, we do not intend to intimate that this course of conduct was for the purpose of misleading the court; it is to be presumed that counsel had what seemed to them to be good reasons for not disclosing and relying upon the easement in question; nor do we intend to decide that the prosecution of the condemnation suit in Alabama and of this equity suit in Kentucky have been inconsistent with the easement now alleged, or constitute an abandonment of or an estoppel against the easement right; those questions are for the Alabama courts to decide. We go no further than to say that this reliance upon the theory of condemnation for so many years, and this resort to the theory of antecedent easement only after the possibilities of the other were exhausted, do not incline a court of equity to grant discretionary favor; and only a clear showing of a probable right in serious jeopardy and of no other available remedy could justify the granting or the maintenance of an injunction based on such a belated prayer.

Not only is the usual rule to be observed that preliminary injunctions should not issue unless a reasonably clear case of necessity and otherwise irreparable injury is made out, but this case makes the rule especially appropriate. It is proposed here to issue (or, what is the same thing, to refuse to dissolve) an injunction which extends beyond the territorial limits of the court, which restrains the parties from proceeding in another state as they otherwise might, and which, in substantial effect, prevents the courts of another state from awarding and executing relief with regard to property in that state as they might otherwise do. To this consideration is to be added the fact that the telegraph company has actually applied for and obtained from the proper Alabama court the complete and full measure of temporary injunctional protection which it is asking in this case from the court below. Not only does this fail to indicate that the injunction from the court below is necessary to prevent irreparable injury, but it rather shows that the injunction here demanded will be of no use whatever, unless the courts of the state where the property is situated decide that the telegraph company has no rights which entitle it to such protection.1

When we start with the consideration that, by withholding for five years what it now concedes is its only claim of right while prosecuting the case on other claims, the telegraph company has all but closed the door to its present appeal for the aid of equity, and then further observe that it is asking the court to go to the very limit of jurisdiction in proceeding extraterritorially and in affecting the courts of another state, and then observe still further that it is already fully protected

<sup>&</sup>lt;sup>1</sup> Upon the former appeal, it appeared that a small fraction of the Alabama lines was protected by an Alabama injunction; but the matter was comparatively negligible, and we found no occasion to consider the effect of an Alabama injunction covering the whole remaining field of controversy.

by the action of the courts of that other state against the injury which it now anticipates, we are satisfied that there is no sufficient basis upon which longer to support the injunction even as to the 400 miles.

4. We do not find ourselves embarrassed, in reaching this conclusion, by the rule to which we referred at the outset that an appellate court will not disturb the action of a trial court, except in case of error of law, or so serious a misapprehension of facts as to be of similar effect. A careful reading of the thorough opinion of the trial judge indicates to us that his conclusion to maintain the injunction as to the entire 1,000 miles is based essentially upon that construction of our former opinion which led him to think that the unitary character of the telegraph system was of itself enough to justify protecting the whole system, without regard to the existence of local right; and this construction we think erroneous. We further observe that the District Judge considered the amended bill to show that, since the decision of the Alabama Supreme Court had determined "the law respecting condemnation, the plaintiff had discovered that it for many years had had and now has" the right of easement which, by its amended bill, it is asserting. cannot find in the bill, nor in the briefs of counsel, any assertion that these easement rights were not fully known at the time of filing the original bill and ever since; and it is apparent that the supposition that the easement had been newly discovered, instead of having been voluntarily withheld, would give a sufficiently different color to the claim of the telegraph company, so that this might have been the turning point in the action of the District Judge.

[5] 5. Pending this controversy as to the rights of the parties, there have developed a governmental assumption of railroad control and an overwhelming public necessity that the operation of the telegraph system as a whole through the state of Alabama should not be embarrassed. We do not see that these things make the slightest difference as to the propriety of maintaining or dissolving this injunction. It appears that the Secretary of War has requested that nothing should be done to interfere with the operation of the telegraph system until he approves, and the railroad company promises full observance of this request. The existing injunction, as to lines in Alabama, should be dissolved, without prejudice as to the easement claimed by the telegraph company, and with the proviso that the railroad company should do nothing interfering with existing lines or their use by the telegraph company until the Secretary of War consents thereto, or until after 30 days' notice to the Secretary of War and lack of objection by him.

6. As the telegraph company has had ample time, since the condemnation question was finally decided in the Supreme Court of Alabama, within which to move its lines, we observe no reason why it should receive further protection from the court below for that purpose, or why it may not get from the Alabama courts whatever similar protection may be proper as incidental to the easement controversy; but we do not decide this matter, and it will not be inconsistent with the mandate to go down, if the District Court shall think proper to enjoin interference as to the 600 miles, or the 400 miles, or both, for the time reasonably necessary for the telegraph company, acting diligently and

in good faith, to establish its lines elsewhere than on the railroad right

of way.

The order below, refusing to dissolve the injunction as to Alabama, is reversed, and an order will be entered in accordance with this opinion. The order granting leave to file the amended bill was discretionary, and is affirmed. Appellant will recover the costs of this court.

# THE WILLEM VAN DRIEL, SR.

NAAM LOOZE VENNOOT SCHAP, S. S. WILLEM VAN DRIEL, SR., V. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1918.)

No. 1552.

The burning of a grain elevator, causing damage to vessels loading thereat, *held* due to negligence of the elevator company in not having proper equipment for notifying operator to stop drive wheel or conveyer belt, resulting in the fire from friction.

2. NEGLIGENCE \$--134(11)—OPERATION OF GRAIN ELEVATOR—CAUSE OF FIRE—EVIDENCE.

Evidence *held* to sustain finding of trial court that elevator fire, causing damage to property in the vicinity, arose from heat generated from friction owing to the choking of a belt used in operating the elevator.

3. RAILROADS \$\iiii 259(3)\$—Fires—Persons Liable—Lessee of Elevator—Control.

Where a railroad company owned all the stock of an elevator company, except a few shares necessary to qualify the latter's officers, and leased the elevator to another railroad company for 999 years, the latter assuming liability for damages, the lessee is liable for the loss to vessels by fire communicated on account of negligence in the operation of the elevator.

Cross-Appeals from the District Court of the United States for

the District of Maryland, at Baltimore; John C. Rose, Judge.

Libel by the Naam Looze Vennoot Schap, S. S. Willem Van Driel, Sr., a corporation, owner of the steamship Willem Van Driel, Sr., against the Pennsylvania Railroad Company and the Central Elevator Company of Baltimore City. Judgment for libelant against the Central Elevator Company only (242 Fed. 285), and the libelant appeals, with cross-appeal by the Elevator Company. Decree affirmed as to liability of the Elevator Company, and reversed as to liability of the Railroad Company.

Albert C. Ritchie, of Baltimore, Md., and J. Parker Kirlin, of New York City (John M. Woolsey and Charles R. Hickox, both of New York City, Stuart S. Janney, of Baltimore, Md., and Robert W. Williams, of Washington, D. C., on the brief), for appellant and cross-appellee.

Shirley Carter, of Baltimore, Md. (Bernard Carter & Sons, of Bal-

timore, Md., on the brief), for appellees and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. Grain elevator No. 3, with the capacity of about 1,000,000 bushels, was located on a wharf in the Canton district of the port of Baltimore. On June 13, 1916, the ship Welbeck Hall, on its east side, and the ship Willem Van Driel, on its west side, were loading grain. About 2 o'clock in the afternoon, after a large part of the cargo of each ship had been loaded, a great explosion occurred in the elevator, which was immediately followed by a fire. Both

ships were seriously injured and a number of persons killed.

On the 22d of January, 1917, a libel was filed on behalf of the ship Willem Van Driel and its owner against the elevator company and the Pennsylvania Railroad Company alleging: (1) Damages from the fire to the ship and cargo in the aggregate sum of \$379,142.25; (2) negligence in the operation of the elevator which caused the fire; (3) liability of the elevator company, and also of the Pennsylvania Railroad Company, as the real owner and operator of the elevator, for the damages, and for such sums as the ship is liable for to the owners

of tugs for salvage services rendered at the time of the fire.

After taking a great mass of testimony the District Court found these facts on the question of negligence: The long belts, to which are attached buckets conveying the grain, are liable to become choked; the consequent stopping of a belt while the pulley to which it is attached continues to move causes friction, which will soon break the belt and produce great heat. Unless the friction is promptly relieved by stopping the pulley, the heat may be so great as to cause ignition. Due care to prevent fire required that some means should be provided to stop quickly the revolving pulley in the upper part of the elevator, upon discovery of the choke by the operatives at the foot of the leg through which the belt moved. Originally, the means adopted in this elevator was a rope attached to the pulley, by which the operatives on the lower floor could detach the pulley and stop the conveying belt as soon as it became choked. This instrumentality was abandoned, and reliance placed on communications to the operatives on the upper floors by speaking tubes. To connect with the machinery floor on which the pulleys were placed, such messages had to be relayed from the next floor below. The machinery room above was 240 feet long; and the only regular attendant on that floor was an oiler, whose duties sometimes required him to be absent, attending to duties elsewhere. Owing to his absence on this occasion, the tube message was not received by him on the machinery floor, and there was delay of about 2 minutes in getting the information to the machinery floor, by a messenger sent from the floor below. The message that No. 3 belt was choked was understood by Aires, a mill expert on the machinery floor, to refer to No. 2 belt. This mistake caused a further delay. Aires called through a hole in the floor to Smith, the operator who had sent the message, that No. 2 was all right. Upon being informed that the trouble was with No. 3 Aires, with Lucas, the messenger, moved the lever intended to disconnect the pulley controlling the belt, but without effect. Looking into No. 3, he saw smoke. Afterwards a scantling was used in the unsuccessful effort to stop the large wheel which drove the pulley. Aires then walked about 120 feet to a telephone, where he could communicate with the engineer, and ordered all the machinery stopped. This order was promptly obeyed, but it was about 2½ minutes after the power was shut off before the machinery stopped. Immediately thereafter No. 3 belt broke and fell. The engine was then started again on the supposition that all danger was over. Very soon

afterwards the fire and explosion occurred.

[1] From this condensed statement of the facts, considered in the light of ordinary knowledge of physical law, it is evident that friction produced by a choked belt was liable to make heat sufficient to ignite explosive dust, always present in an elevator, and the dry wooden structures through which the belt ran. It seems equally clear that in the presence of such a peril mechanical means should have been provided to stop the running of the pulley against a choked belt, if such mechanical means could be provided at reasonable expense, and that, if excessive expense or other causes prevented the use of such mechanical device, a speaking tube or telephone communication should have been provided from the operative at the foot of the belt to an operative at the pulley to send and receive the warning to stop the pulley. The failure to provide either of these means of prompt and certain communication justifies the finding by the District Court of lack

of due care in providing against fire.

[2] Strong argument is presented in support of the contention that the fire originated in leg No. 2, and was not due to the choking of the belt in No. 3. While there is some confusion and conflict in the evidence, careful consideration leads to the conclusion that the finding of the District Court that it did originate in No. 3 from the negligence in operation is too well supported by the evidence for this court to disturb it. There was indubitable testimony that smoke was seen in No. 3 and that live coals fell from it after the choking and the friction. It is true that some of the witnesses testified to the presence of live coals about the same time in leg No. 2. If there were no evidence of an operating force sufficient to cause fire, and of the actual presence of smoke and sparks at that location before the fire, it would hardly be safe to say that the preponderance of the evidence indicated the origin of the fire in No. 3. What fixes the preponderance against No. 3 as the place of origin is the presence of a force operating there sufficient to cause fire, and the absence of such force in leg No. 2. The finding of the District Court that the fire originated in No. 3, because of the lack of reasonable care in providing an arrangement to disconnect promptly the pulley from a choking belt, is so well supported by the evidence that it would be improper for this court to disturb it.

[3] The inquiry remains whether the Pennsylvania Railroad is liable as a participant in the operation of the elevators by reason of its control of the elevator company. This depends upon the question of fact whether the elevator company, although in name and organization a distinct corporation, was in substance a mere corporate agent or instrumentality of the Pennsylvania Railroad Company. So. Pac.

Terminal Co. v. Int. Comm. Com'n, 219 U. S. 523, 31 Sup. Ct. 279, 55 L. Ed. 310; Joseph R. Foard Co. v. State of Maryland, 219 Fed. 827, 135 C. C. A. 497; Lehigh Valley R. Co. v. Delachesa, 145 Fed. 617, 76 C. C. A. 307.

There is no controversy as to the material facts of the relationship between the Pennsylvania Railroad Company and the elevator company. The Northern Central Railroad Company constructed elevator No. 3 in 1903. The Central Elevator Company was incorporated in 1901, with capital stock of \$100,000. Its entire stock was subscribed by the Northern Central Railroad Company and is now so held, except a few shares bestowed to qualify individuals as directors. The dividends on all the stock of the elevator company were paid to the Northern Central Railroad Company. In 1914 the Northern Central Railroad Company leased all of its property and franchises to the Pennsylvania Railroad Company for 999 years. This lease, while formally executed in 1914, provided by its terms that it should be effective from the 1st day of January, 1911, and the control of the Pennsylvania Railroad Company over the Northern Central and the elevator company commenced certainly not later than that date. The lease provides for the payment of 8 per cent. dividends by the Pennsylvania Company on the stock of the Northern Central. The latter company retained its organization for the purpose of distributing the dividends, but after 1911 did not manage or operate anything. By the terms of the lease the Pennsylvania Railroad Company assumed to the Central Railroad Company liability for all claims for damages. After 1911 the Pennsylvania Company maintained the same relationship to the elevator company that the Northern Central had maintained before. The elevator company could accept no grain except that which came over the tracks of the controlling railroad. The general superintendent of the Pennsylvania Company in Baltimore, as an incident of that office, is president of the elevator company. The treasurer, the assistant secretary, comptroller, subcomptroller, and other accounting officers, holding similar positions in the railroad company, have charge of the accounts of the elevator company, but are paid by the railroad company. An employé of the railroad company signs the vouchers of the elevator company as its auditor of disbursements. The railroad company, through various officers, issued orders from time to time as to the charges and other features of the management of the elevator company. The salary of the superintendent of the elevator company was increased by order of the fourth vice president of the railroad company. The railroad company controls the funds of the elevator company. In January, 1908, when the surplus of the elevator company amounted to \$100,000, held by the Northern Central Railroad Company on a special deposit at 3 per cent, the elevator company, at the request of the railroad company, voted to apply \$90,600 of this surplus as additional rent for preceding years.

It is true that the elevator company and its stockholders and directors held meetings, but in all essential particulars their action was dictated and controlled by the railroad company. The whole course of dealing showed that the surplus of \$200,000 it had in the bank at the time of

the fire was absolutely under the control of the railroad company. The superintendent of the elevator company, who directed its mechanical operation and its subordinate employés, had no duty to perform with the railroad company, but were evidently under its ultimate control. It would be impossible to imagine a relationship between corporations where the subsidiary corporation was more completely under the control of the dominant corporation. The elevators were constructed and operated merely as a facility to the business of the railroad company. Applying the language of Judge Wallace in Lehigh Valley Railroad Co. v. Du Pont, 128 Fed. 840, 64 C. C. A. 478, the potential and ultimate control of all its property and business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. Such complete dominance and control by the railroad company made the elevator company its mere puppet. United States v. Del., Lack, & West, R. R., 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438.

The decree of the District Court is affirmed as to the liability of the elevator company, and reversed as to the liability of the Pennsylvania Railroad Company.

## HARPER v. HARPER.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1918.)

#### No. 1566.

L. ACTION €= 48(2)—MISJOINDER OF CAUSES OF ACTION—TRESPASS ON THE CASE—CRIMINAL CONVERSATION AND ALIENATION.

In trespass on the case, two causes of action growing out of substantially the same transactions, and depending upon substantially the same evidence, as for criminal conversation and for alienation of the wife's affections, may be joined.

- 2. Appeal and Error \$\iff 960(1)\$—Bill of Particulars—Discretion of Court. Discretion of trial judge in refusing to require bill of particulars will not be disturbed, unless inspection of whole record clearly convinces appellate court that refusal resulted in injustice, which is not the case where both counts of the declaration relate to the same matters, and, in the second count, defendant's alleged wrongful acts are detailed.
- 3. EVIDENCE \$\sim 317(2)\$—HEARSAY—CRIMINAL CONVERSATION.

In husband's action for criminal conversation and alienation, testimony of wife's daughters as to their mother's confession of her acts with defendant, made some time after the alleged occurrences, being hearsay evidence, was incompetent.

4. Husband and Wife \$\iiii348\$—Criminal Conversation and Alienation—Evidence.

In husband's action for criminal conversation, where wife testified to sending telephone message to defendant to meet her, it was competent for husband to testify to contents of message, handed to him by mistake.

5. EVIDENCE \$\infty\$ 473—Suspicions of Witnesses.

In a husband's action for criminal conversation and alienation, suspicions of wife's daughters as to improper relations of their mother and defendant were incompetent.

6. APPEAL AND ERROR \$\infty\$=1050(1)-HARMLESS ERROR.

In action for criminal conversation and alienation, although suspicions of wife's daughters as to improper relations of their mother and defendant were incompetent, the error of admitting them was immaterial; suspicions being inevitable, if their testimony was true.

7. EVIDENCE = 178(6)—SECONDARY EVIDENCE—DESTROYED LETTER.

In husband's action for criminal conversation and alienation, where wife testified she took posted letter from her husband's trunk and burned it, and husband testified to finding scraps of letter written to wife by defendant, which he read by pasting together, evidence of the compromising contents was competent.

8. Husband and Wife \$\igchip 333(5)\$\—Alienation and Criminal Conversation —Limiting Evidence.

In husband's action for alienation of his wife's affections, limiting testimony as to drunkenness of plaintiff on occasions when his wife was present was a proper exercise of discretion, as to remoteness of the bearing of such testimony on the relations of husband and wife.

9. Husband and Wife €=333(5)—Criminal Conversation and Alienation —Evidence.

In husband's action for alienation of his wife's affections, where plaintiff admitted one assault upon his wife, but denied any other assault, in absence of independent evidence of another assault, plaintiff's plea of guilty to charge of assault on his wife of later date before a justice of the peace was properly rejected, as possibly relating to the prior assault.

10. Husband and Wife \$\sim 348\$—Criminal Conversation—Evidence.

In husband's action for criminal conversation, evidence of sexual intercourse between husband and wife before marriage was inadmissible, as too remote to prove misconduct of the wife with other men after marriage.

11. EVIDENCE \$\inside 147-Negative EVIDENCE-ALIENATION AND CRIMINAL CON-VERSATION.

In husband's action for criminal conversation and alienation, mere negative testimony of neighbor that he observed no impropriety between defendant and plaintiff's wife was properly excluded, as without probative value.

12. WITNESSES \$\infty\$405(1)\$\to\$Contradiction.

In husband's suit for criminal conversation and alienation, where wife said she did not remember of ever telling third person anything as to charges against her, this was a denial upon a material point, making contradiction of her testimony by such third person competent.

13. Husband and Wife \$\sim 333(3)\$—Criminal Conversation and Alienation —Evidence.

In husband's suit for alienation, evidence of expressions by wife of intention to marry another man, also contradiction of wife on that point, was immaterial, where, at the time of the imputed expressions, the alienation had been made final by divorce.

- 14. EVIDENCE \$\leftleq 471(17)\$—Belief—Alienation and Criminal Conversation. In husband's action for alienation and criminal conversation, testimony of defendant's wife that she believed him true to her was properly excluded.
- 15. APPEAL AND ERROR € 1047(4)—HARMLESS ERROR—REBUTTAL EVIDENCE—REPETITION.

New trial cannot be granted defendant, because some evidence allowed in rebuttal was repetition, where it is not evident that defendant was prejudiced.

16. Limitation of Actions €=31-Statute of Limitations-Personal Action Not Surviving.

Under Code W. Va. 1913, c. 104, § 12 (sec. 4425), a personal action, such as a husband's action for criminal conversation and alienation of his wife's affections, which does not survive, is barred in one year.

17. Limitation of Actions \$==104(1)—Statute of Limitations—Initiation of Period.

General rule is that statute of limitations begins to run from date of injury, and mere lack of knowledge of actionable wrong does not suspend it, nor does silence of wrongdoer, unless he has done something to prevent discovery; even concealment by him will not prevent running of statute, unless there is a good reason for injured person's failure to discover the wrong.

18. Limitation of Actions \$==192(3)—Statute of Limitations-Initiation

In husband's action for criminal conversation and alienation, where defendant pleaded statute of limitations of one year, to escape application of general rule that statute began to run from date of complete alienation and last act of criminal conversation, it was essential that plaintiff should allege by replication affirmative acts of concealment by defendant, and reasons for his failure to discover wrongs.

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge.

Action by Charles H. Harper against Joseph William Harper. To review judgment for plaintiff, defendant brings error. Reversed.

F. L. Bushong, of Charlestown, W. Va., and C. N. Campbell, of

Martinsburg, W. Va., for plaintiff in error.
Forrest W. Brown, of Charlestown, W. Va., and Herbert S. Larrick, of Winchester, Va. (Ward & Larrick, of Winchester, Va., and Brown & Brown, of Charlestown, W. Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and Mc-DOWELL, District Judge.

WOODS, Circuit Judge. The first count of the declaration of Charles W. Harper against his brother, Joseph W. Harper, alleges criminal conversation with plaintiff's wife, Mary E. Harper, on November 8, 1915, and on other days unknown, resulting in alienation of her affections and depriving plaintiff of the benefits of the marriage relation. The second count alleges alienation of the wife's affections by persuasion and malicious statements concerning the plaintiff, and criminal conversation from July, 1907, to November, 1915, as aggravation of the wrong. The action was commenced on July 18, 1916. Defendant's demurrer having been overruled, and his demand for a bill of particulars denied, the trial resulted in a verdict and judgment in favor of the plaintiff.

[1] There was no error in overruling the demurrer for misjoinder of the causes of action. In trespass on the case, two causes of action growing out of substantially the same transactions and depending on substantially the same evidence may be joined. Galizian v. Henry,

71 W. Va. 292, 76 S. E. 440.

[2] The discretion of a trial judge in refusing to require a bill of particulars will not be disturbed, unless inspection of the whole record clearly convinces the appellate court that the refusal resulted in injustice. That is not the case here. Both counts of the declaration

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relate to the same transactions, and in the second count is set forth in detail the story of the alleged wrongful acts committed by the de-

fendant, depended on to support both counts.

- [3] Evidence was introduced, both direct and circumstantial, tending to prove the alleged criminal conversations continued from time to time, and the separation and divorce of plaintiff and his wife in consequence of it. The defendant, testifying in his own behalf, denied all the acts of wrong attributed to him, and introduced evidence tending to corroborate his denial. An important witness for the plaintiff was his divorced wife, who testified to her sexual intimacy with defendant, his advice to her to obtain a divorce, and his promise to marry her. Her daughters, Edna Harper and Mrs. Lyle, also testified to facts tending to indicate improper relations between the defendant and plaintiff's wife. On the issue thus made, Edna Harper and Mrs. Lyle were allowed to testify to confessions of Mrs. Harper of her acts of sexual intimacy with the defendant, made some time after the alleged occurrences. This was hearsay evidence of a very objectional kind, intended to bolster the direct testimony of plaintiff's witnesses on the vital issue of the case. The confessions imputed did not accompany the acts, and were not associated with them, and were incompetent. Cochran v. Cochran, 196 N. Y. 86, 89 N. E. 470, 24 L. R. A. (N. S.) 160, 17 Ann. Cas. 782; Sanborn v. Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864; 13 R. C. L. 1491.
- [4] Mrs. Harper testified to sending a telephone message to defendant to meet her in Winchester. It was clearly competent for plaintiff to testify to the contents of this message, handed to him by mistake, because the sending of a message by Mrs. Harper to the defendant was under the circumstances an act of probative value, taken in connection with other evidence.

[5, 6] The suspicions of the daughters of plaintiff as to the improper relations of their mother and the defendant were not competent; but the error of admitting them was immaterial, as suspicions

were inevitable, if their testimony was true.

[7] Plaintiff testified to finding scraps of a letter written to his wife by the defendant, which he read by piecing together the scraps. Mrs. Harper having testified that she took the letter from her husband's trunk and burnt it, evidence of the compromising contents was competent. The same rule applies to other letters written by defendant to plaintiff's wife, which she said she had burned.

[8] Limiting testimony as to the drunkenness of the plaintiff on occasions when his wife was present was a proper exercise of discretion as to remoteness of the bearing of such testimony on the relations

of husband and wife.

[9] The plaintiff admitted an assault upon his wife in July, 1907, upon finding her and his brother, as he testified, improperly caressing each other; but he denied any other assault. The defendant offered as proof of another assault plaintiff's plea of guilty to the charge of assault on his wife in January, 1908, in response to a charge appearing on the docket of a justice of the peace. In the absence of any independent evidence of another assault, the testimony was properly reject-

ed, on the ground that it may well have related to the assault committed in 1907, or at any time before the charge was made to the justice.

[10] Evidence of sexual intercourse between husband and wife before marriage was properly held to be too remote to prove unchastity

of the wife with other men after marriage.

[11] The mere negative testimony of a neighbor that he observed no impropriety between defendant and plaintiff's wife was of no probative value, and was properly excluded.

[12] The testimony of Mrs. Mary E. Harper as it appears in the

record contains this question and answer:

"Q. Didn't you tell Mr. Miley that there was nothing to these charges your husband had made against you? A. Did 1 not? I don't remember of telling Mr. Miley anything."

This we understand was a denial by the witness on a material point,

and the contradiction of it by Miley was competent.

[13] Evidence of expressions by Mrs. Harper of an intention to marry one Day was immaterial, as was the contradiction of Mrs. Harper on this point, for the reason that at the time of the imputed expressions the alienation had been made final by the divorce, and therefore a desire to marry Day did not tend to show that such a desire, and not her relations with the defendant, accounted for the separation.

[14] Clearly the testimony of the defendant's wife that she believed

him true to her was properly excluded.

[15] It is true that some of the evidence allowed in rebuttal appears to be repetition, but a new trial cannot be granted on that ground,

since it is not evident that the defendant was prejudiced.

- [16] The statute of West Virginia provides a limitation of one year for commencing personal actions, such as this, that do not survive. Code 1913, c. 104, § 12 (sec. 4425); Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700. There was evidence tending to prove that the injury charged to the defendant of complete alienation of the wife's affections, resulting in her final determination not to return to her husband, occurred more than a year before the commencement of this action. There was also evidence tending to prove that the last act of criminal conversation imputed to defendant took place more than a year before the commencement of the action.
- [17] The general rule is that the statute begins to run from the date of the injury, and mere lack of knowledge of the actionable wrong does not suspend it, nor does silence of the wrongdoer, unless he has done something to prevent discovery of the wrong. Boyd v. Beebe, 64 W. Va. 216, 61 S. E. 304, 17 L. R. A. (N. S.) 660; Merchants' National Bank v. Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828; 17 R. C. L. 193; Bailey v. Glover, 88 U. S. 342, 22 L. Ed. 636; Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. Even concealment by the wrongdoer will not prevent the running of the statute, unless the person injured alleges and proves a good reason for his failure to discover the wrong. "A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it

was, how it was made, and why it was not made sooner." Hardt v. Heifweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548; Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; Avery v. Cleary, 132 U. S. 604, 10 Sup. Ct. 220, 33 L. Ed. 469; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807. In Bailey v. Glover, 21 Wall. (88 U. S.) 342, 22 L. Ed. 636, it is said that the same rule applies in law,

as in equity.

[18] There is no allegation in the declaration of concealment by the defendant of the wrongs charged against him or of the reason for the failure of the plaintiff to discover them. The defendant having pleaded the statute of limitations, to escape the application of the general rule that the statute began to run from the date of the complete alienation and the last act of criminal conversation, it was essential that plaintiff should allege by replication affirmative acts of concealment of the defendant and the reasons of his failure to discover the wrongs. The plaintiff did not by replication make such allegations, and therefore the defendant was entitled to the following instruction, refused by the court, which expresses the general rule on the subject:

"The court instructs the jury that if they believe from the evidence in this case that no act of sexual intercourse between the defendant and Mrs. Mary E. Harper took place within one year next preceding the institution of this suit, and if they further believe from the evidence that the said J. William Harper did not, at any time during one year next preceding the institution of this suit, alienate or attempt to alienate the affections of Mrs. Mary E. Harper from her husband, and that he did not during said year entice her away, or attempt to entice her away, from her husband, then they shall find for the defendant."

For the errors indicated the judgment is reversed; but the reversal is, of course, without prejudice to the plaintiff's right to apply to the District Court for amendment of his pleadings.

Reversed.

# TOSH et al. v. WEST KENTUCKY COAL CO.

(Circuit Court of Appeals, Sixth Circuit. June 14, 1918.)

No. 3094.

1. Injunction \$\infty 231-Judgment for Contempt-Joint Defendants.

A judgment adjudging two persons charged and tried together guilty of contempt for violating an injunction, although by separate acts, may be reviewed as to both on a single writ of error.

2. Injunction = 218-Acts Constituting Contempt-Violation of Injunctional Decree.

Persons amenable to an injunctional decree are subject to proceedings for contempt for its violation, without regard to the lapse of time since the decree, especially where the proceedings are criminal in character.

3. Injunction == 228-Permanent Injunction-Persons Concluded.

A decree in a strike suit enjoining defendants "and all other persons whatsoever who may have acquired notice, information, or knowledge of this judgment" from interfering by threats, violence, or intimidation with complainant's employés binds persons having notice who, although not parties, were in privity with the defendants, but persons not parties nor

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privies, who ten years later took part in another and unrelated strike as members of the same labor union are not amenable to such decree, although served with notice.

In Error to the District Court of the United States for the West-

ern District of Kentucky; Walter Evans, Judge.

Proceedings for contempt by the West Kentucky Coal Company against Sam Tosh and George Overby. Judgment against defendants, and they bring error. Reversed.

Henson & Taylor, of Henderson, Ky. (W. O. Smith, of Central City, Ky., and Luke Teague, of Madisonville, Ky., of counsel), for plaintiffs in error.

H. D. Allen, W. T. Harris, and H. D. Allen, Jr., all of Morganfield, Ky., and Edmund F. Trabue, John C. Doolan, Attilla Cox, and W. W. Crawford, all of Louisville, Ky., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

PER CURIAM. Defendant in error, as complainant in a bill in equity, filed during a strike affecting its employés in its mining business, and growing out of an attempt to unionize its mines, obtained in November, 1907, a final decree enjoining the defendants therein and "all other persons associated or connected with them or under their authority, or direction or control, and all persons whatsoever, who may have acquired notice, information or knowledge of this judgment from in any manner interfering with, molesting, hindering, obstructing, or stopping any of the business of complainant, or its agents, servants, or employés, in the operation of its property or business at any of the mines or upon any of the properties" of complainant in certain counties named, and from compelling or inducing (or attempting to do so) any of complainant's employés by threats, intimidation, force, or violence to refuse or fail to do their work, or to discharge their duties as such employés, or to leave its service, or from in any manner interfering with, molesting, or hindering any of such employés, and from preventing or attempting to prevent any person or persons by threats, intimidation, force, or violence from entering or continuing in complainant's employ, as well as from other means of violence, interference, or intimidation set up.

Plaintiffs in error were not parties to that action. A certified copy of the decree was served on each of the plaintiffs in error in April, 1917, and May, 1917, respectively—thus between nine and ten years after entry of the final decree. On June 2, 1917, the Coal Company, upon affidavit of its general superintendent, accompanied by affidavits of other parties, obtained in the court below an order to show cause why plaintiffs in error (and others) should not be punished for contempt of court in violating this injunction. Later plaintiffs in error were, upon trial by jury under Clayton Act Oct. 15, 1914, c. 323, § 22, 38 Stat. 738 (U. S. Comp. Stat. 1916, § 1245b) convicted of contempt of court, in violating the injunction, by knowingly attempting, the one by threats of violence, to induce and compel a certain employé of the Coal Company to refuse or fail to do his work as such employé, the

other by threats and violence to induce another employé of the Coal Company to leave its service and employment. Plaintiffs in error were sentenced each to 60 days' imprisonment and each to the payment of a substantial fine—both fines being ordered paid to the Coal Company, except that in the case of one of them a portion was ordered paid to the subject of the alleged violence. This trial and conviction were had against the contentions of plaintiff in error, seasonably urged, that they were not amenable to the injunction, and that neither the facts alleged nor the evidence offered constituted an offense or authorized their conviction. This writ was brought to reverse that judgment.

[1] 1. Plaintiffs joined in a single writ of error. Motion is made to dismiss on the ground that review can be had only on separate writs. Separate writs are required where judgments in wholly separate suits are sought to be reviewed (Brown v. Spofford, 95 U. S. 474, 484, 24 L. Ed. 508), even though the cases were consolidated for trial (L. & N. Ry. Co. v. Summers [C. C. A. 6] 125 Fed. 719, 720, 60 C. C. A. 487), and even where the cases grew out of one accident (Waters-Pierce Oil Co. v. Van Elderen [C. C. A. 8] 137 Fed. 557, 562, 70 C. C. A. 255). In two of the cases cited jurisdiction was retained in the absence of objection by defendant in error. In the third a motion to dismiss, made after the lapse of the 6 months' period for issuing writ, was overruled because of stipulation by counsel that the writs of error might be considered and treated as a single writ, the record printed and treated as one and the same, and the causes argued as one.

In the instant case, while the motion to dismiss was made about 4 months after judgment, it was not made until more than 4 months after settlement of the joint bill of exceptions, nor until more than 3 months after filing præcipe calling for copy of the proceedings as to each plaintiff in error, accompanied by an indorsement of opposing counsel, "Service of this præcipe is accepted and we agree that the above record will be sufficient," nor until more than 2 months after the filing in this court of the printed transcript. The proceeding in this case was joint throughout, both as respects affidavit for arrest, order to show cause, trial, verdict, and judgment entry; the judgment as to each respondent being merely separately paragraphed. Moreover, it has been the practice of this court to review judgments, not only in criminal cases proper, but in proceedings for criminal contempt, by joint writ of error, as in Foster v. United States, 178 Fed. 165, 101 C. C. A. 485; Sona v. Aluminum Castings Co., 214 Fed. 936, 131 C. C. A. 232; Kalamazoo Co. v. Proudfit Co., 230 Fed. 120, 144 C. C. A. 418. The motion to dismiss is overruled.

[2] 2. We see no merit in the contention that the injunctional decree in the equity suit afforded no basis for contempt proceedings for its violation against parties amenable to it, upon the ground that the decree finally adjudicated the rights of the parties to it, or because of mere lapse of time since its rendition. The purpose of the decree was to restrain—it looked to the future. Instances of contempt proceedings for violations of final decrees are numerous; it is enough to refer to Waterman v. Standard Drug Co., 202 Fed. 167, 120 C. C. A. 455, and Kalamazoo Co. v. Proudfit Co., 230 Fed. 120, 144 C. C. A.

418 (both decisions of this court) and Clay v. Waters (C. C. A. 8) 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897. Analogy is found in Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853, where the right to maintain proceedings for violation of preliminary injunction was expressly declared, notwithstanding the reversal of the final decree with direction to dismiss the bill. Nor is the instant case analogous to Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 451, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, where it was held that the settlement of the main case settled contempt proceedings between the parties. Indeed, it was there said that such settlement could not affect prosecution for criminal contempt; and the proceedings in the instant case were criminal in character, so far as they sought and so far as they imposed punishment for the public wrong involved in a contemptuous disregard of the authority of the court, as distinguished from private relief to the party. Bessette v. Conkey, 194 U. S. 324, 329, 24 Sup. Ct. 665, 48 L. Ed. 997; Kalamazoo Co. v. Proudfit Co., supra.

[3] 3. Were plaintiffs in error amenable to the injunction in the equity suit? The acts now complained of were committed in the course of another alleged effort to unionize the mines. One of the plaintiffs in error was an organizer for the union; both had been discharged by the company, one about May 1, 1917; the other had been discharged 2 or 3 months earlier for joining the union. The company was within its rights in refusing to employ union men and in discharging those who joined the union, and was entitled to protection against unlawful invasions of such rights. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, Ann. Cas. 1918B, 461. Plaintiffs in error had a right, by peaceful methods, to persuade others not to work in a nonunion mine, but had no right to attempt such result by violence or intimidation. Hitchman Coal & Coke Co. v. Mitchell, supra; Sona v. Aluminum Castings Co., supra. (The right of an employer to enjoin attempts by peaceful methods to induce its employés to violate their contracts not to remain in his employ after joining the union is not involved here.) If plaintiffs in error were amenable to the injunction, the evidence would sustain their conviction.

The inclusion of the words "and all other persons whatsoever, who may have acquired notice, information, or knowledge of this judgment," would not alone operate to make them parties to the litigation and the resulting decree. It is not even claimed that up to the time of the decree they were in privity with the defendants. Nevertheless, had the strike which was the occasion of the decree been still in progress, plaintiffs in error, by committing the acts of which they were found guilty, after actual knowledge of the injunction, would have rendered themselves amenable to it and liable for its violation (In re Lennon, 166 U. S. 548, 554, 17 Sup. Ct. 658, 41 L. Ed. 1110; Sona v. Aluminum Castings Co., supra); for we see no reason why the rule laid down in the Lennon Case (hereafter referred to) would not apply to a final decree as well as to a preliminary injunction or restraining order. But unless the subject-matter of the suit in which the injunction was issued

still existed, that is to say, unless the condition out of which the alleged contempt grew was in substance the strike condition of nearly 10 years earlier, a mere continuation of it, or unless plaintiffs in error, in the commission of the acts charged against them in 1917, can be said to have been the associates of or to have represented the defendants in the injunctional decree, we think they cannot be held amenable to the old injunction. We are not cited to, nor have we found, authority supporting a contrary view. The Lennon Case does not, to our minds, lend such support. In that case the strike against the Ann Arbor Railroad was still on, accompanied by refusal on the part of the other railroads defendant to haul Ann Arbor freight, and respondent was himself an employé of the Lake Shore road and within the express terms of the injunctional order. The court there said:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High on Injunctions, § 1444; Meud v. Norris, 21 Wis. 310; Wellesley v. Mornington, 11 Beav. 181."

In Ex parte Lennon, 64 Fed. 320, 323, 12 C. C. A. 134, the decision of this court, affirmed by In re Lennon, supra, there were cited in support of a similarly stated proposition Wellesley v. Mornington, supra, Rorke v. Russell, 2 Lans. (N. Y.) 242, and High on Injunctions, § 1435. Presumably the language used by each court had relation to the facts of the case. None of the references cited by either court are important, except to the proposition that one having knowledge of an injunction may be guilty of contempt in disobeying it, notwithstanding there was no service or a defective service.

In Employers' Teaming Co. v. Teamsters' Joint Council (C. C.) 141 Fed. 679, cited by defendant in error, where a similar proposition to that announced in the Lennon Case was asserted, the strike was still in progress. While a strike is actually on, it frequently is necessary to the protection of property and business affected to reach persons not parties to the suit, all of whom could in no other way be brought in, by reason frequently of their large numbers and because of conditions of emergency. But such considerations are normally inapplicable to a new condition arising 10 years later.

4. Does it appear that the condition existing in 1917, when the alleged violation of the injunction was committed, was in substance the strike of 1907, or that plaintiffs in error were so far associated with, or so far represented, the defendants in the injunctional decree, as to make them amenable to it by reason of their acts in 1917? We find nothing in either allegations or proofs indicating that the strike of 1907, or the interference with the business of complainant which formed the basis of the injunction, had continued subsequent to the decree made in that year, or that the conditions existing in 1917 were anything more than a new and independent effort to unionize the mines. The most which can be said is that there was danger of a strike or of serious troubles if agitation was permitted, or interference with the company's employes tolerated, and that the issue of union or nonunion mine was the same in 1917 as it had been in 1907.

The defendants in the equity suit were made such in their individual capacities only. The only allegations in the affidavit initiating the contempt proceedings by which it was attempted to connect plaintiffs in error, and their actions, with the original suit and the defendants therein, are that defendants in that suit were at the time members of the United Mine Workers of America, and were acting on behalf of that "organization and their associates therein in all matters charged against them" in the bill of complaint; that that organization "has from time to time added to its membership, and for some time past" plaintiffs in error and others "have been members of said organization, and associated with the individual defendants named in said original bill of complaint and in the decree heretofore rendered in this cause," and that plaintiffs in error and others "have co-operated and confederated with said individual defendants, or acted in the room and stead of said individual defendants, in carrying out the purposes of said organization and said individual defendants, and in attempting, as set forth in the original bill of complaint, to shut down the mines and plant of the plaintiff, and to destroy its property and its earning capacity, unless this plaintiff would accede to the demands of said organization, and of said individuals composing it, and discharge from its employment all of its said employés who were not members of said organization, and refuse to employ in its said mines and plant any person except members of said organization"; that "for several months last past said United Mine Workers of America, the organization aforesaid, have become very active in their endeavors to induce the workmen employed by plaintiff in its mines aforesaid to strike, unless plaintiff would agree with said organization to employ only its members in and about its said mines and plant," and through plaintiffs in error, and others named, "from time to time, have threatened the said workmen that unless they left plaintiff's employment, when said union should, as said union would, call a strike of plaintiff's workmen," plaintiff's employés would be killed, and that other threats of similar character have been made by plaintiffs in error and others named from time to time, and prior to the notice of decree before referred to; that the threats made by the members of the union had caused excitement and alarm in the neighborhood of plaintiff's mines, prompting plaintiff to serve printed and certified copies of the decree in the equity suit upon a large number of prominent members (including plaintiffs in error) of the union residing in the Western district of Kentucky, who were alleged to have made threats against and to have intimidated plaintiff's workmen. Plaintiffs in error admitted their membership in the union, asserting, however, their innocence of the misconduct charged against them, including a denial of co-operation or confederation with the defendants in the equity suit, or an acting in their stead in carrying out the alleged purposes of the organization, and of such defendants, in attempting to shut down plaintiff's plant and mines, or to destroy its property and earning capacity, unless the company would agree to employ only union men. The union was not proceeded against, perhaps because not incorporated.

It is not charged that plaintiffs in error were employés of the Coal Company at the time of the strike involved in the injunction suit, or that they were in any way connected with the strike, or with the committing of any of the acts which were the occasion of the suit in which the decree was entered. The implications are all to the contrary. It is not charged, nor does it appear, that either plaintiff in error was then a member of the union. There was no evidence on the trial that the defendants in the injunction suit had anything to do with the conditions in 1917 (the offer of plaintiffs in error of testimony tending to negative such connection was rejected), or that plaintiffs in error had at any time any actual relations with the real defendants in the injunction suit; nor do we construe the affidavit initiating the contempt proceedings as in substance charging, in this respect, more than that the union was behind the actual strike of 1907, as well as the threatened strike in 1917, and that the defendants in the injunction suit, as well as the plaintiffs in error here, were members of the union and acting in its behalf, the former in the proceedings in 1907 which were the subject of the decree, the latter in the activities of 1917. Indeed, the contention of defendant in error, as stated in the brief of its counsel, is that plaintiffs in error were covered by the decree, "not only because they were members of the union referred to in the bill and decree [in fact the decree makes no mention of the union, directly or indirectly and assisting in doing the things forbidden by the decree. but because they were doing the things which the decree forbade 'all persons whatsoever' to do."

In our opinion, the renewed efforts of the United Mine Workers to unionize the mines, and the connection of plaintiffs in error with such efforts, were not enough to so tie the conditions of 1917 to those existing in 1907 as either to make the former but an extension of the strike of 1907, or as to make plaintiffs in error, with respect to their acts in 1917, the associates or representatives of the defendants in the decree of 1907. We have no occasion to consider what the situation would have been, had the United Mine Workers been a party to the injunction suit, or had the defendants therein been made such in an official capacity, as representing the union, as was the course taken in Hitchman Coal & Coke Co. v. Mitchell, supra. The conditions in 1917 may or may not have been enough to justify an injunction. If they were, it is to be presumed one could have been had. There has been no adjudication to that effect, on supplemental proceedings or otherwise.

The conviction of plaintiffs in error by the jury was made to depend solely upon their making the threats or committing the acts of violence charged against them, with knowledge that the employé so threatened or subjected to violence was in the company's service or employment, and with intent to prevent such employé from continuing therein or from performing his services in such employment, as the case may be. If the injunction of 1907 is of its own force applicable to new conditions in 1917, no reason appears why it would not be applicable to conditions 20 years, or even 30 years, after the decree is entered, provided the union which was back of the attempted union-

izing of the mines in 1907, out of which the injunction grew, was also back of the new and independent attempt to unionize the mines 20 or 30 years later. Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction, especially where the remedy is sought to be exercised, not through the public officers, but by the employer alone, and primarily on behalf of its private interests, is fraught with great possibilities for oppression.

Under the circumstances shown here, to hold plaintiffs in error amenable to contempt for violating the injunction made nearly 10 years before would extend the rule of the Lennon Case, as well as of the adjudications generally, far beyond any decision which has come to our attention. To our minds such extension is unwarranted upon

principle, as well as unsupported by authority.

The judgment of the District Court must be reversed, and the record remanded to that court, with directions to dismiss the contempt proceedings.

UNITED STATES v. SEUFERT BROS. Co. et al.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

No. 3078.

Indians = 27(5)—United States as Trustee and Guardian-Statute.

In view of Act Cong. Feb. 8, 1887, as amended by Act Feb. 28, 1891, securing personal rights of citizenship and protection of laws to members of tribes of Indians to whom allotments are made under Act Feb. 8, 1887, § 6, as amended by Act May 8, 1906, United States, as trustee and guardian of Indian allottee and trust patentee of certain Indian reservation lands, cannot maintain action for damages caused to fish wheel owned and operated by Indian on Columbia river; wheel having been constructed, maintained, and repaired by Indian with funds derived from sale of 40 acres of his allotment of lands,

In Error to the District Court of the United States for the District

of Oregon; Charles E. Wolverton, Judge.

Action at law by the United States, as trustee and guardian of Sam Williams, against the Seufert Bros. Company and F. A. Seufert. A demurrer to the complaint was sustained, and plaintiff brings error. Affirmed.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or., for plaintiff in error.

A. S. Bennett, of The Dalles, Or., for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This action is brought by the United States against the defendant in error on behalf of Sam Williams, an Indian, to recover damages to a scow fish wheel owned and operated by Williams, and for damages for loss of certain fishing seasons.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It is alleged that Sam Williams is a full-blooded Indian, born off of the territorial limits of the Yakima Indian reservation, but in the state of Washington; that his mother was a member of the Cowlitz tribe of Indians, and his father a member of the Yakima tribe; that he has lived for 21 years last past off of the reservation and on the south bank of the Columbia river, in the state of Oregon, and has there taken up a homestead under the laws of the United States, and lives there with his family, and has adopted the habits of civilized life. It is alleged that said Williams is allotted, as an allottee, No. 1525 upon the said Yakima Indian reservation, certain lands within the boundary of said reservation to which a trust patent was issued in favor of said Williams for 80 acres of land on said Yakima Indian reservation, a portion of which allotment has always been and is now held in trust for said Williams by the United States under the act of Congress approved February 8, 1887 (24 Stat. 388, c. 119), as amended by act of Congress approved February 28, 1891 (26 Stat. 794, c. 383): that said Williams is in the charge and under the control of the superintendent of the Yakima Indian reservation, who has held and now holds certain moneys and trust funds as the property and for the use of said Williams; that said Williams is by reason of the facts stated, a Yakima Indian allottee and ward of the United States: that on the 24th of January, 1910, upon petition from Williams and payment in full of the purchase price by the purchaser, the United States sold and gave title in fee by patent from the United States to one McMeachan to 40 acres of Williams' allotment on the Yakima reservation; that by this sale there was derived certain money which was placed to the credit of Williams' allotment; that a substantial portion of the fund derived from said sale was used by said Williams in the building, construction, maintenance, and repair of a scow fish wheel to be used in operating on the Columbia river. It is this scow fish wheel which was damaged, and the United States, in its alleged capacity as trustee and guardian of said Williams, brought this action to recover of the defendant compensation for such damages.

The act of February 8, 1887 (24 Stat. 388-390), secured the personal rights of citizenship and the protection of the laws to members of bands or tribes of Indians to whom allotments were made under the act. Section 6 provides as follows:

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing

or otherwise affecting the right of any such Indian to tribal or other property." Comp. St. 1916, § 3951.

The act of May 8, 1906, amending the act of February 8, 1887 (34 Stat. 182, c. 2348), defers the time when an allottee shall have the benefit of and be subject to the laws of the state or territory in which they may reside until the expiration of the trust period of 25 years and when the lands have been conveyed to the Indian by patent in fee. It is further provided:

"That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

By the act of March 1, 1907, making appropriations for the current and contingent expenses of the Indian Department, etc. (34 Stat. 1015–1018, c. 2285), it is provided:

"That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee-simple patent had been issued to the allottee." Comp. St. 1916, § 4225.

It is contended that under these statutes Williams is a ward of the United States and that the United States in the execution of that trust was authorized to protect the personal property of the allottee, when it appears that said property was acquired with funds derived from the sale of allotted lands. When the time came for the distribution of the lands of the Indian reservations to the adult Indians residing on the reservations or belonging to the bands or tribes attached to the reservations, the United States assumed the trust of holding the lands for the Indians for a period of 25 years while the Indians were forming the habit of independence and attaining the responsibility of individual ownership and management. This guardianship was also extended to protect the Indians from the vices attending traffic in liquors, and the use by Congress of their moneys in their education and civilization (U. S. v. Nice, 241 U. S. 591-595, 36 Sup. Ct. 696, 60 L. Ed. 1192); but nowhere that we can find has the United States assumed to continue the trust after the issuance of the fee-simple title or to follow the proceeds of the sale of lands when the sale has been made by competent Indians. Where a sale has been made by a noncompetent Indian the guardianship of the proceeds of the sale was extended by the act of March 1, 1907, to that relation in a manner corresponding in some degree to a guardianship of funds belonging to a noncompetent person under the laws of the state or territory.

In the present case, the patent has been issued and the proceeds converted into a scow fish wheel, and with respect to the management of this property it is not alleged that Williams is a noncompetent Indian. On the contrary, the presumption, as well as the inference, to be drawn from the facts stated in the complaint, is that he is individually competent to manage his own business affairs, and discharge the duties of a citizen of the United States. With this presumption and inference in his favor, and the statute not providing for the extension of the guardianship of the United States over the property or proceeds of the sale of allotted lands of competent Indians, there is but one conclusion to be drawn from the facts stated in the complaint, and that is the statute has not provided either generally or specifically that the United States shall act as a guardian for Williams in the ownership and operation of his scow fish wheel, but as to all such matters he has the full authority and responsibility of any other citizen of the United States. This we think is the meaning of section 6 of the act of February 8, 1887, as amended by the act of May 8, 1906, providing that:

"Every Indian who has voluntarily taken up \* \* his residence, separate and apart from any tribe of Indians, \* \* \* and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens."

In United States v. Waller, 243 U. S. 452–459, 37 Sup. Ct. 430, 432 (61 L. Ed. 843), the Supreme Court states the relation of the United States to the Indian in the following language:

"The tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. United States v. Nice, 241 U. S. 591, 598 [36 Sup. Ct. 696, 60 L. Ed. 1192], and cases cited."

In that case the question was whether lands in an Indian reservation allotted and patented in trust to adults of the mixed Indian blood belonged to them with all the rights and incidents of full ownership, including the right of alienation and whether when they had conveyed such lands in ignorance of the fact that they were making a conveyance, the United States could maintain for their benefit a suit to annul the deeds upon the ground that they were procured through fraud. The claim of right to maintain such a suit was plainly based upon the supposed guardianship of the United States over the Indian in the transaction. The right to maintain the suit was denied, the court holding that the United States was without capacity to bring the action for the Indians. We are of the opinion that upon the law thus stated, the complaint does not state facts sufficient to constitute a cause of action.

The judgment of the District Court must therefore be affirmed; and it is so ordered.

## PAPPENS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918. Rehearing Denied October 14, 1918.)

#### No. 3130.

1. WAR \$\infty 4\to Keeping or Setting up Bawdyhouse in Military Zone-Violation of Order of Secretary of War-Statute.

An indictment charging keeping or setting up a house of ill fame within five miles of any military camp, etc., though without averment of the receiving of any persons into the house for the purpose of prostitution, charges a misdemeanor, for though the offense charged is violation of an order or regulation issued by the Secretary of War, the order was made pursuant to Act May 18, 1917, c. 15, § 13, making violation of any such order a misdemeanor.

2. WAR & 4-Suppressing Bawdyhouses Within Military Zone-Police Power of State.

Under Const. art. 1, § 8, rule of Secretary of War providing that keeping or setting up of houses of ill fame, etc., within five miles of any military camp, etc., is prohibited authorized by Act May 18, 1917, c. 15, § 13, authorizing and directing Secretary of War to do everything deemed necessary to suppress and prevent keeping or setting up of houses of ill fame within needful distances of any military camp, etc., was not invasion of police power reserved to state, therefore in excess of power of Congress.

3. WAR \$\iftharpoonup 4-\text{National Powers to Wage War-Control of Congress.}

The execution of the powers to raise and support armies and to make rules for their government, assigned to the national government by the federal Constitution, comes within the obligations or duties of Congress; its control over the subject being plenary.

4. WAR €=4-Power of Congress.

In making provision for waging war, Congress, in protection of the common good, may enact such legislation as its wisdom deems essential, excepting interference with the power vested in the President with respect to the command of the forces and conduct of campaigns.

5. CRIMINAL LAW \$\infty 829(4)\$—Entrapment—Instruction.

In prosecution for violating rule of Secretary of War prohibiting keeping or setting up of house of ill fame within five miles of military fort, etc., instruction that courts will not sanction conviction of person based upon circumstances showing he was induced by officers to commit the offense, that he might be brought to punishment, sufficiently covered point in defendants' request, though coupled with explanation that, if officers received information crime was being committed secretly, it was their right to ascertain truth.

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Ernest Pappens and Marie T. Pappens were convicted of keeping a house of ill fame within five miles of a military fort, and they bring error. Affirmed.

Samuel M. Shortridge, of San Francisco, Cal., for plaintiffs in error. John W. Preston, U. S. Atty., of San Francisco, Cal., and James E. Colston, Sp. Asst. U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendants, plaintiffs in error, were convicted under two counts of an indictment charging them with will-fully and knowingly keeping a house of ill fame, in which prostitution was carried on in the city of San Francisco, at a place known as the Palm Hotel; the said house being within five miles of a military fort, to wit, Ft. Mason and the Presidio of San Francisco, the said fort and Presidio being used for military purposes of the United States. The act of Congress under which the indictment is drawn is entitled:

"An act to authorize the President to increase temporarily the military establishment of the United States." Act May 18, 1917, c. 15, 40 Stat. p. 76.

Section 13 provides as follows:

"Sec. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prositution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building, as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both."

After the passage of the act the Secretary of War made a rule which provided that the keeping or setting up of houses of ill fame, brothels, or bawdyhouses within five miles of any military camp, fort, training or mobilization place being used for military purposes by the United

States is prohibited.

[1] It is said that, inasmuch as there is no averment of the receiving of any persons into a house used for the purpose of prostitution, the offense charged here is but the violation of a rule made by the Secretary of War. This is true in so far as it is said that the offense charged is a violation of an order or regulation issued by the Secretary of War; but it is also true that the rule violated was made pursuant to the statute which empowers and authorizes the Secretary, during the war, to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, within such distance as he may deem necessary, of any military camp, and which makes violation of any such order a misdemeanor.

In United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, the Supreme Court, reaffirming the principle that Congress cannot delegate legislative power to an executive officer, held that the authority to make administrative rules is not a delegation of legislative power, and that such rules were not raised from an administrative to a legislative character because the violation thereof is punished as a public offense. In that case the defendant was indicted for violation of a rule making it unlawful to graze sheep on a forest reserve. Justice Lamar, for the court, said:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson v. United States, 207 U. S. 462 [28 Sup.

Ct. 163, 52 L. Ed. 278]. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forest from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty. \* \* The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof.'" Estes v. United States, 227 Fed. 818, 142 C. C. A. 342.

The doctrine of that decision is controlling, because in the statute now under examination Congress has declared that the Secretary shall do all in his power to suppress the keeping of houses of prostitution within reasonable distances of a military post and has given him power

to carry out the objects of the statute.

[2] Defendants argue that the rule in question, even if authorized by Congress, was an invasion of the police power reserved to the state of California, and therefore in excess of the power of Congress. We cannot sustain the contention. Congress, having acted under its constitutional power in declaring that the state of war between Germany and the United States exists, found it necessary and proper that there should be the exercise of the additional constitutional powers "to raise and to support armies," and also "to make rules for the government and regulation of the land and naval forces."

- [3] The execution of these powers assigned to the national government came within the obligation or duties of Congress, and its control over the subject is plenary. Tarble's Case, 80 U. S. (13 Wall.) 397. 20 L. Ed. 597. Power to raise an army to carry on the war was recognized by the pledge of Congress (by joint resolution approved April 6, 1917 [40 Stat. 1]) of all the resources of the country "to bring the conflict to a successful termination," and has been executed by the several acts of legislation providing for the organization and support of the Army and Navy and to promote the efficiency thereof. It is obvious that, to avoid calamity to the nation, the powers referred to in their greatest strength must be upheld as indispensably incidental to the power to declare war. It has been written by Story, in reference to the unlimited power of Congress to raise and support armies. that to be of value the power must be unlimited. "It is impossible," he wrote, "to foresee or define the extent and variety of national exigencies and the correspondent extent and variety of the national means necessary to satisfy them. The power must be coextensive with all possible combinations of circumstances, and under the direction of the councils intrusted with the common defense. To deny this would be to deny the means, and yet require the end. These must therefore be unlimited in every matter essential to its efficacy; that is, in the formation, direction, and support of the national forces." 2 Story on the Constitution, § 1183.
- [4] The power to make rules and regulations for the government of the land and naval forces naturally accompanies the power to raise

and maintain such forces, and extends to the necessities and emergencies which may arise and call for the exercise of the power. The Constitution did not define the boundaries of the powers under consideration, but in making provision for carrying on the war Congress, in protection of the common good, may enact such legislation as in its wisdom it deems essential to the prosecution of the war with vigor and success, excepting interference with the power vested in the President with respect to the command of the forces and the conduct of campaigns.

The protection, it may be the existence, of the nation depends upon the efficiency of the Army and Navy and the service of those in it. And we have no real doubt that, if Congress deems it necessary to help keep the Army in its greatest efficiency to suppress and prevent the keeping of houses of ill fame during the war within certain distances of military posts, it may, in the exercise of part of its war power, make laws which will carry its will into execution. Article 1, § 8, of the Constitution; United States v. Casey (D. C.) 247 Fed. 362.

Possible infringement upon the police power of the state is not an impediment, for the statute is an exercise of war power, and the authority conferred upon the Secretary of War by section 13, supra, is

expressly limited to the duration of the present war.

[5] Defendants argue that their rights were prejudiced, because the court refused to charge the jury that, if it were found that the officers of the government, or persons employed by the government officers, advised or instigated or induced or procured defendants to violate the law, defendants should be acquitted. But the court sufficiently covered the point by charging the jury that officers of the government have no right primarily to proceed to induce a person who would not otherwise commit the offense charged simply for the purpose of arresting them and bringing them to punishment; that the courts do not recognize such a right in officers and will not sanction the conviction of a person based upon circumstances which disclose any such methods of proce-In further explanation the court said, however, that if the officers of the law received information leading them to believe that crime was being committed in a more or less secret way, it was their right to take such steps as the testimony showed had been taken to ascertain whether in fact the offense charged was being committed, and said that, if the testimony of the prosecution was believed, nothing reprehensible was done "so far as tending to disclose a case of inducing or entrapping" the defendants into committing acts with which they were charged. The jury were also told that they should review the evidence in the case, and say whether or not it showed the guilt of the defendants, or failed to do so, within the principle stated. We have carefully read all the testimony, and are of the opinion that the instruction was correct and applicable to the case, which was brought fairly within the rule of Freeman v. United States, 243 Fed. 353, 156 C. C. A. 133.

Other points made have had our careful consideration, but furnish no ground for reversal.

The judgment is affirmed.

# THE EL MONTE. THE CLEMATIS.

(Circuit Court of Appeals, Fifth Circuit. June 18, 1918.)

No. 3097.

A vessel moving past and near the docks of a harbor, and striking a vessel approaching a pier to berth and whose fog signals had been heard, held in fault, proximately causing the collision, by failure to observe the requirements of article 16 of Regulations for Preventing Collisions in Harbors and Inland Waters (Comp. St. 1916, § 7889), in not maintaining a moderate speed, and in not stopping her engines sooner and navigating with caution until the danger of collision was over.

2. Collision \$\infty\$=100(2)—Fog-Stopping in Channel.

Collision *held* not primarily due to the fault of the vessel struck in stopping and lying in a fog substantially motionless across the channel, directly in the path of the colliding vessel, with notice of its approach.

3. Collision \$\infty\$=100(2)—Fog-Signals.

Vessel, struck by another while approaching a pier to take a berth, held not at fault in failing to give fog signals as required by article 15 of the Inland Rules (Comp. St. 1916, § 7888).

4. Collision \$\infty\$100(2)\to\$-Lookout.

A vessel, approaching in a fog a pier to berth, when struck by a vessel passing the docks on the water front, *held* not in fault proximately contributing to the collision by failure to maintain a proper lookout.

5. Collision 5-96-Proximate Cause-Last Clear Chance.

If signals from the Clematis gave notice to the El Monte of the presence of a vessel ahead when the El Monte was hidden from view by a fog, and the El Monte thereafter negligently failed to take suitable precautions to avoid a collision, and the Clematis was not negligent after the imminence of a collision was disclosed to it, the El Monte was solely responsible, because having the last clear chance to avoid the collision.

6. Collision \$\sim 136\text{-Damages}\to Detention.\$

Where the vessel damaged by collision was detained in her clearance port undergoing repairs from the date of the collision February 10, 1916, to March 22, 1916, an allowance of 40 days' detention, excluding the sailing date, at the charter rate for demurrage, was proper, where it appeared that the owner could have realized more for the vessel during that time

7. Collision \$\infty\$ 128—Damages—Loss of Profits.

The loss of profits or of the use of a vessel pending repairs or other detention arising from a collision is a proper element of damage.

8. Collision = 130—Damages—Interest.

As the party responsible for damages resulting from a collision became liable when it occurred, interest on the amount of such damages, if not then paid, was allowable from that date.

9. Collision \$\infty\$137—Damages to Cargo—Amount.

Where a cargo of wheat was partly damaged by a collision in Galveston, the loading port, necessitating its unloading, drying, reconditioning, and reloading, an award of damages to its owner in the difference between its market value at Rotterdam, its destination, in sound condition, and its value there in its damaged condition, was not improper, where its sale in Galveston would have been made at a sacrifice and its delivery at destination minimized the loss, and such difference was less than the difference between its value at Galveston before the collision and its value there after it was reconditioned.

Appeal from the District Court of the United States for the South-

ern District of Texas; Waller T. Burns, Judge.

Libel by the Stag Line, Limited, claimant of the steamship Clematis, and the Commission for Relief in Belgium, against the Southern Pacific Company, claimant of the steamship El Monte and cargo, and the National Surety Company. Decree for libelants, and respondents appeal. Affirmed.

J. Parker Kirlin, Charles R. Hickox, Robert S. Erskine, and Wm. H. McGrann, all of New York City, and W. T. Armstrong, of Galveston, Tex., for appellants.

Mart H. Royston and Wm. B. Lockhart, both of Galveston, Tex.,

for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree which adjudged the steamship El Monte liable for damages resulting to the steamship Clematis and its cargo from a collision between the two vessels which occurred near one of the docks in the port of Galveston. Each of the vessels, which had been on opposite sides of the same pier, the Clematis on the east side and the El Monte on the west side of it, started on a voyage during the afternoon of February 10, 1916; the Clematis getting under way in the channel about half an hour before the El Monte, both going east. The weather was fairly clear when the Clematis started, but a heavy fog came up ahead while it was still in the harbor of Galveston and was passing the docks on the city's water front, and the pilot and the captain of the vessel concluded to berth it until the fog lifted. The pilot on the Clematis, who had passed along the water front a short while before, knew that there was a vacant berth at Pier 21, and it was determined to put the vessel in there. When it was approaching that pier, to be berthed there, and was near enough to it for attempts to be made to get a line to shore, which was on the vessel's starboard side, the El Monte collided with it on its starboard quarter.

In behalf of the El Monte it is claimed, first, that that vessel is not liable for any of the damage sustained by the Clematis and its cargo; and, second, that, if the El Monte was so at fault as to make it liable, faults chargeable against the Clematis were such as called for

a division of the loss occasioned by the collision.

A large volume of evidence was adduced, some of it being depositions of witnesses examined out of court, but a considerable part of it on both sides being the testimony of witnesses examined in the presence of the trial judge. The court did not set out its findings of facts. The evidence adduced by the opposing parties was very conflicting. It would be exceedingly difficult, if not impossible, for an appellate court to reach satisfactory conclusions from an examination of the record as to many material matters, if there existed no basis for presuming in favor of the correctness of findings which the decree rendered, in the light of the evidence, indicates were made by the trial court. But we are not to be unmindful of the fact that, so far as conflicting versions

of occurrences were given by witnesses examined in the presence of the trial judge, there may have been evidences disclosed to him, but not found in the written report of the testimony made a part of the record on appeal, of the verity of one version and of infirmities in the opposing one, justifying the conclusion that a preponderance of the evidence sustained such findings as would support the decree appealed from.

[1] The record is not such as to justify us in concluding that the El Monte is not liable for any of the damage caused by the collision. The distance by way of the channel traversed from the starting place of the two vessels to where the collision occurred is about a mile and a half. Long before the El Monte was in dangerous proximity to the Clematis, it was obvious to those in charge of the former that there was a dense fog ahead, preventing objects within it being seen until they were too near to be avoided by a vessel moving at such speed that it could not be maneuvered with great promptness. The space covered by the fog was one within which other vessels were likely to be. There was much testimony tending to prove that while the El Monte was gaining on the Clematis repeated fog signals, and also danger signals occasioned by the presence of small vessels near the Clematis, were given by the latter, which must have apprised those in charge of the former, if they were duly watchful, of the presence of a vessel in the fog ahead. Though the testimony in behalf of the El Monte was to the effect that such signals were not heard by any one on that vessel, the record does not enable us to say that the trial court was not justified in finding that the signals were given by the Clematis, as testified to, and must have been heard by those in charge of the navigation of the El Monte. While the witnesses for the El Monte denied that the fog signals testified to were heard, its pilot, who was a witness in its behalf, admitted that, as that vessel backed out of the berth from which it started, he "heard a whistle down the channel, blew maybe two or three whistles," and that afterward he heard "a ship blow two long and one short," the signal for a tug, but that "he did not know where the vessel was that blew the whistle—whether it was at the wharf or at sea."

Other testimony made it plain that the signal for a tug which the El Monte's pilot admitted he heard was given by the Clematis, and that it was heard and the direction of it, apparently without difficulty, located by the captain of the tug Kelly, which at once proceeded towards the Clematis, according to the testimony of the Kelly's captain, who was a witness for the El Monte, having the El Monte right behind it as it went down the channel, and getting within seeing and speaking distance of the Clematis just before the collision occurred. The Kelly had assisted the Clematis to get away from the dock from which it started, and, according to the testimony of its captain, then went east, stopping at Pier 39 for fuel oil, and, just as it was leaving that place, it heard, and immediately started in response to, the signal of the Clematis for a tug. The evidence was such as to support a finding that a proximate cause of the collision was the nonobservance by the El Monte of the requirements of the following explicit statutory regulation, prescribed to prevent collisions:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until the danger of collision is over." Article 16 of Regulations for Preventing Collisions in Harbors and in Inland Waters. 3 U. S. Comp. Stat. 1913, § 7889 (Comp. St. 1916, § 7889).

When the Clematis first could be seen through the fog by those directing the navigation of the El Monte, the latter was moving with such speed that it could not be kept from running into a vessel directly ahead, which was stationary or slowly moving in the same general direction in which the El Monte was going. Just prior to and at the time of the collision, the El Monte was moving past and not far from the docks along the water front of a busy port, where other vessels were likely to be met or overtaken; a dense fog rendering objects ahead not visible until they were so near that a vessel moving as the El Monte was could not avoid colliding with another vessel in its path, which was not moving towards it or across its course, and not long before having been apprised that another vessel was near enough for a signal from it to be heard, whether the location of such other vessel was or was not disclosed. Considering where the El Monte was and the attending circumstances and conditions, we think the conclusion was warranted that it was not maintaining the moderate speed required by the first paragraph of the above-quoted regulation. The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Umbria, 166 U. S. 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Sagamore, 247 Fed. 743, --- C. C. A. --: Ouinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303. A phase of the evidence was such as to support a finding that the El Monte heard, apparently forward of her beam, the fog signal of a vessel the position of which was not ascertained, with the result of imposing upon it the duty of complying with the requirement of the second paragraph of the quoted regulation. The trial court may have been fully justified in regarding that phase of the evidence as the one worthiest of belief, and in concluding that the El Monte, before the Clematis was visible through the fog, should have stopped her engines sooner than she did, and then navigated with caution until the danger of collision was over, and that its failure to do so was a proximate cause of the collision. Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726.

[2-5] Mention will be made of the faults attributed to the Clematis:
(1) In behalf of the El Monte it is urged that the collision was primarily due to the fault of the Clematis in stopping and lying in a fog substantially motionless across the channel, directly in the path of the El Monte, and about at right angles to the course of the latter, with notice that it was approaching from the west. The evidence well supported a finding against this contention. There was testimony to the effect that several minutes before the collision occurred the course of the Clematis in the channel was changed by sheering or canting it, so as to head it in the direction of the wharf at which it had been determined that it would seek a berth; that, though the Clematis signaled for a

tug and desired the assistance of one in getting docked, it did not stop and wait for such assistance, but, just before the collision, was moving very slowly towards Pier 21, and at the time of the collision was in such a position with reference to it that it was at an angle of about 45 degrees to the course of the El Monte, and was near enough to that pier for attempts to be made, with some chance of success, to get a line ashore. This testimony as to the position of the Clematis, just before and at the time of the collision, with reference to the wharf and the course of the El Monte, was convincingly corroborated, and the opposing testimony discredited, by the evidence afforded by the appearance after the collision of the part of the Clematis which was struck by the El Monte. By measurements and pictures the nature of the wound in the Clematis was graphically disclosed to the court. The angle of collision as thus disclosed persuasively indicated that the Clematis was not directly athwart the channel and obstructing the navigation of an overtaking vessel which was going at such speed as to be able to keep out of the way of a vessel ahead when it could be seen, there being ample unobstructed room in the fairway for any movements required to accomplish this result.

(2) Another contention is that there was a failure on the part of those in charge of the Clematis to give fog signals as required by article 15 of the Inland Rules. 3 U. S. Comp. St. 1913, § 7888 (Comp. St. 1916, § 7888). This contention is based on testimony which, as above stated, is in sharp conflict with other testimony to the effect that fog signals were given by the Clematis as required by the rule, and that other signals also were given when the El Monte was near enough to be apprised thereby of the presence of the Clematis ahead, and yet was far enough away to avoid a collision if the signals had been heeded and properly acted on. It is not made to appear by the record that a finding based on the last-mentioned phase of the evidence was

clearly wrong.

(3) It is contended that the failure of the Clematis to maintain a proper lookout was a fault proximately contributing to the collision. Circumstances of the collision which are uncontroverted make it plain that the occurrence was not attributable to any omission to maintain a proper lookout ahead. The record is such that it cannot properly be said that the court was clearly wrong if it concluded either that the Clematis maintained a proper lookout astern or that any dereliction there may have been in the performance of that duty was not a proximate cause of the collision. The evidence indicated that the person on the Clematis who was charged with the duty of keeping a lookout astern saw the El Monte as soon as it was visible, and as soon as, if not sooner than, any one on the El Monte saw the Clematis, and that this was too late for the collision to be avoided by anything either vessel then could do. If signals from the Clematis gave notice to the El Monte of the presence of a vessel ahead when the latter was hidden from view by the fog, and thereafter the El Monte negligently failed to take suitable precautions to avoid a collision, and the Clematis was not negligent after the imminence of a collision was disclosed to it, the El Monte is to be considered as solely responsible, because it had

the last clear chance to prevent the collision, any antecedent negligence of the Clematis in the matter of a lookout astern being remote, and such as could have made no difference in the result. The Nacoochee, supra; The Bailey Gatzert, 179 Fed. 45, 102 C. C. A. 612; Philadelphia & R. R. Co. v. Klutt, 148 Fed. 818, 78 C. C. A. 508; The Portia, 64 Fed. 811, 12 C. C. A. 427.

We conclude that the assignments of error based on the failure of the court to hold the Clematis liable for part of the loss are not sustainable.

[6-8] The decree awarded to the owner of the Clematis, the Stag Line, Limited, the amount of damages which the court ascertained were caused by the collision, with interest thereon at 6 per centum per annum from the date of the collision. Complaint is made of some of the items allowed. As a result of the collision the Clematis was detained at Galveston, undergoing repairs, from the date of the collision, February 10, 1916, to March 22, 1916. The court allowed for 40 days' detention—excluding the day of sailing—at the charter rate for demurrage, £150 per day. This allowance at that rate is not fairly subject to complaint, as the evidence adduced indicated that, under the conditions existing at the time of the collision and during the period of the detention, the owner could have realized more for the use of the vessel, if it had been available, than was awarded for the period of detention. It is well settled that the loss of profits, or of the use of a vessel, pending repairs, or other detention, arising from a collision, is a proper element of damage. The Conqueror, 166 U.S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; Galveston Towing Co. v. Cuban S. S. Co., 195 Fed. 711, 115 C. C. A. 438. As the party responsible for the damages resulting from the collision became liable when it occurred, interest on the amount of such damages, if not then paid, was allowable from that date. Galveston Towing Co. v. Cuban S. S. Co., supra. It has not been made to appear that the survey fees allowed by the court were improper or excessive.

[9] The cargo of the Clematis was wheat belonging to the Commission for Relief in Belgium. As results of the collision some of the wheat was lost, some of it was damaged by salt water, necessitating the unloading, drying, reconditioning, and reloading of it, and the remainder of the wheat was not damaged. The owner by intervening petition asserted its claim to damages caused to the cargo by the collision. Complaint is made of that part of the award to the cargo owner which fixed its compensation for the loss sustained on the damaged and reconditioned wheat. On this item the court allowed the difference between the market value of the wheat at Rotterdam, its destination, in sound condition, and the value of the same wheat at Rotterdam in its damaged condition. It is insisted that what the owner lost on the damaged wheat was the difference between its value at Galveston before the collision and its value there after the collision, and that the party responsible for the loss is not chargeable with the value added to the

damaged wheat by carrying it from Galveston to Rotterdam.

There might be merit in this contention if it did not satisfactorily appear that the appellant was benefited, and not prejudiced, by having

the loss on the damaged wheat ascertained in the way followed by the court. The counsel for the intervener made a statement to the court to the effect that the damaged wheat, after being reconditioned, was reloaded and shipped to Rotterdam, because it would have been a great sacrifice to have sold it on this side, as it would have had to be sold as storm-damaged wheat, and would have brought only from 20 to 40 cents a bushel. This statement was not objected to and was not controverted. The evidence showed that the damaged wheat, after being dried and reconditioned, was classed by the official grain inspector at Galveston as "no grade wheat." It is to be inferred that the loss on the damaged wheat was lessened by incurring the expense of sending it to Rotterdam. The owner was performing a duty it owed when it adopted the course which would result in minimizing the loss, and was entitled to be reimbursed the expense incident to its doing so. The difference between the value of the damaged wheat at Rotterdam and what it would have been worth there if it had not been damaged as a result of the collision was a sum less than the difference between the value of that wheat at Galveston before the collision and its value there after it was dried and treated. The loss to the party liable to indemnify the owner was reduced by carrying the damaged wheat to Rotterdam and valuing it there, instead of at Galveston. All of the loss on that wheat which was due to the collision, not merely a part of it, was chargeable against the party found to be solely responsible for the collision.

The conclusion is that no one of the complaints against the decree appealed from is well founded. That decree is affirmed.

## REYNOLDS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1918.)

No. 4983.

1. Indians \$\infty\$=15(1)-Lands-Restrictions on Alienation.

Under Act Feb. 8, 1887, § 5 (Comp. St. 1916, § 4201), relating to Indian allotments, which provided that "upon the approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees," the trust period during which the title was to be held in trust by the government began to run from the date of such approval, and not from the date of the patent.

2. Indians \$\infty\$=15(1)-Lands-Restrictions on Alienation.

Under statutory authority given the President to extend the period during which Indian allotments are held in trust by the government, a proclamation extending the period as to certain classes of allottees does not affect one whose period had already expired.

Trieber, District Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the United States against Suda Reynolds. Decree for complainant, and defendant appeals. Reversed and remanded, with instructions to dismiss bill.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  $252~\mathrm{F.--}5$ 

Mark Goode, of Shawnee, Okl. (Hal Johnson, of Shawnee, Okl., on the brief), for appellant.

Lal D. Threlkeld, Asst. U. S. Atty., of Oklahoma City, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before SANBORN, Circuit Judge, and TRIEBER and YOU-MANS, District Judges.

YOUMANS, District Judge. This is an appeal from a decree in which it is adjudged that appellant, Suda Reynolds, defendant below. has no right, title, or interest in a certain tract of land in Pottawatomie county, Okl. The suit was brought by the United States against the appellant as the grantee of one of the heirs of Stella Washington, an absentee Shawnee allottee, under the act of Congress approved February 8, 1887 (24 Stat. 388, c. 119 [Comp. St. 1916, §§ 4195–4210]), as amended by Act of Congress approved March 3, 1891 (26 Stat. 1019, c. 543). The allotment of the land in question was made under sections 3 and 5 of the act of February 8, 1887, which sections, so far as applicable here, read as follows:

"Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the \* \* \* agents in charge of the respective reservations on which the allotments are directed to be made, \* \* \* under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such \* \* \* agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office. \* \* \*

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, or his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

[1] Under the authority conferred by these sections, allotments were made by the proper officers, a schedule of the allotments, dated August 7, 1891, was deposited in the General Land Office of the United States and on the 16th of September, 1891, these allotments were approved by the Secretary of the Interior. The allotment of the land in question to Stella Washington was included in the schedule and in the approval.

Section 5 above quoted, provides for a trust period of 25 years, which period could be extended by the President of the United States at his discretion. The preliminary or trust patent was issued to Stella

Washington, February 6, 1892. On the 24th of November, 1916, the President made the following order:

"It is hereby ordered, under authority contained in section 5 of the act or February 8, 1887 (24 Stats. 388, 389), that the trust periods on the allotments of the Absentee Shawnee and Citizen Pottawatomie Indians in Oklahoma, which trust expires during the calendar year 1917, be and is hereby extended for a period of ten years from the dates of expiration, with the exception of the following."

Then follow numbers of allotments and names of allottees. Stella

Washington's name and number do not appear in the list.

Appellant contends that the trust period began on the 16th of September, 1891, the date of the approval of the allotments by the Secretary of the Interior, and that it had expired on the 24th of November, 1916, the date of the President's order. The conveyance to appellant was executed February 17, 1917. The government contends that the trust period began, so far as the land involved in this case is concerned, on the 6th of February, 1892, the date of the preliminary or trust patent, and that as to such land the trust period expired on the 6th day of February, 1917.

Each allottee became entitled to his preliminary or trust patent upon the approval of the allotments by the Secretary of the Interior. The issuance of the patent was a mere ministerial act. The beginning of the trust period under the act of Congress did not depend upon the time of the performance of the ministerial act by the officers of the General Land Office.

Counsel for the government contend that the case of United States v. Rowell, 243 U. S. 464, 37 Sup. Ct. 425, 61 L. Ed. 848, is decisive of the question involved here. In that case Mr. Justice Van Devanter, speaking for the court, said:

"This is an action in ejectment brought by the United States against James F. Rowell and two others. The land in controversy is a quarter section--160 acres-in an Indian school reserve in Comanche county, Okl. Three statutes, all enacted in the same year, must be noticed. The first of these is a provision in Act April 4, 1910, c. 140, 36 Stat. 269, 280, authorizing and directing the Secretary of the Interior 'to enroll and allot' James F. Rowell as an adopted member of the Kiowa Tribe of Indians. The second is the following provision in Act June 17, 1910, c. 299, § 3, 36 Stat. 533: 'That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for' the tract in controversy 'to James F. Rowell a full member of the Kiowa, Comanche and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.' And the third is the express repeal of the provision just quoted by Act Dec. 19, 1910, c. 3, 36 Stat. 887. The controversy turns chiefly upon the true construction and effect of the provision of June 17 and the constitutional validity of the repealing provision of December 19.

"But it is insisted that the provision of June 17, 1910, was a grant in præsenti, and operated in itself to pass the full title to Rowell, and therefore that he had a vested right in the land which the repealing act could not affect. If the premise be right, the conclusion is obviously so. But is the premise right? Of course, a grant may be made by a law, as well as by a patent issued pursuant to a law; but whether a particular law operates in itself as a present grant is always a question of intention. We turn, therefore, to the provision relied upon to ascertain whether it discloses a purpose to make such a grant; that is to say, a purpose to pass the title immediately

without awaiting the issue of a patent. We find in it no words of present grant, but only a direction to the Secretary of the Interior 'to issue a patent in fee' to Rowell for the tract described. Only through this express provision for a patent do we learn that a grant is intended, and if it were eliminated nothing having any force would remain. This, we think, shows that a present statutory grant was not intended, but only such a grant as would result from the issue of a patent as directed. The cases cited as making for a different conclusion are plainly distinguishable, in that they deal with laws or treaties making grants, and either containing no provision for a patent or providing for one merely by way of further assurance.

for one merely by way of further assurance.

"It is also insisted that, by applying for a patent before the provision therefor was repealed, Rowell accepted that provision and thereby acquired a right to have it carried into effect, of which he could not be divested by the repealing act consistently with due process of law. But the provision did not call for an acceptance, and it is evident that none was contemplated, other than such as would be implied from taking the patent when issued. Besides, statutes of this type are not to be regarded as proposals by the government to enter into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be divested or impaired. Gritts v. Fisher, 224 U. S. 640, 648 [32 Sup. Ct. 580, 56 L. Ed. 928]; Choate v. Trapp, 224 U. S. 665, 671 [32 Sup. Ct. 565, 56 L. Ed. 941]; Sizemore v. Brady, 235 U. S. 441, 449 [35 Sup. Ct. 135, 59 L. Ed. 308]. \* \* \* For these reasons we conclude that the repealing provision was valid, and that, while it did not affect Rowell's status as an adopted member of the tribe, or his right to obtain in the usual way an allotment from the tribal lands not specially reserved, it did revoke the special provision made in his behalf in the act of June 17, 1910."

The Supreme Court in that case held that an act of Congress directing that a patent be issued to an individual could be repealed by Congress before the patent itself was delivered, and that no constitutional right was violated by the repealing act. The instant case presents a different question. The right of Stella Washington to a preliminary or trust patent became vested on the day of the approval of her allotment. Her equitable title was then complete, and did not depend upon the delivery of the patent. Ballinger v. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464.

The postponement of the performance of the ministerial act of causing a patent to be prepared and signed could not postpone the vesting of the equitable interest in Stella Washington, nor could it postpone the beginning of the trust period. In the case of Monson v. Simonson, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260, there is presented an instance in which a specific allotment was by act of Congress relieved from the restrictions imposed during the trust period and the Secretary of the Interior was authorized to cause to be delivered to the allottee an unconditional patent. In that case the court said:

"It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with the title in fee. Recognizing that this was so, and for reasons deemed sufficient, Congress, by the provision in the act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: "The Secretary of the Interior is hereby authorized and empowered to issue a patent' to the allottee. By 'patent' is meant of course, the ultimate patent passing the fee, for the trust patent or allotment certificate had issued 16 years before. The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it seemed wise, but not to require him to do so. And it is

significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words 'and all restrictions as to sale, incumbrance, or taxation of said lands are hereby removed.' It hardly can be said that the absence of those words in this instance and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee."

The authorization to deliver a patent to the allottee was permissive and not mandatory as stated by the Supreme Court. The language of section 5 of the act of February 8, 1887, is mandatory. It says:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, etc."

The Secretary is given no discretion with regard to the issuance of

the patents.

It is urged that departmental construction is opposed to the views herein expressed. Such construction is always entitled to great consideration, but in this instance such construction is in our judgment opposed to the plain and unambiguous language of the statute. There are statutes in which Congress has provided that allotments shall be inalienable for a certain period from the date of the patent. March 2, 1889, c. 422, 25 Stat. 1013, 1014, providing for allotments to the Peorias and Miamies, contains the following provision:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years."

Act March 2, 1895, c. 188, 28 Stat. 907, contains the following provi-

"Provided, that said allotments shall be inalienable for a period of twentyfive years from and after the date of said patents."

Act July 1, 1902, c. 1362, 32 Stat. 641, 642, contains the following provisions:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allotable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment. \* \* \*

from the date of certificate of allotment. \*

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years: in each case from date of patent."

[2] It thus appears that, whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so. In our judgment the trust period expired September 16, 1916, before the issuance of the executive order of November 24th of the same year. The President had no power to revive the expired period nor to create another period. Congress created a trust period, and authorized the President to extend it in his discretion. Congress, however, did not authorize the President in his discretion to create a new trust period. The power to extend a trust period already created is one thing. The power to create a new trust period is an entirely different thing.

It follows that the case must be reversed and remanded, with direc-

tions to dismiss the bill of complaint. It is so ordered.

TRIEBER, District Judge (dissenting). I concur in the conclusions of the majority of the court that the trust period of 25 years began on September 16, 1891, the date of the approval of the allotment by the Secretary of the Interior, and that it had expired before the 24th day of November, 1916, the date of the President's order extending the trust period for ten years from the date of expiration. But in view of the decisions of the Supreme Court in Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591, and Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600, opinions filed March 4, 1918, and the decisions of this court in David v. Youngken, 250 Fed. 208, — C. C. A. —, filed April 3, 1918, and Harris v. Bell, 250 Fed. 209, — C. C. A. —, opinion filed April 30, 1918, I am of the opinion that, as the President was authorized by the proviso in section 5 of the act of February 8, 1887 (34 Stat. 388), to extend the trust period in his discretion, he had the same power to extend it after the expiration of the first trust period as Congress had. The order by the President extending the trust period having been made before the conveyance of the allotment and without the approval of the Secretary of the Interior, the conveyance was absolutely void.

For this reason I am of the opinion that the decree of the District

Court was right, and should be affirmed.

### In re CANISTER CO.

### BARNITT v. MAXWELL et al.

(Circuit Court of Appeals, Third Circuit. July 20, 1918.)

No. 2374.

1. BANKRUPTCY \$\infty\$ 446—Petition to Revise—Scope.

On position to revise an order dismissing a petition

On petition to revise an order dismissing a petition to assess the stock-holders of a bankrupt corporation, the appellate court is confined to questions of law.

2. Bankruptcy &= 250(1)—Corporations—Assessment of Stockholders.

An order of the referee in bankruptcy levying an assessment of 100 per cent. on all stockholders cannot be supported, where the bankrupt cor-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

poration was the owner of much valuable property, and the referee made no finding as to the proportion to which each share was liable to assessment, for that responsibility cannot be shifted to successive juries.

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge. In the matter of the Canister Company, bankrupt. An order of the referee, assessing stockholders of the bankrupt company, was reversed on petition of Henry D. Maxwell and others (248 Fed. 587), and Marshall A. Barnitt, trustee, petitions to revise. Affirmed.

Geo. M. Shipman, of Belvidere, N. J., and E. L. Katzenbach, of

Trenton, N. J., for petitioner.

Henry D. Maxwell, of Easton, Pa., and Malcolm G. Buchanan, of Trenton, N. J., for respondents.

Joseph A. Seidman, of New York City, for unsecured creditors.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The Canister Company, a New Jersey corporation, was adjudged bankrupt in July, 1916, and in the following March a creditor (joined afterward by the trustee) petitioned the referee for an order assessing the stockholders, both common and preferred, for the payment of the bankrupt's debts. The petition was based on the averment that, although the stock had been issued as fully paid, such payment had not been made in cash, and that "if any property was given for any shares of stock so issued the same was of little or no value." An assessment was therefore asked, calling for so much of the par value as was still unpaid.

Some of the preferred stockholders appeared and opposed the petition, and the referee heard a good deal of testimony, finally levying an assessment of 100 per cent. on both classes of stockholders and directing the trustee to collect it. The preferred stockholders applied for a review, and the referee, in certifying the case to the District Court, stated his findings of fact and gave his reasons for the assessment. It was conceded that the stock had been issued, not for cash, but for the property of the Canister Manufacturing Company (the predecessor in business of the bankrupt), which had become insolvent in 1909 and had been reorganized. We need not go into the details of the plan that was then carried through without objection, or (as far as we can see) without being open to successful attack by any person then affected thereby. It is enough to say that the Phillipsburg Investment Company, acting as agent for the creditors and stockholders of the Manufacturing Company, acquired title to all that company's property of every kind, and under section 49 of the New Jersey Corporation Act (2 Comp. St. 1910, p. 1630) used the property as the basis of the stock now in question, which was then issued under that section to the creditors and stockholders of the Manufacturing Company as "fully paid stock and not liable to any further call." The section provides, further, that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive"; and no charge of fraud is now made. After the reorganization, the bankrupt continued the business for six or seven years, and it does not appear that any objection has heretofore been made to the settlement of the Manufacturing Company's affairs, or to the use that was made of its property as the basis for the bankrupt's

It is evident, therefore, that the referee was called on to determine whether the stock in question had in fact been fully paid, and, if not, for how much the shares were still subject to assessment. What the referee did appears by the following paragraphs from his report:

"I find from the proofs deficiency of assets needed to pay bankrupt's debts of considerably more than \$200,000, and that therefore the amount of default in payment for outstanding stock, if it should finally appear to be full par value of any or all of the shares of stock, will be needed to pay the debts of the bankrupt.

"I find that there is substantial doubt about the full payment of any of the stock, and that the weight of evidence, as the proofs now stand, is that some

of the shares are only partly paid and some are entirely unpaid.
"I find, also, that it is to be taken that it is in the interest of creditors generally, in the administration of the estate, to make the said order. Authority for jurisdiction to make the order in question is in the case of In re New Foundland Syndicate in its two stages, which, in my judgment, bring it closely to the present controversy. The first is in 28 Am. Bankr. Rep. 119, opinion by Judge Rellstab. The second is in the Circuit Court of Appeals, Second Circuit, February 27, 1917 (Enright v. Heckscher, 240 Fed. 863, 153 C. C. A. 549), on appeal from the Southern District of New York of the trial of a plenary suit pursuant to said decision in our own district.

"If it could be found from the proofs that the organization plan was an agreement, and that the various negotiations and transactions were simply carried out under that agreement, there is still the difficult question of the way in which the property turned over for the stock was valued. appraisal was by Messrs. Darnell, Adams, and Woods, all of them officers of both the buyer and seller companies, as the Canister Manufacturing Company and the Canister Company must be regarded; the Phillipsburg Investment Company being claimed to be only an intermediary. However honestly these gentlemen may have acted, their interests were in the reorganization, and efforts on their part to make values fit is easily attributable to them by the unpreferred creditors, especially in view of the speculative nature of much that they appraised, to wit, patents, good will. patterns, and special machinery adaptable only to particular work. Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

"I am therefore constrained by the present proofs to find that there is very considerable doubt concerning the payment in full of all the capital stock outstanding. It is true undoubtedly that property did go over from the Canister Manufacturing Company to the Canister Company, and that it is payment on stock, but to what extent and on what shares it applies cannot be determined by the present proofs. In my judgment that can only be determined by the trustee bringing a plenary suit against a stockholder in which the issues can be narrowed down to his particular dealings which resulted in his holding the stock. Perhaps a number of such suits may be

necessary.

"There remains only the question of economic administration. I am relieved from deciding this question by the insistment of the unsecured creditors themselves that the plenary suits be brought. I gave due notice to all creditors of a meeting at which this very question would, among others, be considered. At that meeting, May 18, 1917, as will appear from the records thereof, there was a large attendance and every secured creditor was called upon for his vote. The vote to assume the risk of loss from such suits was virtually unanimous. The only creditor who voted 'no' was one who also represented a number of partially secured creditors. The claims represented in this vote constituted a very large majority of the unsecured claims.

"It is therefore to be remembered again that the situation called upon me to determine, not whether the stock is fully paid, but whether the unpreferred creditors who are most insistent, should be allowed plenary suits to fully investigate the manner of payment for the stock. I found that, they being willing to stand the expense, the right to plenary suits cannot be reasonably denied them, and therefore made the order reviewed."

His order assessed all the stock "to an amount equal to the par value

of the stock issued to and held by said stockholders."

When this order came before the District Court, Judge Davis pointed out its deficiencies (248 Fed. 587), and thereupon made an order sending the case back,

"to the end that such further evidence as may be necessary and available be produced and taken by said trustee before said referee, to enable the said referee to ascertain, determine, and find the necessary facts to support an order of assessment against the holders (or some of them) of the capital stock of the said bankrupt, to wit: That the assets of the bankrupt are insufficient to pay its debts and the expenses of administration; the approximate amount of such deficiency; that the shares of the capital stock of the said bankrupt, or some of them, were not paid for in full; which of such shares of stock have not been paid for in full, and the amount of such deficiency of payment in respect of each; the respective holders of such shares as have not been fully paid, and which of them had, or are chargeable with, knowledge of the fact of such deficiency of payment, in their acquirement of said stock; the pro rata share required to be paid by such holders in order to liquidate the indebtedness of the bankrupt and pay the expense of administration.

"And it is further ordered, adjudged, and decreed that if the evidence heretofore, or hereafter to be, produced before said referee, be insumcient to enable him to make such findings of fact as aforesaid, the referee shall dismiss the petition for the assessment of stockholders."

[1, 2] This is the order that we were originally asked to revise, and it is so plainly interlocutory that during the argument we were on the point of dismissing the proceeding before us as premature. Thereupon counsel acquiesced in the correctness of this position, but urged that to send the case again to the referee would be useless, because they had no more evidence to offer on either side; and, in order to dispose of the controversy, they stipulated that the interlocutory order complained of should "be deemed for all purposes, both in this court and in the court below, a final decree of said District Court dismissing so far as respects the preferred stockholders the petition originally filed with the referee, \* \* \* praying for an order of assessment against the stockholders of said Canister Company." What is before us now, therefore, is a proceeding to revise an order dismissing the petition to assess, and, as this confines us to questions of law (Hall v. Reynolds [C. C. A. 8] 224 Fed. 103, 139 C. C. A. 659; Gaudette v. Graham [C. C. A. 9] 164 Fed. 312, 90 C. C. A. 243; Ross v. Stroh [C. C. A. 3] 165 Fed. 630, 91 C. C. A. 616; Collier [11th Ed.] 581, and cases cited), the precise point is whether the dismissal was right or wrong on the facts reported by the referee and accepted by the District This being the point, we see no error in the order to dismiss. The facts found by the referee were not sufficient to support an assessment of 100 per cent, upon the stock. Unquestionably the stock had a large amount of valuable property behind it, and much of the

evidence related to this subject, although it did not enable the referee to reach a satisfactory conclusion. No doubt, for this reason, he did not find the ultimate fact, what proportion of each share was liable to assessment, or the subsidiary facts that might support such a finding; and we cannot agree that in place of such findings he could substitute an assessment of the largest amount that could possibly be called, and thereby shift to successive juries the burden of deciding separately, and probably with varying results as the evidence might vary, the correct amount with which each stockholder should be charged. If Babbitt v. Read, in the Circuit Court of New York (173 Fed. 712, 23 Am. Bankr. Rep. 256), decides such an assessment to be proper, we must decline to follow that decision, referring in support of our refusal to In re Remington Co., 153 Fed. 345, 82 C. C. A. 421, a ruling to the contrary by the Circuit Court of Appeals of the same circuit. See, also, In re New Foundland Syndicate (C. C. A. 3) 201 Fed. 917, 120 C. C. A. 255.

As the facts found by the referee were insufficient to support the assessment, the order dismissing the petition was correct, and is now affirmed.

### SUGAR v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1918.)

### No. 3176.

1. CRIMINAL LAW \$\infty 1178-Waiver of Error.

Where error assigned, on ground of objection to the indictment, that the grand jury was not selected, designated, nor impaneled according to law, was not argued orally or by brief, and the record disclosed no fact upon which the claim could be based, it would not be considered.

- 2. Army and Navy \$\iff 20\$—Selective Draft Law—Constitutionality.

  Selective Draft Act May 18, 1917, is in no way contrary to the letter or spirit of the Constitution, nor to any intelligent conception of free government.
- 3. CONSTITUTIONAL LAW &= 62—SELECTIVE DRAFT LAW—DELEGATION OF POW-

Selective Draft Act May 18, 1917, is not unconstitutional as conferring legislative power upon the President, notwithstanding the presidential proclamation of the same date, issued as directed by section 5 of the act, which required registration of citizens specified therein; such proclamation having been designed to give notice of, and explain the act, but not to have the force of a law.

4. INDICTMENT AND INFORMATION \$\instructure 111(4)\to Negativing Exceptions in Statistic

Indictment charging failure to register as required by the Selective Draft Law, which alleged that accused was a male between ages of 21 and 30, and was not an officer or enlisted man of the Regular Army or Navy, nor of the National Guard or Naval Militia, nor of the Officers' Reserve Corps, nor of the Reserve Corps in the service of the United States, and was not in any manner exempted nor excused from registering, sufficiently negatived the exceptions in the act.

5. Army and Navy \$\iff 40\$—Failure to Register under Draft Law—Indict-Ment—Sufficiency.

Indictment charging failure to register as required by Selective Draft Act May 18, 1917, need not negative accused's bad health, though inability, through sickness, to register, might disprove willful refusal to register.

 ARMY AND NAVY \$\sim 40\to Failure to Register under Draft Law-Indict-Ment-Sufficiency.

The Selective Draft Act May 18, 1917, and the President's proclamation in regard thereto, do not require indictment for refusal to register to allege the age of accused.

7. CRIMINAL LAW \$\ightharpoonup 970(1)\top-Arrest of Judgment-Indictment-Plea of

Where indictment specifically alleged willful refusal to register under Selective Draft Act May 18, 1917, and accused pleaded guilty thereto, there could be no force in his motion in arrest of judgment.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Maurice Sugar was indicted for willful refusal to register under Selective Draft Act May 18, 1917, entered plea of guilty, was sentenced, and entered motion in arrest of the judgment. To review order denying such motion, he brings error. Affirmed.

Joseph B. Beckenstein, of Detroit, Mich. (Willis G. Clarke, of Detroit, Mich., and Seymour Stedman, of Chicago, Ill., of counsel), for plaintiff in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich. (Andrew C. Baird, of Detroit, Mich., of counsel), for the United States.

Before WARRINGTON and KNAPPEN, Circuit Judges, and WALTER EVANS, District Judge.

EVANS, District Judge. Section 5 of the act commonly known as the Selective Draft Act (chapter 15, 40 Stat. 80), approved May 18, 1917, contains the following provisions:

"All male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered."

On the same day the President made and published a proclamation wherein was recited in full, among others, section 5 of the act. After this recital the President said:

"And I do further proclaim and give notice to all persons subject to registration in the several states and in the District of Columbia, in accordance with the above law, that the time and place of such registration shall be between 7 a. m. and 9 p. m. on the fifth day of June, 1917, at the registration place in the precinct wherein they have their permanent homes. Those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day here named are required to register, excepting only officers and enlisted men of the Regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia while in the service of the United States, and officers in the Officers' Reserve Corps and enlisted men in the Enlisted Reserve Corps while in active service."

The indictment charges that the accused was a male person between the ages of 21 and 30 years; that he was a resident of Detroit at 1109 Euclid avenue west, which was in the Sixteenth precinct of the Fourteenth ward of that city; and that he willfully failed and refused to present himself for registration at the time and place indicated; and, further, that he was not at that time—

"An officer or enlisted man of the regular army, or the navy, or of the Marine Corps of the United States, and not being then and there an officer or an enlisted man of the National Guard or Naval Militia in the service of the United States, or of the Officers' Reserve Corps or enlisted in the Enlisted Reserve Corps in the service of the United States, and not being then and there in any manner exempted or excused from registering under the terms of the aforesaid act of Congress."

He moved the court to quash the indictment, and, that motion being overruled, he filed a demurrer, which was also overruled. He then entered a plea of not guilty, but afterwards, with leave of the court, withdrew that plea, and pleaded that he was guilty of the offense charged in the indictment, and thereupon was sentenced to one year in the Detroit House of Correction.

Subsequently he entered a motion in arrest of the judgment, and,

upon that being overruled, the writ of error was sued out.

The motion to quash the indictment, the demurrer thereto, and the motion in arrest of the judgment entered upon the plea of guilty, all seem to rest upon the same propositions, which, stated generally, are:

(1) That the Selective Draft Act violates the Constitution of the

United States.

(2) That it is against the spirit of that instrument and against the spirit of free government.

(3) That the indictment does not sufficiently charge an offense un-

der the act.

(4) That it is too vague, uncertain and ambiguous to give notice of

the offense charged, and

[1] (5) That the grand jury which returned it was not selected, designated, or impaneled according to law. However, as the error assigned upon this ground of objection to the indictment was not argued, either before the court or by brief, and as the record discloses no fact upon which the claim is or could be based, it calls for no comment, and must be dismissed from further consideration.

[2] In May, 1917, the country, pursuant to the declaration by Congress made in April, had become engaged in a great war for the achievement of the most justifiable ends. The Constitution of the

United States plainly gives to Congress authority not only to declare war, but to raise and equip the armies essential to obtaining the amplest and most beneficial results from the conflict. Congress determined by the enactment of the statute upon which the indictment is based that the way to raise the necessary army was by a selective draft, and gave the President power to put into full operation the measures designed to accomplish that end. The act prescribed the manner of doing this, and its provisions, speaking generally, are so manifestly within the constitutional power of Congress as not to admit of serious discussion. Nor is it possible to find in the Constitution a word or a line which could be fairly held to indicate any subtle "spirit," either of its own or of the "free government" built upon it, which, to be found, must be metaphysically searched out; and we conclude that to raise an army by drafting the men necessary for that purpose is in no way contrary to either the letter or the spirit of the Constitution nor contrary to any intelligent conception of free government.

But nothing more need be said upon the general question of the constitutionality of the Selective Draft Act, because, apart from the considerations stated, the Supreme Court definitely held it to be constitutional in Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, and in other decisions pointed out by this court (March 5, 1918, in Breitmayer v. United States, 249 Fed. 929, — C. C. A. —).

[3] Nevertheless it is yet insisted that the act violates the Constitution because, as counsel contends, it confers legislative power upon the President. It is elementary that Congress cannot delegate legislative power to the President (United States v. Moody [D. C.] 164 Fed.

269), but we find no such delegation in the Selective Draft Act.

Cases like United States v. 200 Barrels of Whisky, 95 U. S. 576, 24 L. Ed. 491, and United States v. 11,150 Pounds of Butter, 195 Fed. 663, 115 C. C. A. 463, establish the proposition that Congress may authorize heads of departments or other executive officers to make regulations within certain limitations, and that when so made within those limitations, such regulations have the force and effect of law and may be enforced as such. But a careful study of the proclamation of the President now in question will show that, while the future making of regulations in the premises was foreshadowed, none were made nor intended to be made by or through that document. Its manifest purpose was to give the people of the United States wide, accurate, and official information of the enactment of the statutory provision now before us and which is set out in full therein. The act required a proclamation for the purpose of giving that character of notice to all who might be subject to the draft provisions and who were thus notified to present themselves at the proper places of registration. It was not intended that the proclamation should itself be law, but that it should give notice of the provisions of a most important statute which Congress had just enacted, and which required prompt enforcement. is sufficient, therefore, to say that its purpose was not to add to the law, nor to make regulations, but to give to the public the most prompt. and the widest possible notice of certain provisions of a new law.

Ordinarily the rule of law is that all persons must take notice and

are presumed to have immediate notice of the enactment of a statute, and it is elementary that all are bound by it whether or not they have had actual notice of it, but the obvious purpose of the provision in this statute requiring the issuing of a proclamation by the President or some other officer to be designated by him was thereby to give notice of the provisions of the act, not, indeed, to each individual person interested, but to the public generally, and the act provides that the proclamation thus made shall carry with it a presumption of notice. The arrangement was much better calculated to give widespread and real information than was the operation of a mere presumption that all citizens know the law and are bound to take notice of it. Obviously, therefore, it was in the interest of all who were subject to the draft provisions of the act that this wide publicity should be given.

[4] Assuming that when a law creating a crime contains exceptions which qualify the general provision the indictment should negative all those exceptions, we nevertheless find that there was no exception in the act itself which was not adequately negatived in the indictment.

[5] There was no necessity for averring in the indictment that the accused was in good health, inasmuch as there was no exception of that character named in the statute, though at the trial under such an indictment evidence of bad health and consequent inability to get to the place of registration might have been offered to show that the failure to attend and register was not "willful" within the meaning of the statute, and probably a jury, if the other testimony in connection with that tending to show bad health warranted it, would find the defendant not guilty of a willful refusal to register.

[6] We need not consume time in a discussion of the contention that it was necessary to state in the indictment the date of the birth of an accused person. The statute does not require it, and the suggestion on that point made in the President's proclamation was obviously advisory to the extent that it pointed out that every person should remember the date of his birth so as to be able to show the board whether or not he was within the age limit fixed for registration.

[7] After an examination of the authorities relied upon by the plaintiff in error, and after the most careful consideration possible of the character of objections made, we have concluded that no one of them was sufficient, and that there can be no force in the motion to arrest the judgment when the record shows that the indictment explicitly charged that there was a willful refusal to register, and when a plea of guilty plainly admitted the charge to be true.

It results that the judgment must be affirmed.

### SUGAR v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 10, 1918.)

#### No. 3175.

1. Indictment and Information \$\infty\$=125(5\frac{1}{2})\top-Joinder of Two Offenses.

Indictment charging that defendants conspired to commit an offense against and to defraud the United States in violation of Pen. Code, § 37 (Comp. St. 1916, § 10201), and to unlawfully and willfully aid and counsel unknown persons to refuse to register under the Selective Draft Act, did not charge two distinct defenses, no facts being alleged to show a conspiracy to defraud the United States, so that the allegation as to fraud was surplusage.

2. CRIMINAL LAW \$\infty\$ 1032(5)—ERROR—RESERVATION OF EXCEPTIONS.

The objection that the language of the indictment is indefinite, uncertain, and ambiguous is not available on writ of error, where no such objection was made in the court below, since it does not then appear that accused was prejudiced.

- 3. Indictment and Information \$\iffill 108\$—Reference to Statutory Section. Indictment charging that defendants conspired to interfere with registration under Selective Draft Act May 18, 1917, \$ 5, by publication of newspaper counseling persons not to register, sufficiently charged a public offense, notwithstanding section 6 of the Selective Draft Act was also the basis of the offense charged, the act and not the sections being important, in view of Rev. St. U. S. \$ 1025 (Comp. St. 1916, \$ 1691), preventing indictments from being deemed insufficient unless the defect tends to the prejudice of defendant.
- 4. CBIMINAL LAW \$\infty=970(5)\$—MOTION TO ARREST JUDGMENT—PRINCIPALS—INTERFERENCE WITH SELECTIVE DRAFT.

On motion to arrest judgment notwithstanding plea of guilty, Cr. Code \$332 (Comp. St. 1916, § 10506), providing that whoever aids, counsels, or procures the commission of an act is a principal, has no effect favorable to one indicted jointly with others for conspiracy in violation of Pen. Code, § 37 (Comp. St. 1916, § 10201), to obstruct registration under the Selective Draft Act May 18, 1917.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle,

Judge.

Maurice Sugar and others were indicted for conspiracy to unlawfully and willfully aid and abet and procure persons to violate the Conscription Act. Sugar moved to quash the indictment, and the motion was denied (243 Fed. 423); whereupon he demurred to the indictment, and the demurrer was overruled, and he entered plea of guilty, was sentenced, and moved in arrest of judgment, and the motion was denied, and he brings error. Judgment affirmed.

Seymour Stedman, of Chicago, Ill., and Willis G. Clarke, of Detroit, Mich., for plaintiff in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich., for the United States.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before WARRINGTON and KNAPPEN, Circuit Judges, and WALTER EVANS, District Judge.

EVANS, District Judge. The indictment charges that on the 26th day of May, 1917, and on divers other days subsequently thereto, up to and including the 31st day of May, 1917, at the city of Detroit, Mich., Nathan L. Welch, Maurice Sugar, Samuel N. Diamond, Ludwig Bolz, Robert Westfall, Daniel L. Powell, Jr., and other persons unknown to the grand jury, did conspire, confederate, and agree together to commit an offense against the United States, and to defraud the United States, in violation of section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) of the United States, in this, that they and each of them did then and there unlawfully conspire, confederate, and agree together among themselves, and with other persons unknown, to unlawfully and willfully aid and abet, counsel, induce, and procure, certain male persons, whose names are to the grand jurors unknown, and being male persons between the ages of 21 years and 30 years, both inclusive, who are subject to registration under the terms and provisions of section 5 of an act of Congress approved May 18, 1917, c. 15, 40 Stat. 80, entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and in accordance with the regulations prescribed by the President under said act, and at the time and place designated in the proclamation made, issued, and promulgated by the President under said act, to willfully fail and refuse to present themselves for registration at the time and place and in the manner provided in said act and said regulations, proclamation, and public notice, and to unlawfully evade the requirements of said act in not registering at the time and place and in the manner provided by the said act and regulation, proclamation, and public notice. It further charged that in pursuance of said conspiracy, and to effect the object thereof, said Nathan L. Welch, said Maurice Sugar, said Samuel N. Diamond, said Ludwig Bolz, said Robert Westfall, and said Daniel L. Powell, Jr., and each of them, on the 27th day of May, A. D. 1917, at the city of Detroit, Mich., did unlawfully, willfully, and knowingly print, publish, issue, and circulate, and cause to be printed, published, issued, and circulated, certain literature in opposition to the operation and enforcement of the aforesaid act of Congress and proclamation and regulation promulgated for the enforcement of said law, said literature consisting of a certain issue of a weekly newspaper printed and circulated in said city of Detroit, and know as the Michigan Socialist, and said issue of said newspaper being the issue dated as follows, to wit, "Detroit, Mich., Sunday, May 27, 1917," and being known as the "Anti-Conscription Edition" thereof, the heading of said issue of said newspaper so printed and published and circulated in said city of Detroit being in the words and figures following, to wit, together with the resolution adopted by the Socialist Party of Detroit, appearing on the first page of said newspaper:

# ANTI-CONSCRIPTION EDITION THE MICHIGAN SOCIALIST

Published by the Socialist Party of Detroit

Vol. 1

Detroit, Mich., Sunday, May 27, 1917.

No. 46

What Socialists Will Do on Registration Day Resolution Adopted by the Socialist Party of Detroit

The government of the United States, in the interest of the capitalist class, has now plunged this country into the mad orgy of death and destruction which is convulsing the nations of the old world, and has forced conscription upon the people of this country.

We, the Socialist party of Detroit, in joint meeting assembled, reaffirm our allegiance to the principle of international working class solidarity, reiterate our unalterable opposition to this war, and denounce the law just passed to

conscript the workers into military service.

This law forces into "involuntary servitude" a portion of the population of the country, and we brand it as a violation of the spirit of the thirteenth amendment to the constitution.

In the name of the workers, who will bleed but not benefit, we pledge ourselves to oppose registration for conscription by refusing to enroll upon registration day, and we call upon all workers to refrain from signifying their willingness to kill the workers of any other nation.

Better the freedom of a prison cell than slavery in the interest of commercialism.

And said issue of said newspaper, consisting of four pages of printed matter, then and there containing certain articles, editorials, and illustrations opposing the enforcement of the aforesaid act of Congress providing for the temporary increase of the military establishment of the United States, and known as the Selective Service Act, and inciting those subject to the operation of said act to willfully fail and refuse to present themselves for registration or to submit thereto as provided in said act, and in the regulations and the President's proclamation pertaining thereto, and exhorting said young men subject to said registration and draft to oppose and refuse to register, and particularly inciting and urging all such young men to violate said law and to oppose the enforcement of the same, as shown in the leading article printed and published in the first column of the first page of said issue, said leading article being in the words and figures following, to wit:

## "WILL YOU CRINGE LIKE A COWARD OR STAND UP LIKE A MAN?

Will you follow sheeplike the plutocratic interests sponsoring this war to the European slaughter house to be butchered and maimed so that plutocracy may coin profits out of the misery of the war stricken nations?

Have you any backbone at all?

Will you permit military authorities to draft you into involuntary servitude, in contempt of real American tradition?

Will you stand by with your hands folded and permit the assassination of the constitutional rights of American citizens?

The hour is at hand when you must either act like a man or forever relinquish your civil and moral right.

War was declared by the President and Congress in the same arbitrary manner that the Kaiser declared it. You were not consulted about it.

A draft law has been passed over the protests of American workers. Registration is but a few hours ahead.

252 F.—6

Will you register your willingness to rot in the trenches to accommodate our American plutocracy?

What will you do?

You must choose and decide quickly.

Thousands of Detroiters have decided to refuse to register and refuse to permit the military authorities to conscript them to fight in a war about which they were not consulted. Will you stand with them and join their ranks? Will you stand up like a man for your rights NOW, or will you cringe like a coward when the supreme test of your manhood arrives?

The question is simple.

Will you go forth and murder your fellowmen, against whom you have no grudge, or will you refuse to participate in the murder party? Are you ready to stand with men who will go down in history as the real men of the day, by fighting to maintain such democratic rights and privileges as have been gained through years of sacrifice, or will you sheepishly follow the American murder machine?

Better a prison cell than the blood of innocent workers on your hands. BE A MAN!"

The plaintiff in error moved to quash the indictment, and when that motion was denied filed a demurrer, which was overruled. He at first entered a plea of not guilty, but afterwards withdrew it, and entered a plea of guilty, and thereupon a fine of \$500 was imposed. He moved in arrest of this judgment, and, this being denied, sued out the writ of error, which brought the case here.

The motion to quash the indictment, the demurrer, and the motion to arrest the judgment entered upon the plea of guilty, all seem to rest upon the same contentions, two of which may be adequately stated as follows:

- 1. That the Selective Draft Act is unconstitutional; and
- 2. That, though not named in the grounds either of the motion to quash or the motion in arrest of judgment, it is assigned for error that the grand jury which returned the indictment was not designated, selected, listed, or impaneled as required by the statutes of the United States and the rules of the trial court.

These two contentions are substantially similar to some of those considered and disposed of by our opinion delivered June 29, 1918, in another case, 252 Fed. 74, — C. C. A. — (No. 3176), of the same plaintiff in error against the United States. What was said in that opinion on these contentions need not be repeated, but it leads to the conclusion that neither of them is maintainable.

- [1] 3. A third contention is that the indictment charges two distinct offenses under section 37 of the Penal Code, it being supposed that it was intended to charge that there was also a conspiracy to defraud the United States. Obviously, we think, no such charge is made, inasmuch as there is no specification of any facts to constitute an offense of that character. It was not sufficiently charged, and the court below held that the words "to defraud the United States" found in the indictment were surplusage, and this, we think, was correct. It becomes clear, therefore, that only one offense is charged, and the contention to the contrary cannot be sustained.
- 4. What is referred to in the indictment as section 37 of the Penal Code is section 5440 of the Revised Statutes (section 10201, Comp. Stats. 1916), which has been before the courts for construction in

many cases, not only those reported but in every-day trials. Frequently an indictment is founded on a conspiracy to defraud the United States, and this, per se, is one of the separate and distinct offenses made punishable by the section. But probably more frequently the alleged conspiracy is one to violate some law of the United States, and, in order that the accused may be informed of what he is to answer, the indictment must definitely allege facts which show the unlawful characteristics of his acts as fixed by some statutory enactment. Only a few cases need be cited to clearly show the rule of pleading governing the latter class of cases. In Ex parte Wolf (D. C.) 27 Fed. at page 611, it was said:

"To constitute a good indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with such reasonable certainty the acts intended to be effected or carried out by the agreement of the parties so that it can be seen the object of the conspiracy was a crime against the United States."

In United States v. Lyman (D. C.) 190 Fed. 414, 416, the rule was thus stated:

"To constitute the crime of conspiracy, the object of the unlawful agreement must be the commission of some offense against the United States in the sense only that it must be some act made an offense by the laws of the United States."

See, also, United States v. Thomas (D. C.) 145 Fed. 78, and Radin v. United States, 189 Fed. 569, 111 C. C. A. 6. In Brown v. Elliott, 225 U. S. 393, 32 Sup. Ct. 812, 56 L. Ed. 1136, and in France v. United States, 164 U. S. 677, 17 Sup. Ct. 219, 41 L. Ed. 595, the Supreme Court dealt with cases where the indictment carefully followed the rule stated, though its decisions were upon other questions.

The conspiracy statute is in these words (section 37, Penal Code), namely:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 5 of the Conscription Act provides that-

"any person who shall willfully fail or refuse to present himself for registration, or to submit thereto as herein provided, shall be guilty of a misdemeanor."

Section 6, that-

"any person who \* \* \* evades or aids another to evade the requirements of this act \* \* \* shall, if not subject to military law, be guilty of a misdemeanor."

These are the requirements of the laws of the United States which the persons named in the indictment are accused of having conspired to violate by aiding persons liable to the draft to evade the duties prescribed.

- [2] It is urged that the language of the indictment is indefinite, uncertain, and ambiguous; but, even if this be true, no objection was made on that ground in the court below. Consequently it is not available here, inasmuch as it has in no way been shown that it prejudiced the accused.
- [3] The substantial objection insisted upon, is that the indictment does not state facts sufficient to show the commission of a public offense. Examining its allegations, we find that it plainly charges that the persons accused entered into a conspiracy to aid persons unknown, but who are described sufficiently to show that they came within the provisions of the Selective Draft Act, requiring them to duly present themselves for registration on June 5, 1917, to evade that duty, and that a specified act, namely, the writing and publishing of the paper set forth, was done by them to carry into effect the objects of the conspiracy.

Possibly the language of the indictment is not as clear as it might be because it, unnecessarily, names section 5 of the Selective Draft Act as the legislation involved, when, in fact, the offense charged must, in connection with section 37 supra, have its basis not only in that section, but also in section 6 of the act. In these circumstances, and in view of section 1025, R. S., Bennett v. United States, 194 Fed. 632, 114 C. C. A. 402, and Daniel v. United States, 196 Fed. 465, 116 C. C. A. 233, we hold that the indictment is based on those provisions of the act the language of which covers the offense charged, whether that language is found in section 5 or elsewhere—the act, and not the mere numbered sections of it, being the substantial thing to be regarded, and particularly when the language of the indictment clearly points out what conduct is aimed at and sought to be punished.

True, the indictment charges that the names of the persons thus aided were unknown to the grand jury, but the acts alleged to have been done by the accused to carry the conspiracy into effect were of a character to aid generally any and all persons within their reach and influence to evade those requirements; and though the influence of those acts might be far reaching, and might aid many to evade the duty of registering for the draft, punishment might be altogether avoided because of the impossibility of locating and naming the exact persons aided. This general consideration, indeed, has always been the basis of the practice of permitting an indictment to show that persons were unknown. 1 Wharton's Criminal Law, § 949; Wharton's Criminal Pleading and Practice, § 113; United States v. La Coste, 26 Fed. Cas. No. 15,548.

The character and contents of the publications printed and circulated by the accused, and fully set out in the indictment, were particularly and dangerously adapted to that end, and Congress cannot well be supposed to have left it open to persons disloyally disposed to adopt that manner of aiding others of similar inclinations who were subject to the draft, but desirous of evading it. We conclude, therefore, that the indictment sufficiently charges a public offense, and that it is not so vague, indefinite, or uncertain as to prejudice the substantial rights of the accused, although the individuals thus aided are

not named. What we shall presently say upon the motion to arrest the judgment, notwithstanding the plea of guilty, may also support this conclusion.

[4] 5. Section 332 of the Criminal Code (Comp. St. 1916, § 10506)

reads as follows:

"Whoever directly commits any act, constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

It is insisted that the operation of these provisions would make "principals" of the persons accused in the indictment. If we assume (as is unavoidable) that this is correct, the Selective Draft Act in no way makes them anything else, and we have been altogether unable, therefore, to agree to the conclusion urged by counsel that this section can or should have any effect upon the case favorable to plaintiff in error.

The indictment plainly charges that the persons named therein conspired and agreed together to aid persons to the grand jurors unknown to evade the requirements of the act, and that in order to effect the object of such conspiracy they published and widely circulated the paper set forth therein, and which is well adapted to the end in view. Plaintiff in error by his plea of guilty of the offense thus charged left no doubt of the truth of the facts alleged against him. In this situation—the act being constitutional—it is difficult to perceive any grounds for arresting the judgment based upon that plea. The judgment is therefore affirmed.

KNAPPEN, Circuit Judge. I entirely agree that the action of the District Court was right and that it should be affirmed. I construe the indictment, however, as charging a conspiracy not merely to aid but also to counsel and induce others to violate the Selective Draft Act by refusing to register; and I think section 332 of the Criminal Code thus has application.

## THE WILLIAM GUINAN HOWARD.

(Circuit Court of Appeals, Second Circuit. May 1, 1918.)

No. 252.

1. Collision \$\infty 70-Liability-Barges.

A coal barge, which had been towed by tugs of a railroad company to a point where she was moored with other barges, *held* not at fault for a collision with another vessel in the vicinity, resulting when such barges by reason of a gale broke from the moorings; the fault in no way being that of the barge or her master.

2. Collision 570-Liability-Persons at Fault.

Where a railroad company's tug, which had a flotilla of coal barges in tow, moored them in such a way that the whole flotilla relied on the mooring lines of the first barges, held, that the railroad company was

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liable for the damage of a collision resulting when the barges, by reason of a gale not unusual at that time of the year, broke from their moorings.

Hough, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Burtis M. Wasson against the barge William Guinan Howard, her tackle, etc., claimed by Thomas J. Howard, who impleaded the Philadelphia & Reading Railway Company. From a decree for claimant and the railway company, libelant appeals. Reversed, and decree entered against the Railway Company.

Appeal from a decree in admiralty entered on the 19th day of October, 1917. The proceeding was commenced by a libel in rem against the barge William Guinan Howard on behalf of the schooner Henry H. Chamberlain for a collision on the 26th of December, 1915, on the anchorage grounds on the Staten Island side of the Arthur Kills, which separate Staten Island from the New Jersey shore. The Chamberlain, which was lying at anchor in the Kills on that day, was struck by the Howard, then adrift, and injuries were done to the schooner's bow.

The answer of the Howard alleged that she was picked up at Mariner's Harbor, Staten Island, by tugs of the Philadelphia & Reading Railroad, and had been towed to the stakes in possession of the railroad at the locus in quo; that she was placed at the rear end of a flotilla of light boats some 600 teet or more in length, and was left in an exposed and unprotected position, so that she swung with the tide; that on the morning of December 26 a storm from the northwest broke the barges adrift; and that without her fault and negligence she collided with the Chamberlain. The Howard filed a petition against the Philadelphia & Reading Railroad Company as the party in fault, which answered that it had left the Howard in the usual place for morning light boats, as had been done for many years; that the place was proper for that purpose, except under extraordinary conditions; and that she broke adrift because of an unprecedented gale on the day in question.

On the trial it appeared that the Chamberlain had anchored with about 30 fathoms of chain on the Staten Island side of the Arthur Kills on the anchorage ground on the 25th of December in a place of ordinary safety. The Howard, a light coal boat, had been towed to Port Reading by the Philadelphia & Reading Railroad on the night of the 24th. She was the last boat of some 40 or 50 light coal boats, which the railroad was taking to Port Reading to fill with coal. The tow arrived at about 11:30 at night, and was laid behind a number of other light boats, which were there waiting. The entire flotilla, when the extra 40 or 50 boats had been added, contained some 60 or 70 in all. From the bulkhead on the New Jersey side of the Kill extend three coal piers, and to the southwest of these extend a double row of stakes about 300 feet in length, from the bulkhead at the end of which and at right angles there extend another double row of stakes, 222 feet in length, parallel with the bulkhead and making an L. All the slips were full, and the flotilla was tailed from the corner of the L of stakes so formed, so that it lay alongside. As it extended some 700 feet from the corner, the greater part of its length was beyond the outshore leg of the L, which, as has been said, was only 222 feet in length. In consequence, the whole flotilla relied upon the mooring lines of the first barges, and, as those alongside the stakes were not made fast, it swung out into the stream with the tide.

In the early morning of the 25th the wind was moderate, but it began to rise about 6 o'clock, and blew through the 25th at a general average of between 30 and 40 miles an hour, reaching a maximum by midnight of the 25th of 62. The gale increased in the early morning of the 26th and by between 5 and 7 o'clock in the morning reached a maximum of 66 miles from the northwest, with an hourly wind movement of between 50 and 60 miles an hour. The northwest wind carried the flotilla off shore, so that it hung substantially

at perpendicular to the stakes at which the first barges were moored. At about 6 o'clock in the morning the strain proved too great for some of the fasts, apparently those which held the second tier to the first, and the whole flotilla broke adrift. The Howard, driving across the Kills, came in contact with the bow of the Chamberlain and did the damage here sued for.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for the Henry H. Chamberlain.

Herbert Green, of New York City, for the William Guinan Howard. Pierre M. Brown and Macklin, Brown & Purdy, all of New York City, for Philadelphia & R. R. Co.

Before HOUGH, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

LEARNED HAND, District Judge (after stating the facts as above). [1] We all accept the excuse of the Howard that she was powerless under the circumstances. The only possible fault that can be charged against her is that her master, during the night of the 25th and 26th, should have gone ashore for help. It seems to us somewhat fantastic to suppose that a bargemaster under the circumstances could or should have made any effort to have the boat transferred. She was a helpless scow, without means of locomotion, subject to the control and under the direction of the railroad, which towed her to her posi-

tion, and we can see no fault on her part.

[2] The majority of the court, however, does not agree that the railroad company was free from negligence. It seems to us inherently dangerous to lay so large a number of empty barges with high freeboard alongside a string of piles situated as these were, and without any control except the mooring of the first tier. In the first place, we think that to allow such barges to swing out on every tide is a serious obstruction to navigation (Hughes v. Penn. [D. C.] 93 Fed. 110, 103 Fed. 925), even in fair weather: but as to that we do not think it necessary to make any finding. To allow them to swing in a gale reaching a maximum of 66 miles an hour seems to us, however, beyond any excuse. The almost inevitable result is disaster. The combined resistance against the wind of a string of barges 60 or 70 in number is almost certain to result in parting the mooring of the whole or the fasts between some of them. What happened seems to us to have been almost inevitable. Moreover, the railroad concedes that the same thing had taken place five or six times in the past, and, while these accidents extended over a long period of time, they were ample warning that the practice was unsafe, and necessarily unsafe, not only to the barges, but to any shipping which lay on the anchorage grounds to leeward.

The railroad's excuse is that the row of stakes did not extend far enough to the southwest, so that each tier might be made fast to the piles, and it is suggested that the railroad did not own land on which stakes could be driven. Nothing of the sort appears in the testimony; but, if it did, it would be no excuse, assuming, as we must, that the practice was dangerous. Either the railroad must acquire sufficient

land for its purposes or it must not moor so many barges in a string at that place. How wide each tier need have been to accommodate all the barges at that time we do not know, and it is unnecessary to inquire. The railroad owed a duty to other shipping in the Kills to prevent what happened here.

It is suggested that The Lyndhurst, 147 Fed. 110, 77 C. C. A. 336. exonerates the railroad. In that case the accident happened through the failure of the barge to make fast a tow line to the tug. We do not see the application of the case. There is no evidence that the fasts between the first and second tier were improper. It was not to be expected, in our judgment, that they should hold against such a strain as was imposed upon them. Nor do we find that the Edwin Terry, 162 Fed. 309, 89 C. C. A. 17, touches this case. The Media (D. C.) 132 Fed. 148, Id., 135 Fed. 1021, 68 C. C. A. 127, is not in our judgment in point either. In that case the barge was injured because of the extraordinarily low tide caused by a high gale. The case was decided upon the theory that the extraordinarily low tide was not to have been anticipated. Judge Adams particularly distinguished the case from one in which the boat was left subject to swing in any change of wind. The injury there was done by a submerged pile upon which the barge was impaled, and which, as we understand, was not known This chain of circumstances seems to us much more remote than that in the case at bar.

The railroad asserts that this way of mooring the flotilla has been customary in the place in question for 25 years past; but it does not appear that it was the custom of any but this respondent, and in any event it had been amply demonstrated in the past that it was a dangerous custom, and as such it cannot be excused. The gale was of no extraordinary violence for the season. It was of a kind to be expected once or more during any winter in these waters, and in accepting a risk no more uncommon the railroad made itself responsible for the ensu-

ing damage.

Judge HOUGH thinks that the Philadelphia & Reading Railway Company was not in the usual relation of tug to its tow at the time of the storm. It is true that the allegations upon which that conclusion might be based were denied in the railroad's answer to the petition, and that the only proof upon the trial was that of MacGregor, who said that the boats were going down to Port Reading to load coal; that being the place where the railroad did load coal on barges. It is at least equally possible that the agreements included, not only towage to Port Reading, but coaling there, in which case it would be responsible for a tug's ordinary care, due to a tow while moored. That the railroad did select the berth and leave the barge there is conceded. We do not think that the record justifies our speculation as to whether its duty was then at an end, because neither in the opinion below, nor in any of the briefs, is it suggested that the general relation of tug to tow had ceased. The cause having been disposed of throughout upon the assumption that the sole question was of the railroad's negligence, we hardly think it our duty, or indeed our right, to raise such a point of our own accord.

The decree is reversed, and a decree will be entered against the Philadelphia & Reading Railway Company, with costs in both courts, and in favor of the Howard, but without costs in either court.

HOUGH, Circuit Judge (dissenting). The corporation which the court holds responsible for the consequences of a violent storm was not by charter or otherwise in charge of the Howard, at or near the time she went adrift. It did tow the barge, and that contract was fulfilled when the Howard was delivered where she wanted to go, at a customary mooring place, safe at the time of delivery. It also offered the wharf or mooring, where the barge safely lay until an unusual storm tore her and other boats loose. The place and method of fastening were well known, safe in most weathers, and nothing caused apprehension of danger when the Howard was made fast.

The barge went where she did by the volition and for the purposes of her owner, and when the railroad company had safely towed her to destination, and furnished her with a usual mooring place, their mutual relations were ended. I am not advised by the majority opinion of what breach of contract the railroad was guilty; but by implication it seems held to a sort of general guardianship of anything lying at the stakes. Such a duty or office has never heretofore been held to exist, and is not in my judgment founded either on positive law,

or good maritime analogy.
Therefore I dissent.

### LANDES v. KLOPSTOCK.

### LIEBMAN et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

Nos. 208, 209.

1. Sales \$\isin 82(3)\$—Action for Price—Conditions Precedent—Shipment of Goods.

Under bought and sold notes for sugar payable June 15, 1917, and entitling the seller to 10 days' notice of shipment, the shipment did not become a condition precedent to the buyer's absolute obligation to pay on June 15th unless he had given the contract notice that he required shipment on June 15th, and where he failed to do so the seller had a right of action, unless his conduct excused the buyer's default.

- 2. Sales \$\iiiis 332\$—Notice of Shipment—Sale on Buyer's Account.

  Under bought and sold notes for sugar deliverable and payable June 15, 1917, entitling the seller to 10 days' notice of shipment, the seller's notice to the buyer that if he was not given the contract shipping notice he would sell on the buyer's account did not entitle him to sell on failure of such notice, as the buyer might pay before shipment, and as he was not required to give any shipping notice, though he could not get delivery without it.
- 3. Contracts \$\iff 316(5)\$—Repudiation by Buyer—Remedies of Seller.

  If the promisee insists upon performance, he waives the right to sue upon the promisor's repudiation of the contract, especially where the promisor does not himself retract in season.

In Error to the District Court of the United States for the Southern District of New York.

Actions by Jacob Landes, doing business as J. Landes, and by Louis Liebman and Nathan Liebman, copartners doing business as Liebman Bros., against Paul Klopstock, doing business as the Paul Klopstock Company. Judgment in each case for defendant upon a directed verdict, and plaintiffs bring error. Affirmed.

Writs of error from judgment of the District Court for the Southern District of New York (Manton, J., presiding) upon a directed verdict for the defendant, after trial with a jury. The jurisdiction of the court depended upon diverse citizenship. The case was this:

On April 18, 1917, the two plaintiffs each received and delivered bought and sold notes for the sale to the defendant of 200 and 300 tons of sugar already identified in the port of New York. A copy of one of these notes for 200 tons is as follows:

"New York, April 18, 1917.

"Bought from J. Landes,

"Address, 192 Division Ct., City.

"Sold to Paul Klopstock & Co., "Address, 17 Battery Place, City.

"Terms: Net cash-payable on presentation of shipping receipts. Shipment to be made by May 15. Payment in full to be made by May 15, whether or not shipment is made. 10 days' notice of shipment. Freight

"Basis

723"(f. o. b. New York)

"Routing: 200 (two hundred) tons fine granulated, \$7.23 net cash,

"Accepted: Paul Klopstock & Co.

"M. G. Wanzor & Co."

Subsequently the time of payment and delivery under these contracts was extended for 30 days; that is, until June 15, 1917.

On May 23, 1917, the buyer wrote the following letter to each of the plaintiffs:

"Gentlemen: Referring to your favor of the 20th demanding payment for 300 tons of granulated sugar you claim to have sold this firm: The writer, who has just returned from Europe, had this matter brought to his attention for the first time yesterday. It seems from investigations made by the writer that this was a private speculation on the part of Mr. Irving Kanegieser, our export manager, which was absolutely unauthorized by the writer. It is a well-known fact to all our trade that Mr. Kanegieser's authority to make any purchases whatsoever during the writer's absence is only effective on definite and specific instructions and authority from the writer in the case of each transaction, and in this case no such instructions or authority were ever given him. Because of this we are compelled, much to our regret, to refuse to assume any responsibility whatsoever in connection with this matter, and to advise you that Mr. Kanegieser's connection with this firm will cease in the near future."

The question of Kanegieser's authority to bind the defendant was not raised upon the argument.

Thereafter plaintiffs Liebman Bros. on May 31, and the plaintiff Landes on June 1, wrote identical letters, of which the following is a copy:

"Gentlemen: Pursuant to the contract between you and ourselves, dated April 18, 1917, and thereafter extended to June 15, 1917, as per your instructions, we hereby request that you give us shipping instructions for the sugar therein described on or before June 5, 1917, as provided for in the contract. In the event that we do not receive these instructions in accordance with the terms of the contract, we will sell the sugar for your account and look to you for any damage sustained by us."

Receiving no notice in accordance with the demands in them, the plaintiffs on June 11, 1917, four days before the time, sold the sugar on the defendant's account, and seek now to charge him with the difference between the sale price and the contract price.

Bigelow & Wise, of New York City (Ernest A. Bigelow, of New York City, of counsel), for plaintiffs in error.

Arthur Mayer, of New York City, for defendant in error.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] This case, strictly speaking, does not involve the doctrine of anticipatory breach, because the action was brought after June 15th, upon which day the defendant's obligation to pay for the sugar became absolute. The shipment of the sugar could not become a condition precedent to that obligation, unless the defendant had given notice on or before June 5th that he required shipment on June 15th, which he never gave. Therefore, unless the plaintiffs by their conduct had at that time excused the defendant's default, their right of action is clear. In the consideration of the case, however, the doctrine of anticipatory breach does become indirectly involved.

The defendant's excuse is the plaintiffs' letters of May 31st and June 1st, announcing that, if the defendant did not advise them on or before June 5th where they should ship the sugar, they would sell it on his account. This they clearly had no right to do, because the defendant might, if he chose, pay before shipment, a possibility contemplated in the contract. He was under no duty to give 10 days' notice at any time, though he could not get delivery without it. Such a notice, followed by the sale of the sugar, excused the defendant's performance, unless it was itself in turn excused by the defendant's letter of May 23d, which was a total repudiation of the contract. It is upon this last question that the case turns.

Upon receipt of the defendant's letter the plaintiffs need have done nothing; they could have waited till June 15th and sued the defendant under any of the remedies open to a seller, or they might themselves have declared the contract at an end, save for their right to sue at once under the doctrine of anticipatory breach. It is perfectly clear that they did not mean to declare the contract at an end. Three times in their letters they speak of the defendant's duty under the contract to give the notice, and they leave no ground for doubt that they intended to hold the defendant to his performance according to the contract as they understood it.

We need not consider whether, having taken that attitude towards the contract, the plaintiffs were excused from further performance if the defendant's obligation had been conditional. The English rule is that the promisee, if he means to ignore the repudiation, must still perform, quite as though the promisor had not repudiated. The language of Lord Cockburn in Frost v. Knight, L. R. 7 Ex. 111, 112, has been accepted generally, and in Dalrymple v. Scott, 19 Ontario Appeals, 477, it was the basis of the decision. True, it is difficult to see how these cases can be reconciled with the well-settled rule in this country that, when the promisor repudiates, the promisee not only

need not perform, but, if he chooses to perform, does so on his own account. Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; Dillon v. Anderson, 43 N. Y. 231; Danforth v. Walker, 40 Vt. 257; Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783. In the case at bar we have not that question, because the plaintiffs had no conditions precedent to perform; they were required to do nothing until the day of payment arrived. We may therefore assume that the American rule obtains.

They chose, on the other hand, to take positive action, and in that they erred, for only two courses were open to them, and they attempted an intermediate. They might have declared the contract at an end and sued at once. We pass the question whether any other declaration is necessary beyond the bringing of an action; we do not hold that there must be a prior acceptance of the rescission, so called. They did not accept the repudiation in any way; on the contrary, they refused to recognize it, quite as clearly as though they had said: "We decline to recognize your right to repudiate." Having so ignored it, as was their right, they added a condition, not authorized by the contract, upon which their own continued performance was to depend. This they had no right to do. Rubber, etc., Co. v. Manhattan, etc., Co., 221 N. Y. 120, 116 N. E. 789. It is true that they supposed they were acting under the contract, and the case is a hard one, but no harder than any other in which a party acts upon an interpretation of a contract. with which the courts do not agree. That is a hazard all must run.

[3] It is suggested that, as the plaintiffs had the right to declare an immediate breach, they might accord the defendant the right to retract, and that their letters should be taken as equivalent to a declaration that, if the defendant persisted in his repudiation until June 5th, they would accept the repudiation. They might have done this; but they did not. The question is whether we may regard their insistence upon the contract, which they misunderstood, as in effect a declaration that it was at an end. While we have avoided deciding whether such a declaration is necessary in order to sue upon a repudiation, either before or after the stipulated time of performance, we do hold that, if the promisee insists upon performance, he waives the right so to sue upon the repudiation, certainly if he does not himself retract in season.

Judgments affirmed, with costs.

# In re GRAHAM & SONS et al.

### GRAHAM & SONS v. YORE (two cases).

(Circuit Court of Appeals, Seventh Circuit. July 19, 1918.)

Nos. 2630, 2631.

1. BANKRUPTCY \$\iff 440\to Order Refusing Confirmation of Composition-Mode of Review-"Composition."

Where order dismissing petition for confirmation of composition with creditors was predicated wholly on proposition of law that proposed offer was not a composition within the Bankruptey Act, and in no manner involved question of right of bankrupts to be discharged, order involved matter of law arising in bankruptcy proceedings, and is reviewable in Circuit Court of Appeals on petition to review and revise, and not on appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Composition.]

2. Bankruptcy \$\infty\$382--Specifications of Objections to Confirmation of Composition-Overruling on Demurrer.

When District Court in bankruptcy entered its order refusing to confirm composition with creditors, predicated upon report of referee as special master, it amounted to overruling of demurrer to specifications of objections to confirmation of composition offer.

3. Bankruptcy \$\sim 382\$—Objections to Composition Offer—Hearing on Merits.

Under Bankruptcy Act, § 12c, and the Supreme Court's General Order in Bankruptcy XXXII (89 Fed. xiii, 32 C. C. A. xxxi), objecting creditors, as well as proponents of composition offer, on the objections to confirmation of the offer and their specifications were entitled to hearing, and to a judgment of the judge of the District Court upon the merits.

4. BANKRUPTCY \$\ightharpoonup 379\to Offer of Composition\to Equivalence to Assignment.

Though general assignment, made before bankruptcy, in itself is act of bankruptcy by Bankruptcy Act § 3a, under sections 12a, 12d, composition offer to creditors, made after bankruptcy, though substantially the equivalent, in results to creditors, of general assignment for their benefit, had it been carried out before bankruptcy, is not therefore in law no offer of composition at all, but must be confirmed or rejected by court on merits.

5. Bankruptcy €=379—Offer of Composition—Advantages and Disadvantages.

Advantages and disadvantages to creditors of bankrupt from proposed composition need not be set forth in composition offer itself, in order that judge, pursuant to his duty, may investigate merits of offer and of objections, and determine its advantage or disadvantage to creditors.

6. BANKRUPTCY \$\infty 382\top-Composition-Confirmation.

Facts and circumstances which bear on advisability of confirming bankrupt's offer of composition are no part of offer itself, but are properly presentable at hearing of offer and objections thereto, for which Bankruptcy Law makes provision; it being for judge then to determine whether composition is for best interests of creditors.

Appeal from, and Petition to Review and Revise Order of, the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Graham & Sons and others, bankrupts. On petition by the bankrupts to review and revise an order, on objection of Mary Yore and others, refusing to confirm a composition with creditors, and on appeal by the bankrupts from such order. Appeal dismissed, and, on the petition to review and revise, order reversed, with direction to proceed in accordance with the opinion.

It appears that on June 29, 1917, involuntary petition in bankruptcy was filed against Graham & Sons, partnership, and Frank J. Graham and Ralph R. Graham, the alleged copartners; that on application of bankrupts adjudication was ordered delayed, and that October 23, 1917, petitioning creditors, by leave of court, amended their petition making Minnie P. Graham a party as an alleged copartner with the others; that she filed answer to the amended petition, and an order was entered referring the matter to the referee, and calling a meeting for the allowance of claims and examination of the bankrupts; that January 28, 1918, there was filed a petition for confirmation of an offer of bankruptcy, together with what purported to be the written consents of a majority in number and amount of the scheduled creditors, and deposit made with the clerk of the court of promissory notes and trust agreement and conveyance of property as provided in the composition offer, and the sum of \$160,000 in cash for the payment of claims lawfully entitled to priority, and the costs. The composition offer is as follows:

"We propose to give to each creditor who shall make proper proof of claim a promissory note for the full amount of said claim, signed by Graham & Sons, Frank J. Graham, Ralph R. Graham, and Minnie P. Graham, payable on or before three years after the court shall confirm the proposed composition; said notes not to bear interest until maturity, and to bear interest after maturity at the rate of five (5) per cent. per annum. In order to secure the payment of these notes, we propose to convey to the Chicago Title & Trust Company, as trustee, for the benefit of the creditors holding said notes, all of the property, whether real or personal, and of every kind and nature, belonging to Graham & Sons, Frank J. Graham, Ralph R. Graham, and Minnie P. Graham, or in which they have any interest, subject only to court costs, proper expenses of administration, and the debts entitled by law

to priority. The trust deed will contain the following provisions:

"First. All of our property, including real estate, notes, bonds, mortgages, stocks, cash, and everything else of value, shall be held by the trustee, with full power in said trustee to collect, manage, and convert the same into cash, and as quickly as practical to pay the proceeds, from time to time, to our

creditors upon the said notes so given to them.

"Second. A committee of five, to be selected by the Honorable George A. Carpenter, Judge of the United States District Court (or in the event of his inability to act, then by some other judge of the United States District Court), shall advise with the trustee in the management and disposition of the property and the reduction of the assets into cash, and shall have authority at all times to advise with the trustee regarding the sale of property, the payment of dividends, and other matter of importance that may arise, including questions of costs, expense and fees.

"Third. If the amounts collected by the trustee permit of the payment of

the notes before their maturity, they shall then be paid.

"Fourth. Any property remaining in the hands of the trustee after the payment in full of all notes, costs, expenses, and fees shall be reconveyed to us."

"February 14th was fixed for showing cause why the offer of composition should not be confirmed, and on that day certain creditors appeared in opposition to the petition to confirm, and objections were thereupon filed by about 20 creditors. February 28th bankrupts moved to strike from the files all the objections, on the ground that they were not presented in sufficient time. This motion was overruled, and the court ordered that the petition for confirmation of the composition and all objections thereto be referred to Referee Wean for hearing, and that they be speedily heard and report made.

March 4th and 6th this hearing proceeded to the extent of the opening statements of counsel for the objectors, whereupon adjournment was had until March 8th, when leave was given bankrupts to file exceptions to the objections to confirmation, and motion to strike them out. Whereupon on March 8th the court ordered that the exceptions and motion to strike "be referred to Frank L. Wean, Esq., to hear said exceptions and said motion, and to report to the court his conclusions as to the sufficiency of said specifications of objection and upon said exceptions and said motion to strike out and dismiss."

The subsequently filed report of said Wean states that "thereafter, upon the 11th, 12th, and 13th of March the undersigned heard the oral arguments of counsel in respect to the matters as directed by order of March 8th." The report then discusses at considerable length the exceptions, and concludes that "for the reasons above stated, and those stated in the specification of the objectors, appearing from the composition papers and the petition to confirm, my conclusion is that the specification as a whole is sufficient; that the scheme proposed is not a composition within the reasonable construction of the Bankruptcy Act of 1898 as amended, and that the petition to confirm should be denied."

On the hearing of the report and exceptions to it the court entered this order: "This cause coming on now to be heard upon the report of the special master, Frank L. Wean, heretofore filed herein under order of March 8, 1918, and on the exceptions of the bankrupts and certain creditors to said report, and the court having heard the arguments of counsel and being fully advised in the premises: Now, therefore, it is ordered that the exceptions to said report of the special master be and the same are hereby overruled, and said report of said special master confirmed. And it is further ordered that the court's approval of said offer of composition be and the same is hereby withheld and the petition of the bankrupts for confirmation of said offer is denied, and said petition to confirm dismissed."

John D. Black, of Chicago, Ill., for petitioners. Herman Frank and Lloyd C. Whitman, both of Chicago, Ill., for respondents.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] 1. It is contended for the creditors objecting to the composition offer that this court cannot take jurisdiction of the controversy either on petition to review and revise or on appeal, and much discussion is presented on behalf of both sides respecting the right of review and mode of appellate procedure. We are abundantly satisfied that such is the nature of the order denying and dismissing the petition to confirm the composition offer that any party aggrieved thereat may properly seek relief in a court of review.

In evident doubt as to which of the two methods of appellate procedure provided for in bankruptcy matters is applicable, both have been invoked, and appeal from the order and petition to review and revise are both pending. Section 25a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]) provides for appeals in cases: (1) From a judgment adjudging or refusing to adjudge defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of \$500 or over. Section 24a (section 9608) confers appellate jurisdiction in controversies arising in bankruptcy proceedings as to which there would be appellate jurisdiction in other cases; and

section 24b (section 9608) gives Circuit Courts of Appeals jurisdiction "either interlocutory or final, to superintend and revise in matter of law

the proceedings of the several inferior courts of bankruptcy."

In Re Friend, 134 Fed. 778, 67 C. C. A. 500, this court considered a petition to review and revise an order of the District Court confirming a composition. The decision turned upon whether petition to review and revise was proper in such case. It was held to be improper there because under the law confirmation of the composition discharged the bankrupt from his debts (section 14c [section 9598]), and that appeal was the proper procedure where the order attacked discharged the bankrupt. The question of procedure was again before us in Re Mc-Voy Hardware Co., 200 Fed. 949, 119 C. C. A. 337, which was an appeal from an order of the District Court declining to confirm a proposed composition on the ground that it was unfair to the creditors. It was held that where, as in that case, the proposed composition was rejected upon grounds which did not or could not determine the question of the right of the bankrupt to a discharge, the question of the bankrupt's discharge was not involved in the order, and that such an order was not within the purview of the statute granting the right of appeal, and the appeal was accordingly dismissed.

We see no reason to depart from the principles declared and applied in these cases. In the case at bar the order dismissing the petition for confirmation was predicated wholly upon the proposition of law that the proposed offer was not a composition within the meaning of the Bankruptcy Act, and it in no manner involved the question of the right of the bankrupts to be discharged. Under these circumstances we conclude that what is here involved is a matter of law arising in the bankruptcy proceedings, and is reviewable in this court upon petition to

review and revise, and not on appeal.

2. From the report itself it appears that the issue heard by Referee or Special Master Wean was the one made by the court's order of March 8th, which had to do only with the sufficiency of the specifications of objection to the composition, and bankrupts' motion to strike out and dismiss them. That nothing else was then involved or heard is further apparent from this language of the report:

"The real question to be determined by the court is the sufficiency or insufficiency of the specification of objections as to matters of law and form, whether on its face it sets forth grounds of law or of fact in legal form sufficient to defeat the confirmation of the proposed composition and to apprise the parties and the court of what the proponents of the composition have to meet."

Bankrupts' exceptions and motion which were the subject-matter of the order of March 8th were equivalent to a demurrer by bankrupts to the specifications of objection which had been filed to the composition offer and petition to confirm it; and the hearing under the reference of March 8th was a consideration of that demurrer, and the opinion and report of the referee or special master a recommendation to the court as to the manner of its disposition. The order of the court following the report is predicated directly upon it, and does not purport to be any broader in its scope than the recommendations of the

report itself. But the report (as well as the court's order predicated on it) goes beyond finding, as it does, "that the specification as a whole is sufficient." It makes further finding and recommendation that the offer of composition be not approved, and that the petition to confirm be dismissed—a conclusion which, if warranted, might ordinarily be reached, not upon a finding of the legal sufficiency of the specifications of objection to the proposed offer, but upon a hearing of the merits of

the specifications of objection.

[2] The first specification of the objection to the confirmation of the composition offer is that the composition is not for the best interests of the creditors. This is amplified by voluminous allegations of facts and conclusions; some of the facts appearing of record in the cause, and others not. When the court entered its order predicated upon the report, it amounted to an overruling of the demurrer to this specification, as well as to the other specifications, and so far as concerns the exceptions and motion to strike out the specifications, which were the subject-matter of the order of reference of March 8th and of the hearing which resulted in the order, the situation was as though the exceptions and motion to strike had never been filed; and ordinarily the original objections and the specifications thereof would have stood for hearing, just as they did under the order of February 28th.

[3] Upon those objections and their specifications the objecting creditors, as well as the proponents of the composition offer, were entitled to a hearing, and to the judgment of the judge upon the merits. Section 12c of the Bankruptcy Act (section 9596) requires the date and place to be fixed for the hearing of applications for compositions and objections thereto, and section XXXII of the Supreme Court's General Orders in Bankruptcy (89 Fed. xiii, 32 C. C. xxxi) makes provision for the appearance of creditors opposing application, and for filing specifications of objection. Such provisions imply, of course, the according of reasonable opportunity to all concerned for having objections heard and passed upon.

The theory upon which the referee or special master, after holding the specifications of objection to be upon the whole sufficient, proceeded without further hearing to find and recommend that the petition to confirm the composition be denied and dismissed, as well as that upon which the court adopted such recommendation and entered an order accordingly, is not set forth in the report, except as inferentially it may be gathered from the discussion therein that the demurrer, by way of the exceptions and motion to dismiss the petition for confirmation, was carried back to the offer of composition itself, and sustained thereto upon the ground that the proposed composition offer was not a composition in contemplation of the Bankruptcy Act, and that upon its face the court had not the right, power, or discretion as a matter of law to confirm the composition proposed.

Such a course may be unobjectionable, where it conclusively appears as a matter of law that the original pleading (in this case the offer of composition and petition to confirm) would in no event and under no circumstances, and in no possible state of the proof which might appear upon the hearing of the composition or objections thereto, war-

rant the court in confirming the offer. This must have been, and evidently was, the view of the special master and of the court respecting this composition offer, and looking to the report it seems that the moving consideration for such conclusion is the assumption that the composition offer is upon its face nothing more or less than a general assignment of the property of the bankrupts for the benefit of their creditors, and is therefore under the Bankruptcy Act no offer of composition which the court has any lawful right to entertain. This becomes, therefore, a determining factor in this controversy, for it is plain that the court did not by its action herein undertake to decide whether or not in fact the proposed composition was for the best interests of the creditors, as provided in section 12d of the Bankruptcy Act (section 9596).

[4] That the making of a general assignment for the benefit of creditors is of itself an act of bankruptcy, the Bankruptcy Act unequivocally declares. Section 3a (section 9587). But does it follow of absolute necessity that, bankruptcy having intervened, a proposed composition which, without bankruptcy, would have been the equivalent of a general assignment for the benefit of creditors, vitiates per se such a composition offer? The statute, which is the sole source of authority for composition offers in bankruptcy, provides that "a bankrupt may offer, either before or after adjudication, terms of composition to his creditors," etc. Section 12a (section 9596). It does not undertake to prescribe the kind or character of offer which may be made, nor fix bonds or limitations of any sort. Any offer of composition is within the statute, and when made to the creditors should be disposed of as the statute further specifies. Section 12d provides:

"The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden."

The tests for confirmation thus fixed to be applied by the judge do not presuppose or exclude any particular kind or form of offer, but relate to any offer of composition; and whatever its form or kind, if the judge is satisfied that it meets the prescribed statutory tests, he confirms it, otherwise he rejects it.

From the fact that a general assignment made before bankruptcy is in itself an act of bankruptcy, it by no means follows that a composition offer made after bankruptcy, though the substantial equivalent in its results to the creditors of a general assignment for the benefit of creditors, had it been carried out before bankruptcy, is therefore in law no offer of composition at all. An assignment for the benefit of creditors is the act of the debtor alone, without sanction of any court, and is such an admission of insolvency or of inability to pay that the statute has declared it to be an act of bankruptcy. But, bankruptcy having intervened, the offer of composition, whatever it may be, must under the law first have the assent of a majority in number and amount of creditors and the confirmation of the judge, who shall be satisfied that it is

for the best interests of the creditors. We see no necessary relation between the defeasibility through bankruptcy of a general assignment for benefit of creditors made before bankruptcy, and the validity of a composition offer after bankruptcy, whatever its terms may be.

- [5] That an offer of composition may on its face be suggestive of disadvantage to the creditors as compared with the bankruptcy proceedings does not per se stamp it with invalidity, nor make it proper for the court to reject it without opportunity for its consideration. That a proposed composition would effect merely the transfer of the administration of the bankrupt estate from the bankruptcy court to the bankrupt himself or to a trustee outside of its jurisdiction, without affording any added advantage to the creditors, might furnish a valid and satisfactory reason for concluding that the composition offer is not for the creditors' best interests and for rejecting it. It is within the range of possibility that this or any other offer of composition may have advantages and disadvantages to the creditors not apparent upon the face of the offer itself. While it might not be wholly proper to suggest such here as occur to us, yet whatever they may be, and however improbable that they have existence in fact, it is not necessary that they be set forth in the composition offer itself, in order that the judge may, as is his duty, investigate the merits of the offer and of the objections thereto, and determine its advantage or disadvantage to the creditors. The offer itself need be only what it purports to be, and that which the statute provides for—a statement of the proposed terms of composition.
- [6] The facts and circumstances which bear upon the advisability of confirming the offer are no part of the offer itself, but are properly presentable at the hearing of the offer and of the objections thereto. for which the law makes provision; and it is for the judge then to determine under all the facts and circumstances then appearing, including the nature of the offer itself, whether he is satisfied that the composition "is for the best interests of the creditors." But when in the decision of the preliminary motion to dismiss for legal insufficiency the objections to the confirmation of the offer, the court, though holding the objections sufficient in law, without further hearing dismissed the petition to confirm the composition offer on the ground that there was no lawful composition offer before the court, it deprived the parties of the hearing to which they were entitled, and of the judgment of the judge as to whether or not he was satisfied that the proposed composition was for the best interests of the creditors, and respecting the other statutory propositions on which he is required to pass before confirming or rejecting the offer.

With the conclusion reached by the court that the specifications of objection are as a whole sufficient in law we concur, but we disapprove the order in so far as it rejects without hearing the composition offer, and dismisses the petition to confirm it.

The appeal is dismissed, and on the petition to review and revise the order of the District Court is reversed, with direction to proceed, in accordance with these views, speedily to hear and determine the petition to confirm the composition offer and the objections thereto.

# CUTTING v. VAN FLEET, District Judge, et al.

(Circuit Court of Appeals, Ninth Circuit. June 10, 1918.)

#### No. 3140.

1. CONTEMPT \$\infty 66(1)\to Mode of Review-Appeal or Error.

A proceeding for contempt, arising in connection with a suit in equity, for disobedience of an order made to enforce the rights of a private party, is civil, and is reviewable only by appeal.

2. COURTS \$\iiii 344\$—Contempt—Proceedings for Punishment—Order to Show Cause.

Under equity rule 68 (198 Fed. xxxviii, 115 C. C. A. xxxviii) which provides that, where compensation is allowed to a master by the court, he shall be entitled to an attachment against the party ordered to pay the same, if upon notice he does not pay it within the time fixed by the court, it is discretionary with the court to first issue an order to show cause.

3. CONSTITUTIONAL LAW \$\infty\$83(3)\to "Imprisonment for Debt"\to Imprisonment for Failure to Pay Money.

A commitment for contempt for failure to pay a master's fee awarded by the court, made on application of the master, is not an "imprisonment for debt," but for refusal to obey the order of the court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imprisonment for Debt.]

4. Contempt  $\iff$  60(1)—Proceedings for Punishment—Defenses—Inability to Pay Money.

In a proceeding for civil contempt for failure to comply with an order to pay money, the burden of proof rests on defendant to show his inability to pay, and such inability must clearly appear.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Henry C. Cutting was adjudged guilty of contempt by William C. Van Fleet, District Judge, and brings error adversely to such judge and H. M. Wright, standing master in chancery. Affirmed.

In a suit in equity upon a stockholder's bill against the Monetary Trust Company, a corporation, and Henry C. Cutting, the president thereof, the court below ordered an accounting by Cutting, and referred the matter to the master in chancery for that purpose. The master, after taking and reporting the accounting, petitioned the court to fix his compensation. On January 16, 1918, the court fixed the compensation at \$500, and ordered that it be paid by Cutting within 10 days from that date. A copy of the order was immediately mailed to Cutting's solicitor of record, and on January 27, 1918, the master by letter informed Cutting of the purport of the order, and advised him that, if the order were not obeyed, the court would be asked to enforce the same by process for contempt. On February 11, 1918, the marshal served upon Cutting a duly certified copy of the order, and on February 25, 1918, the order not having been obeyed, the court ordered an attachment to issue, returnable March 4, 1918. The writ was executed, and thereupon bail was given. On March 11, 1918, Cutting presented an affidavit erroneously stating that the order of January 16th had been served upon him on February 19, 1918 (instead of February 11th), and stating that on "said lastnamed date and ever since he has been unable to comply with the court's order, for the reason that he now and during all of said time has not had sufficient means, and is and has been during all of said time financially unable to pay the said sum of \$500." The court below found that Cutting had willfully and without any valid excuse neglected and refused to obey the order of January 16th, adjudged him guilty of contempt of court, and ordered that, unless within five days from that date he should pay the master \$500, with interest and costs, he should stand committed to the marshal's custody until said several sums of money were paid, or until the further order of the court.

Douglas A. Nye, of San Francisco, Cal., for plaintiff in error. H. M. Wright, of San Francisco, Cal., for defendants in error. Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The order of March 11, 1918, is sought to be reviewed here by writ of error. Under the provisions of Act Sept. 6, 1916, c. 448, 39 Stat. 726, the cause will be deemed to be in this court by appeal, since the contempt charged is a civil contempt arising in connection with a suit in equity for disobedience of an order made to preserve and enforce the rights of a private party, and administer the remedy to which he is entitled, and is therefore reviewable only by appeal. Wilson v. Calculagraph Co., 153 Fed. 961, 83 C. C. A. 77; Heller v. National Waistband Co., 168 Fed. 1020, 93 C. C. A. 670; Clay v. Waters, 178 Fed. 385, 392, 101 C. C. A. 645, 21 Ann. Cas. 897; Merchants' S. & G. Co. v. Board of Trade of Chicago, 201 Fed. 20, 26, 120 C. C. A. 582.

[2] It is contended that the summary issuance of attachment, without having first issued an order to show cause upon the appellant, constitutes reversible error. Equity rule 68, (198 Fed. xxxviii, 115 C. C. A. xxxviii) which provides that, when compensation is allowed by the court, the master shall be entitled to an attachment for the amount against the party who is ordered to pay the same, "if, upon notice thereof, he does not pay it in the time prescribed by the court," makes no provision for an order to show cause, and, while an order to show cause may properly be issued in contempt proceedings, the question whether or not it shall issue is one that rests in the discretion of the court. In re Steiner (D. C.) 195 Fed. 299; American Const. Co. v. Jacksonville T. & K. W. Ry. Co. (C. C.) 52 Fed. 937; Fanshawe v. Tracy, 4 Biss. 490, Fed Cas. No. 4,643; United States v. Green, 3 Mason, 482, Fed. Cas. No. 15,256; Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17,210. In the present case there was clearly no abuse of discretion, for the appellant had due notice of all the proceedings from the time of the entry of the original order upon him to pay the master's fees, and made his appearance to show cause, and a rule to show cause could have served no useful purpose.

[3] It is contended that by the order which is appealed from the appellant is imprisoned for failure to pay a debt, and that, since the Constitution of California provides that no person shall be imprisoned for debt in any civil action, except in cases of fraud, etc., and section 990, Rev. Stats. (Comp. St. 1916, § 1636) requires the courts of the United States to conform to the laws of the state in regard to imprisonment for debt, the court below was without jurisdiction to make the order; and the appellant cites Mallory Manuf'g Co. v. Fox (C. C.)

20 Fed. 409, and Nelson, Morris & Co. v. Hill (C. C.) 89 Fed. 477. In the first of those cases it was held that equity rule 82 (now rule 68) cannot be invoked by a party to enable him to collect from the opposite party disbursements for master's fees which could be taxed as part of the costs in the final decree. The court said that rule 82 was for the benefit of the master, and must be enforced upon his application, and for his protection, and that it could not be invoked by a party to the suit. A similar ruling was had in the second case so cited; the court holding that, if an attachment would not be allowed to enforce the payment of the main decree, none could issue to enforce payment of the master's fee.

The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254; Meeks v. State, 80 Ark. 579, 98 S. W. 378; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 216. Rule 68 has taken away the right of the master to hold his report until the payment of his compensation, and has given him in lieu thereof the right to the remedy of attachment. The power to order payment of the master's compensation is essential to the court's procedure, and to the timely exercise of its functions. In 13 C. J. 87, it is said:

"Inasmuch as the constitutional prohibition of imprisonment for debt does not take away the power of the judge to commit to jail for contempt, imprisonment to compel compliance with the mandate of a court, order, decree, etc., is generally authorized if defendant is financially able to comply therewith."

[4] But the appellant contends that by his affidavit he has shown his financial inability to comply with the order. It is true that, in cases of civil contempt for failure to comply with an order to pay money, the defendant may show in defense that he is financially unable to comply. But the showing must be satisfactory, and "the inability to pay must clearly appear." 13 C. J. 20; In re Strong, 111 App. Div. 281, 97 N. Y. Supp. 459, affirmed 186 N. Y. 584, 79 N. E. 1116; In re Murray's Estate, 6 App. Div. 376, 39 N. Y. Supp. 579; Smith v. Smith, 92 N. C. 304; People v. Zimmer, 238 III. 607, 87 N. E. 845. And the burden of proof to show inability to pay is upon the defendant. In re Strong, supra. The appellant's affidavit does not meet these requirements. It states that on February 19, 1918, and ever since, the deponent "has been and is now unable to comply with the terms of said order," for the reason that this deponent has not now, and during all of said time has not had, sufficient means, and is and has been during all of said time financially unable to pay said sum of \$500. There is failure to state that the appellant owns no property, real or personal, out of which \$500 could be realized, or that he has no property concealed, or transferred to others, or other resources out of which he might pay the required sum. This affidavit was made on March 11, 1918. It is notable that in his affidavit of March 1, 1918, presented to show cause why he had not paid the master's compensation, he made no excuse of financial inability, but relied upon the defense that if he paid the master's fees, and the decision of the court were subsequently reversed on appeal, he would lose that sum, for the reason that the plaintiffs were residents of the state of Illinois, and he would be required to expend a greater sum than \$500 to recover back from them the money so paid.

The order is affirmed.

# JOHNSON et al. v. BIXBY et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. May 23, 1918. Rehearing Denied September 11, 1918.)

Nos. 190, 5017.

- CORPORATIONS \$\inserthingsquare 123(11)\to Unauthorized Hypothecation\to Rights of Innocent Pledgee.
  - A brokerage partnership's unauthorized hypothecation of shares of stock indorsed in blank to an innocent pledgee was binding.
- 2. Corporations = 123(24)—Pledge of Stock—Indebtedness.

Where the creditor of an insolvent brokerage partnership on an open account knew, before the account had been closed, a balance struck, and payment rendered, that a large existing debt could not possibly be materially reduced, the existence of an indebtedness was clear, enabling it to foreclose the pledged stock.

3. Corporations = 123(24)—Sale—Amount of Indebtedness.

Where a brokerage partnership pledged its customers' shares of stock, deposited with it, to an innocent pledgee, to secure an indebtedness, the pledgee, on default, could sell any or all of it; but, if it sold it piecemeal, it was required to stop when the proceeds were unquestionably enough to satisfy all possible claims.

4. BANKRUPTCY \$\simes 345\top Proceeds of Sale-Contribution.

Where shares of stock deposited by customers with a brokerage partner-ship were, before bankruptcy of the partnership, wrongfully pledged by it to secure its indebtedness to an innocent pledgee, and after bankruptcy, pledgee sold enough of the stock of customers A and B to pay the indebtedness, and thereafter, in addition, sold stock of customer C, the latter, the proceeds of the sale of whose stock were traceable intact into bankrupt's assets, was entitled thereto without contribution as to customers A and B.

Petition to Revise Order of, and Appeal from, the District Court of the United States for the Eastern District of Missouri; Jacob Trieber and David P. Dyer, Judges.

Contest by James B. Johnson, August Schoellhorn, and Fred F. Bixby for priority in the assets of the bankrupt estate of Payne & Becker, a partnership, as against W. L. Howe, trustee, etc. From the District Court's order, modifying the disposition made by the referee, Johnson and Schoellhorn petition to revise the order, and also appeal from such order. Petition to revise dismissed, and judgment affirmed. Randolph Laughlin, of St. Louis, Mo. (Emil A. Roebke and L. E. Richardson, both of St. Louis, Mo., on the brief), for petitioners and appellants.

Frank H. Sullivan, of St. Louis, Mo. (Jones, Hocker, Sullivan & Angert, of St. Louis, on the brief), for respondents and appellees.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a contest between three parties. Johnson, Schoellhorn, and Bixby, for priority in the assets of the bankrupt estate of Payne & Becker, a brokerage partnership. Each of these three parties had deposited with the bankrupt, under different arrangements and agreements, certain shares of stock, indorsed in blank; none of these deposits, however, authorizing the subsequent use made of the shares by the bankrupt. Shortly after securing the shares the bankrupt pledged them to its Chicago correspondent, Finley, Barrell & Co., as collateral to secure existing and future indebtedness. Some time after this had been done the bankrupt became financially involved. At that time Finley, Barrell & Co. had closed out all of its dealings with the bankrupt, except one small transaction in New England stock. Immediately upon ascertaining the financial difficulties of the bankrupt, Finley, Barrell & Co. proceeded to realize on much of the pledged collateral of all kinds which it held, including the shares of the three parties here involved. In the course of doing this it sold a large amount of collateral not here involved, and the shares belonging to Johnson for \$4.183.50, and those belonging to Schoellhorn for \$12.217. The next day it sold the Bixby stock for \$5,435.50. The sale of the collateral up to the time the Bixby shares were sold was sufficient to pay all indebtedness due from the bankrupt to Finley, Barrell & Co., and leave an excess of \$3,356.65, due the bankrupt. The subsequent closing out of the New England stock (the day following sale of the Bixby stock) resulted in a loss to Finley, Barrell & Co. of \$746.56, thus leaving a final credit due the bankrupt of more than \$2,500, without the proceeds of the Bixby shares, and of \$8,101.65, including such proceeds. This fund, and some shares, not here involved, which had been pledged with Finley, Barrell & Co., but not sold by them, were remitted to the trustee. To this fund each of these contestants lays claim. The referee prorated the fund between the three on the basis of the amounts realized for the respective stocks.

Upon review, the District Court modified this disposition of the amount to payment in full of the Bixby claim and proration of the balance between Johnson and Schoellhorn. A petition to revise and an appeal bring this order before us. Several errors are pressed upon our attention, which will be noticed in turn.

[1] It is said that hypothecation of Bixby's stock by the bankrupt was no greater breach of trust than the hypothecation of the securities of Johnson and of Schoellhorn. Without examining this contention, it may, for the purposes of this opinion, be taken that the bankrupt was without authority to hypothecate any of the stock. The fact, however, is that it did pledge all of it, and, since the certificates were sign-

ed in blank and taken innocently by Finley, Barrell & Co., such pledge

was binding.

[2] It is next contended that the sale of the Johnson and of the Schoellhorn stock was not a valid foreclosure of the pledge, because (a) the open account with Finley, Barrell & Co. was not a debt until the account had been closed, balance struck, and payment demanded, a result, it is claimed, not possible until the New England stock had been closed out, which was after the Bixby stock sale; (b) absence of notice to redeem; and (c) no application of payment until account was balanced several days after the stock sales took place. As to the first proposition, the testimony shows that on the day the Johnson and Schoellhorn stock was sold the status of the account was as follows: It had not been formally balanced upon the books, but the books showed that the bankrupt owed over \$27,000, with but one unfinished item (the New England stock, closed out two days later with a loss of \$746.56). Barrell & Co. knew with fair accuracy upon that date what would be the result of disposing of the New England stock, so that they knew to a certainty that the final debt of the bankrupt could be little altered from what their books then showed it to be. With a large existing debt, which could not possibly be materially reduced, due from an insolvent debtor, the existence of an indebtedness is clear. As to the second proposition, it is enough to say that neither the bankrupt, which made the pledge, nor the trustee, who succeeded to his rights, has complained of any lack of opportunity to redeem. These claimants cannot at the same time contest the pledge and claim protection through it. The third proposition is answered by the testimony showing the credit to the bankrupt account, as of the day of sale, of the amount realized from the Johnson and Schoellhorn stock and other collateral not here involved. This credit overbalanced the then debit by \$3,356.65. We find no objection to the foreclosure and application of this collateral.

[3, 4] Under the title "Potentiality of Payment Does Not Constitute Payment Itself," it is contended there was no application of the proceeds of the earlier sales of collateral until after sale of the Bixby stock, therefore Bixby cannot claim that the sale of his stock was unnecessary; that Finley, Barrell & Co. were not restricted to the debt of the bankrupt, but could collect the entire collateral; that even if there had been full payment as the result of prior sales of collateral, yet Bixby must share in the ultimate fund with Johnson and Schoellhorn on equal terms, because of the doctrine of contribution. above stated, the evidence shows the application of the proceeds of the prior sales before the Bixby sales, and it shows that such prior sales had left a credit far beyond what was necessary to absorb any possible loss upon the New England stock, which was the sole source of liability not then definitely determined. A considerable amount of stock, including all of that here involved, had been pledged for the sole purpose of collaterally securing this indebtedness. The pledgee could sell any or all of it for that purpose. But, if it elected to dispose of the collateral gradually by piecemeal, then it must stop when the proceeds thereof were unquestionably enough to satisfy all possible

claim. The entire purpose of the pledge had then been served, and

any collateral remaining must be returned to the pledgor.

As to contribution, the pledgee had a right to sell the Johnson and the Schoellhorn stock and apply the proceeds, because such action was necessary to pay its debt. So far as this record shows, the other collateral sold that day belonged to the bankrupt. The balance of such proceeds after payment was, so far as the pledgee was concerned, due the pledgor. But as it sprang from stock wrongfully pledged, and can be traced by the owners of that stock, it may be made subject to their superior rights. It is the only fund that can be so followed by them. This measures the maximum residue of their converted property which can be legally identified. The then unsold collateral (including the Bixby stock) was not in æquali jure with the proceeds of the prior sales. This collateral was burdened with no obligation of contribution. It was at that time freed from the pledge. No such obligation originated in the mere fact of a subsequent wrongful sale by the pledgee. No part of the proceeds of the Bixby stock was or. under the circumstances, could properly be applied to the debt. The entire proceeds of that sale remain intact, and can be traced. mere fact that such were transmitted to the trustee in a common sum or payment with the above balance does not lessen Bixby's right therein. It does not create a right in Johnson or Schoellhorn to any part thereof.

The judgment of the trial court was correct, and is affirmed. The petition to revise is dismissed.

WOODS v. LEWELLYN, Internal Revenue Collector (two cases). (Circuit Court of Appeals, Third Circuit. June 18, 1918.)

Nos. 2273, 2274.

1. Internal Revenue &= 7—Income Tax Law—Commissions of Life Insurance Agent—"Income."

Income Tax Act Oct. 3, 1913, § 2, par. A, subd. 1, taxing entire net "income" arising from all sources in the preceding calendar year, and declaring in paragraph B, such income shall include gains, profits, or incomes from salaries, wages, or compensation for personal services of whatever kind, etc., taxes commissions of general life insurance agent derived from renewal premiums on policies obtained by him and accepted in some earlier year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. INTERNAL REVENUE \$\sim 4\$—Federal Income Tax Law—Retroactive Effect.

The federal Income Tax Act, though passed October 3, 1913, could tax income from March 1st of that year.

3. Internal Revenue \$\ifthat{25}\$—Federal Income Tax—Time for Assessment—"False."

Under Income Tax Act Oct. 3, 1913, § 2, par. E, assessment of tax for 1913, in May, 1915, was in time if the taxpayer's return was "false," which evidently does not mean "fraudulent," but merely untrue or incorrect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False.]

In Error to the District Court of the United States for the Western

District of Pennsylvania; Charles P. Orr, Judge.

Suits by Edward A. Woods against C. G. Lewellyn, Collector of Internal Revenue, etc. To review judgments for defendant, plaintiff brings error. Affirmed.

Charles A. Woods, of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., and B. B. McGinnis, Asst. U. S. Atty., both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In these suits the plaintiff, Edward A. Woods, seeks to recover income taxes paid under Act Oct. 3, 1913, c. 16, 38 Stat. 114; one suit being for the 10 months preceding December 31, 1913, and the other, for the year 1914. Both suits were heard on the government's demurrer, and the principal question is the same in each case, namely, whether the tax could lawfully be collected. For each period the collector's assessment was on a larger sum than Woods returned as taxable, but his return (while asserted to have been "false," because not correct) is not charged to have been "fraudulent." He made no concealment of the facts, but appended an explanatory note to the return, containing complete information concerning the money now in question, although the note also insisted that the money was not taxable. The government's position therefore is that the return was not correct, and was therefore "false"; the reason being its failure to include money that should have been there.

The controversy concerns commissions received by Woods during the two periods in question on renewal premiums paid by policy holders in the Equitable Life Assurance Society, and his right to the commissions rests upon three contracts between himself and the society, dated in March, 1896, October, 1899, and November, 1906. For present purposes, they are essentially alike. Since, and probably before, the first of these dates, Woods was one of the society's general agents, having a defined territory, and empowered to appoint subordinates; he was obliged to pay part of the expenses, and his compensation was measured by fixed percentages of the premiums that were actually paid on policies obtained through him and accepted by the society. In each of the returns now in question, he claims to be allowed certain

expenses incurred before March 1, 1913.

[1] In each suit the important question is whether the act of 1913 taxes as income an agent's commissions that were actually received by him within the taxing period, if these commissions were derived from renewal premiums paid on policies that were obtained by him and accepted by the society in some earlier year. In our opinion, the answer is that the act does tax money thus received; the reason being that such money is "income" within the period during which it came into the agent's hands. The act (section 2, par. A, subd. 1) lays a tax on "the entire net income arising or accruing from all sources during the preceding calendar year," and goes on to declare in paragraph B

that such "net income \* \* \* shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or" (evidently in order to include by a drag-net clause any money that might have escaped even the sweeping words just quoted) "gains or profits and income derived from any \* \* " The commissions in controversy appear source whatever. to us to be embraced by this widely inclusive language. No doubt they were earned by work done and money spent in the earlier years; the agent's work was complete when he obtained the application and the society issued the policy; his right to commissions on future renewals came then into being, and he himself was required to do no more. He had earned his pay, and had received a part of it; to the rest, he then acquired a right, such as it was, but no determination could then be made how much the rest would be, and in no event could he receive it except in annual instalments. Although the right had value, it lacked an essential element; no renewal premium might ever be paid, and in that event he would receive nothing more; or renewals might be paid only in part, and then he would be entitled to commission on that part only. The insured might die before a given renewal fell due, or he might allow his policy to lapse, and in either event the right of the agent to future commissions perished. The right, therefore, was contingent; his contracts so provided, for they declared that commission should accrue only as premiums should be paid in cash, and certainly until such payment should be made he had no collectible claim against the society. He had a property right that had value, but contained also an element of risk, and unless he turned it into money it remained contingent. The act taxes money, or its equivalent, or its representative, and a contingent right such as this is not "income" in the senseused by the act. The question has been decided against the plaintiff in the Second Circuit. Edwards v. Keith (D. C.) 224 Fed. 585, affirmed 231 Fed. 110, 145 C. C. A. 298, L. R. A. 1918A, 498, certiorari refused 243 U. S. 638, 37 Sup. Ct. 402, 61 L. Ed. 942. In Lynch v. Hornby, 247 U. S. 339. 38 Sup. Ct. 543, 62 L. Ed. 1149, decided June 3, 1918, it is said "that Congress was at liberty \* \* \* to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the amendment," etc. And see Hays v. Gauley, etc., Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061, decided May 20, 1918.

[2] The other questions need only a few further words. That the act, although passed in October, 1913, could tax the plaintiff's income from March 1st of that year is settled. Brushaber v. Railroad Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. And, if we assume that he has a claim—equitable at least—to be credited for business expenses incurred while he was earning the right to commissions, we can only say that nothing in this

record enables us to ascertain the proper amount. His equitable claim to some deduction may be a ground for action by Congress, but it cannot be a complete bar to the government's claim for a tax that other-

wise appears to be due.

[3] The tax for 1913 was not assessed until May, 1915; but this was in time under paragraph E, if the plaintiff's return was "false." On this point we think the government's position is sound. "False" evidently does not mean "fraudulent," for it is used in opposition to that word; and we think it means not true, or incorrect, as was held by the Circuit Courts of Appeals in the First and the Eighth Circuits in considering the act of 1909. Eliot Nat. Bank v. Gill, 218 Fed. 600, 134 C. C. A. 358; Nat. Bank of Com. v. Allen, 223 Fed. 472, 139 C. C. A. 20.

In each case the judgment is affirmed.

SYMONS, City Recorder, et al. v. UNITED STATES ex rel. MASTERS.

(Circuit Court of Appeals, Ninth Circuit. June 10, 1918.)

No. 3137.

1. MUNICIPAL CORPORATIONS \$\infty\$79—ACTIONS AGAINST—ENFORCEMENT OF JUDGMENT.

Under L. O. L. § 361, which prescribes the method by which judgments against municipal corporations must be enforced, the right of a judgment creditor of a city to pursue such method cannot be affected by anything in the city's charter.

MANDAMUS \$\infty\$=109—Against Officers of Municipal Corporation—Issuance of Warrants.

Under a statute requiring the proper officers of a city to issue warrants in payment of judgments recovered against the city on presentation of the record of the judgment and its satisfaction, it is no defense to an action in mandamus to compel the issuance of such warrants that the city is without funds to pay them.

In Error to the District Court of the United States for the District of Oregon.

Action by the United States, on relation of Charles Masters, against William Symons, as Recorder and Clerk, and William Reid, as Mayor, of the City of Rainier. From an order granting a peremptory writ of mandamus, defendants bring error. Affirmed.

See, also, 238 Fed. 827.

The relator recovered in the court below a judgment against the city of Rainier, Or., for \$9,295.40, with interest and costs. Section 361 of Lord's Oregon Laws provides that, if judgment be given for the recovery of money or damages against a county or other municipal corporation "mentioned or described in section 357" of said laws, no execution shall issue thereon for the collection of such money or damages, but the judgment shall be satisfied by having the judgment creditor present a certified transcript of the docket thereof to the municipal officer charged with the drawing of orders or warrants, after first having satisfied the judgment in full and including in the transcript a memorandum of such acknowledgment or satisfaction and the entry thereof, whereupon such officer shall draw an order on the treasurer for the amount of such judgment and such order or warrant shall then be pre-

Em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sented for payment and paid, with like effect and in like manner as other orders or warrants upon the treasurer. The relator pursued the method prescribed in the statute, caused his judgment to be satisfied, and presented the requisite transcript of the judgment and the docket and the acknowledgment of satisfaction to the plaintiff in error Symons, who was the city recorder of the city of Rainier, and charged with the duty of issuing warrants, and demanded the issuance of an order upon the city treasurer of said city for the amount of said judgment. The recorder, in accordance with instructions received from the council of the city, refused to issue the order or warrant. upon the relator applied to the court below for mandamus, and an alternative writ was issued, compelling said recorder to issue said order and warrant upon the treasurer of said city, and compelling the mayor of said city to countersign the same, or to show cause why they had not done so. On the return day the plaintiffs in error demurred to the writ for want of facts sufficient to constitute a cause of action. The demurrer was overruled, and thereupon the plaintiffs in error answered, setting up certain defenses, and thereafter, on the motion of the relator for judgment on the pleadings, it was ordered that a peremptory writ issue, directed to the plaintiffs in error and requiring them to execute and deliver to the relator a warrant upon the treasurer of the city of Rainier, for the amount of the judgment, interest, and costs. From that order the appeal is taken.

Fred W. Herman, City Atty., of Rainier, Or., and Norblad & Hesse, of Astoria, Or., for plaintiffs in error.

Roscoe C. Nelson and R. C. Wright, both of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the demurrer should have been sustained for want of an allegation in the petition or in the alternative writ that the cause of action on which the relator obtained his judgment was one of those which are enumerated in section 357, Lord's Oregon Laws. It is true that section 361, under which this proceeding was had, refers to section 357, but does so only for the purpose of defining the term "public corporation" as used in section 361. Section 357 defines the causes of action which may be brought by public corporations, but it prescribes no limitation upon the causes of action which may be prosecuted against such corporations, and section 361 requires only that the judgment shall be for the recovery of money or damages against one of the classes of public corporations mentioned in section 357. Again. it is said that the alternative writ is defective for its failure to show whether the relator's judgment was payable out of a special or a general fund. We do not see how the want of such an allegation is material, but, if the alternative writ is defective in that respect, the defect is cured by the answer to that writ, which says that the judgment is payable out of the general fund of the city. There was no error, therefore, in overruling the demurrer.

[1] One of the defenses pleaded in the answer, and now relied upon, is that the municipal charter of Rainier prohibits the expenditure of money by the city, otherwise than from special assessments or funds, unless in pursuance of a special appropriation made for that purpose by ordinance, and that neither of the plaintiffs in error in their official capacity has been instructed by resolution or ordinance to countersign

a warrant for the relator, or to issue municipal warrants to him, and that therefore the plaintiffs in error are powerless to act in the premises. The plain answer to this is the language of section 361. No provision of the charter of a local municipality can avail to abridge or limit the provisions of that section, for it is a general law of the state and is paramount. Straw v. Harris, 54 Or. 424, 103 Pac. 777;

West Linn v. Tufts, 75 Or. 304, 146 Pac. 986.

[2] It is alleged as a further defense that there are no present funds for the payment of the relator's judgment, that the taxing power of the city is limited, that the total maximum of taxes which can be lawfully levied will be required for the payment of the current expenses of the city, and that no money realized from taxes during the year 1918 can be devoted to the payment of the relator's judgment without seriously impairing the efficiency of the municipal government of said city; and it is contended that a writ of mandamus will not issue against city officials to require the issuance of warrants, where the city has no funds with which to pay the same, and that, even if the relator has the technical right to the issuance of warrants, the issuance thereof will place him in no better position than that in which he now is, and the rule is invoked that mandamus will not issue in a case where it will be ineffectual. All this is aside from the question which the record presents. The question here is not whether the city has money with which to pay the relator's warrants when issued, or whether the relator has the power to compel the payment thereof. The sole question is whether or not these plaintiffs in error shall be required to do in their official capacity that which the law plainly commands them to do, and to take the step which is made by statute a necessary step to the realization of the relator's demand. He, upon his part, has complied with the statute. After obtaining his judgment he satisfied the same, and he presented to the plaintiffs in error the necessary record of judgment and satisfaction. He is clearly entitled to receive the warrants of the city for the amount due him. What he shall do with the warrants hereafter is, in this proceeding, no concern of the plaintiffs in error or of the court.

The plaintiffs in error cite cases which hold that mandamus will not issue to compel a city treasurer to pay money when there is no money in the treasury. Such cases are not in point, for here it is not the purpose of the petition or of the writ to compel the payment of money. The purpose is to compel the performance of an act which is plainly required by statute, and the terms of the statute are controlling. Even if there were no such statute, the weight of authority is that the want of funds is no defense to a writ of mandamus to compel the issuance of warrants for debts that are due. Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; State v. Irwin, 74 Wash. 589, 134 Pac. 484, 135 Pac. 472; State v. Hoffman, 35 Ohio St. 435; State ex rel. Jacobs v. Herdman, 28 Del. (5 Boyce) 555, 95 Atl. 549; People v. Secretary of State, 58 Ill. 90.

The order for the peremptory writ is affirmed.

In re CRAMER & ROGERS GROCERY CO. G. H. HAMMOND CO. v. DANENHOWER. SWIFT & CO. v. SAME.

(Circuit Court of Appeals, Third Circuit. July 12, 1918.)

Nos. 2357, 2358.

BANKRUPTCY =166(5)-PREFERENCES-KNOWLEDGE OF CREDITOR.

Receipt by an agent of payment of the claims of two creditors of bankrupt, a grocery company, then actually insolvent, after notification by its attorney that it was in difficulties and that a statement to him by its president was probably untrue, and on the express condition that he surrender the statement, *held* sufficient to sustain a verdict finding the payments preferential.

In Error to the District Court of the United States for the District of

New Jersey; J. Warren Davis, Judge.

Actions at law by John C. Danenhower, trustee in bankruptcy of the Cramer & Rogers Grocery Company, against the G. H. Hammond Company and against Swift & Co. Judgments for plaintiff, and defendants bring error. Affirmed.

Walter H. Bacon, of Bridgeton, N. J., for plaintiffs in error.

Wilson & Carr and Walter R. Carroll, all of Camden, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In these two actions the trustee sued to recover preferential payments. They were tried together, and in each the important question was, and still is, whether the evidence was sufficient to go to the jury. The disputed payments were made to J. H. Loomis, the agent and credit man of each defendant, and the precise question, now and at the trial, is whether the trustee had satisfactorily proved that when Loomis received the money he had reasonable cause to believe that the payment was intended to prefer. On this point the record contains sufficient evidence of the following facts:

The petition in bankruptcy was filed August 21, 1914, and the payments were made on August 5—the Grocery Company being then insolvent—one payment of nearly \$1,200 to the Hammond Company and one of about \$2,700 to Swift & Co. If on August 5 Loomis had reasonable cause to believe that the bankrupt was insolvent, every other element of a preference is present. This is not the usual situation, where an account has been long overdue and a creditor's fears and suspicions have gradually become acute. On the contrary, the essential knowledge that Loomis had, and by which he is to be judged, came to him during two days, August 4 and 5, and in the nature of things it would be more impressive because it was unexpected. He knew that the Grocery Company was the owner of 12 stores in New Jersey, and was apparently doing a prosperous business of several thousand dollars a week. For some months, at least, his principals had

been dealing with the company on the basis of weekly credit, and their bills had been satisfactorily met. The record does not show the items of charge and credit during the period of mutual dealings, but it does show that the oldest item of charge on the Hammond account was July 17, and on the Swift account July 14. How much was overdue on each account does not appear, but in any event the amounts overdue on August 4 were not of long standing, and there is nothing to suggest that either defendant felt any anxiety about payment. Moreover, since July 21 Loomis had in his possession a financial statement made by the bankrupt's president, which showed the company to be solvent by a margin of more than \$50,000. Naturally he felt no uneasiness, and it does not appear that he had even a suspicion that the accounts might be in danger. But on August 4 he received a visit at his office in Philadelphia from an attorney who had close relations with the management of the company, and was told that the company's real condition was such that it could not go on unless its creditors would agree to some arrangement—the reason being that ready money was imperative and could not be had either from the stockholders or from any other source. The defendants' claims were among the largest. and the attorney asked to have them put into his hands; his object being to get control over the situation that was likely to develop. At this unexpected turn of events Loomis produced the statement of July 21, and made it plain to his informant that if the statement was untrue the president might have to face a criminal prosecution. The attorney examined the statement and expressed doubt of its accuracy. Thereupon the claims were put into his hands for immediate collection, and he took them back to New Jersey, where he laid the matter at once before his office associate, who was also the company's attorney and secretary, and by one or both of them the subject was brought to the president's attention. The next day, August 5, the president himself and the two attorneys withdrew from the banks in which the company kept its deposits enough money to pay the two claims and brought the cash to Philadelphia. The reason for taking this unusual step, instead of sending a check to Loomis, or making payment to the attorney in New Jersey, sufficiently appears; they intended to offer the money to Loomis, and they did offer it, on the express condition that the statement should be surrendered, and the payment was not made until the condition was agreed to. Soon afterward the statement was destroyed.

Now, it is fair to say that all this was unusual, and could not be disregarded, as if it were a matter in ordinary course. Clearly it gave Loomis notice that the statement on which he was relying was probably untrue; for, if true, the company could easily pay its debts in the customary way, and the existence of the statement would be of no importance. To demand its surrender as the condition of payment looked much like an admission of its falsity, and of fear that it might be used to support a criminal prosecution. Still further, and of much significance, it was also proved that, while the discussion was proceeding on August 5, the attention of Loomis was expressly called to the

fact that his principals might have to pay the money back, and this could only mean that bankruptcy was so threatening that the payments might turn out to be preferential. These inferences were obvious, and the jury were at liberty to find that a prudent business man should have drawn them, and should have made a further effort to discover the truth. But Loomis made no inquiry, although the three men in his office could have told him exactly what the situation was. They knew that the bankrupt was practically at the end of its resources: that on the very next day the secretary was to meet some of the creditors to discuss a plan for liquidation; and that a bill in equity was either already prepared, or at all events was seriously contemplated, for the appointment by the New Jersey chancery of a receiver on the ground of insolvency, and that in this bill the president and the treasurer were to be parties plaintiff. The bill had been decided upon unless the company should obtain immediate help, and this was known to be out of the question, for the stockholders had refused to furnish more capital, and a purchaser of the business was nowhere in sight. (The bill was filed August 18.) And if he had asked for confirmatory details about the assets listed in the statement, he might have learned the facts that the \$10,000 item of accounts receivable comprised many accounts of long standing, such as no business man of experience would accept as worth more than a small fraction of their face value, and that the item of fixtures and equipment valued them at cost, without charging anything off for depreciation, although no such valuation could possibly be correct.

But, even without inquiry of this sort, the circumstances were such as to point to only one conclusion, namely, that the company's situation was desperate, that in all probability insolvency already existed, and that, while he might be able to force an immediate settlement by the scarcely veiled threat of a criminal prosecution, he would force it at the risk of having the payment set aside as preferential. These inferences were plainly suggested by the facts he knew, and, if he did not actually draw them, the jury had a right to say that a reasonable business man should have drawn them, or must take the consequence of failing so to do. The trial judge was right in submitting this question to the jury, and as the charge was clear and adequate the verdict

is conclusive.

The other questions raised by the assignments of error are of minor importance, and the rulings complained of do not furnish sufficient ground for reversal.

In each case the judgment is affirmed.

### KELLY v. MINOR (two cases).

#### In re KELLY.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

Nos. 1579, 1580.

1. Dower 538-Power of Husband.

Wife's interest in husband's land situated in Virginia is a valuable property right, which belongs to wife exclusively, and of which she cannot be deprived by any act of her husband.

2. BANKBUPTCY \$\infty 262(1) - WIFE'S DOWER - RELINQUISHMENT WITHOUT WIFE'S CONSENT.

In view of Bankruptcy Act, § 47, as amended in 1910 (Comp. St. 1916, § 9631), defining trustee's rights, remedies, and powers as to property in the custody of, and also property not in custody of, bankruptcy court, trustee cannot require relinquishment of wife's dower in the real estate of the bankrupt husband.

3. Dower \$\infty 29-Nature of.

Dower, though called an incumbrance, cannot be otherwise than a contingent estate or interest, being contingent in that it may be extinguished by wife's death before husband, and in that its amount is uncertain and variable, depending on value of property at husband's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dower.]

4. JUDGMENT \$\infty 752-Lien-Change in Value of Property.

A judgment lien is for a definite amount, and is not dependent upon any contingency, or affected by changes in the value of the property to which it attaches.

- Mortgages \$\infty\$=145\topenMortgage Lien\topenChange in Value of Mortgaged Property.
  - A mortgage lien is for a definite amount, not dependent upon any contingency or affected by changes in value of the mortgaged property.
- 6. BANKRUPTCY ==258-PROPERTY SUBJECT TO TRANSFER-MORTGAGED PROPERTY.

Bankrupt's property subject to mortgage lien may be sold by trustee, especially if debt be payable; the mortgagee having no right or claim, except to get the money which is due him.

- 7. BANKRUPTCY € 258—PROPERTY SUBJECT TO TRANSFER—JUDGMENT LIEN.

  Bankrupt's property, incumbered by judgment lien, may be sold by trustee; the judgment creditor having no right or claim, except to get the money due him.
- 8. BANKRUPTCY \$\infty 440\to APPEAL\to Order of Sale of Husband's Real Estate Free of Dower\to Superintendence and Revision.

Appeal cannot be taken from order of sale of bankrupt's real estate freed and discharged of wife's right of dower; such order being reviewable only by petition to superintend and revise.

Petition to Superintend and Revise in Matter of Law Proceedings of, and Appeal from, the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the bankruptcy of Phil G. Kelly. Petition to superintend and revise, and appeal from an order, by Willamena A. Kelly. Appeal dismissed, and order reversed.

For outer cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

James W. Gordon, of Richmond, Va. (Smith & Gordon, of Richmond, Va., on the brief), for petitioner and appellant.

A. B. Dickinson, of Richmond, Va., for respondent and appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and McDOW-ELL, District Judge.

KNAPP, Circuit Judge. The court below, against the protest of the bankrupt's wife, made an order for the sale of his real estate freed and discharged of her inchoate right of dower, with a provision in substance that she should be paid from the proceeds such compensation as the court might thereafter determine to be just. By petition to superintend and revise, and also by appeal, she asserts the invalidity of the order.

[1, 2] The real estate in question is situated in Virginia, and the courts of that state appear to hold that the interest of a wife in the lands of her husband is in the nature of a lien or incumbrance. Strayer v. Lang, 86 Va. 557, 10 S. E. 574; Ficklin v. Rixey, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891. That interest, however, is a valuable property right, which belongs to the wife exclusively, and of which she cannot be deprived by any act of her husband. 2 Minor's Inst. (4th Ed.) 182; Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903. In the latter case it was said that nothing short of the statutory requirements for that purpose will deprive a widow of her right of dower in the lands of her husband of which he was seized and possessed during coverture. And in Clinchfield Coal Co. v. Sutherland, 114 Va. 20, 75 S. E. 765, where the wife refused to join in a conveyance which the husband had made, it was held in effect. as we read the case, that a judgment creditor of the wife could not maintain a suit in equity to compel a sale of her inchoate right of dower for the satisfaction of his debt. This would seem virtually decisive of the case in hand, since the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557) provides, in section 47, as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. 1916, § 9631]), that "the rights, remedies and powers" of a trustee shall be, as to property in the custody of the bankruptcy court, those "of a creditor holding a lien by legal or equitable proceedings," and, as to property not in custody, those "of a judgment creditor holding an execution duly returned unsatisfied." If, then, a judgment creditor of the wife cannot force a sale of her dower right, it must be held that the trustee in bankruptcy of her husband cannot require its relinquishment.

[3-7] It is contended for the trustee that the order under review does not involve the sale of any property belonging to the wife, but only the sale of the bankrupt's property freed from the lien of her inchoate dower. The argument is not convincing. The essential nature of dower is not changed by calling it an incumbrance, for the reason that it cannot be otherwise than a contingent estate or interest in the lands of the husband. An ordinary lien, such as a judgment, mortgage, or deed of trust, is for a definite amount, not dependent upon any contingency, and not affected by changes in the value of the property to which it attaches. Consequently the real estate of a bankrupt sub-

ject to such a lien may properly be sold free and clear, especially if the debt be payable, since the holder of the lien has no right or claim, except to get the money which is due him. But the lien of inchoate dower is of an altogether different character. It is not only contingent, in that it may be extinguished by the death of the wife before her husband, but its amount is uncertain and variable, if she survives, because it depends, not on the value of the property when the husband becomes bankrupt, but on its value at the time of his death. This being so, we are of opinion that the instant case is not taken out of the general rule by the circumstance that the Virginia courts have for certain purposes defined dower as a lien or incumbrance, rather than a contingent estate, for its intrinsic nature must be the same there as elsewhere. And the general rule undoubtedly is that a bankrupt's real estate cannot be sold freed and discharged from the inchoate dower of his wife without her consent. In re McKenzie, 142 Fed. 383, 73 C. C. A. 483; Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080; Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865. In the last-named case the Supreme Court said:

"But, under the provisions of the Bankruptcy Act, all that passes to the assignee by the assignment in bankruptcy, or that can be sold by direction of the court, is property or rights of the bankrupt, or property conveyed by the bankrupt in fraud of creditors."

As we see it, the order in question directs the sale of property belonging to the wife, against her protest, and for a price which she is unwilling to accept; and this in our judgment is without warrant of law

[8] We are of opinion, without discussing the point, that the order is reviewable only by petition to superintend and revise, and upon that petition it must be reversed. The appeal was improperly taken, and will be dismissed.

Reversed.

#### THE NO. 92 et al.

WATER FRONT CONTRACTING & LIGHTERAGE CO. et al. v. GOODWIN-GALLAGHER SAND & GRAVEL CO.

(Circuit Court of Appeals, Second Circuit. May 1, 1918.)

No. 250.

1. SALVAGE \$\infty 37\text{-Recovery-Amount.}

Where a tug in charge of four scows broke down, and had to abandon them at a point where they were in grave danger from tide and reefs, the several scows must be treated in the same condition, and a salvor, which rescued them all, is entitled to the same award for each scow; it being wholly speculative whether the first scow was in greater danger from the reefs than others.

2. Salvage == 26-Elements of Compensation.

In a suit for salvage services, where it appeared the salving vessel was by a court of competent jurisdiction held responsible for injuries

to another vessel during the salvage operations, that finding is conclusive, and the award in favor of the salvor cannot be increased by the amount allowed against it.

3. Salvage \$\infty 24\to Awards\to Amount.

In ascertaining the nature of salvage services, the difficulty and the risk of injuring some other craft should be considered; the problem being, not to award so little as to discourage salvage, or so much as to encourage unnecessary and exaggerated service.

4. SALVAGE \$\infty\$51-AWARD-EFFECT.

The trial court, in making an award for salvage services, has much the duty of a jury, and the amount fixed by it will not be disturbed, if within those limits which define the maximum and minimum which reasonably should be awarded.

5. SALVAGE @==34-AWARD-AMOUNT.

Where a tug broke down and was forced to abandon four scows, worth about \$16,050, and they were in danger from tides and reefs, a salvor, which rescued the scows and brought them to a safe anchorage, *held* entitled to \$600, though the services did not involve any danger and took but little time.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by the Water Front Contracting & Lighterage Company and others against Scows Nos. 92, 102, 118, and 138, and their tackle, claimed by the Goodwin-Gallagher Sand & Gravel Company. From an award, libelants appeal, on account of its insufficiency. Reversed, with directions.

Appeal from the decree of the District Court filed July 7, 1916, awarding to libelants \$190 as compensation for salvage services. The sole ground of appeal is the inadequacy of the award.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellants.

Foley & Martin, of New York City (George V. A. McCloskey, of New York City, and William J. Martin, of Chicago, Ill., of counsel), for appellee.

Before HOUGH, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

MAYER, District Judge. On September 25, 1914, at about 11:30 at night, the tide strong flood and a heavy wind from the west, the steam tug Olympia, belonging to claimant, was bound up through Hell Gate. At the entrance to the Gate, between Mill Rock and Hallett's Point, the Olympia's machinery broke down, and she was therefore forced to abandon four sand scows which she had in tow, thus leaving them adrift to go up in the flood tide through the Gate. These scows were worth about \$16,500. Libelants' steam lighter Sullivan went to the assistance of the scows and towed them into Potts Cove, the nearest and safest place, where she tied them up to a dock. When the Sullivan was turning this rather heavy tow around and stemming the tide, the flood tide swung the rear scow against the side of the scow William Turner, which was moored at the dock, causing dam-

age for which libelants have been held responsible in the sum of \$400. [1] The service rendered by the Sullivan occupied about one-half hour, close to midnight, when there was danger of going aground, and when the salved scows were drifting up through the Gate, with the danger of striking on the Scaley Rocks, and, in such event, if not sunk, then at best fetching up on Casino Beach. For this service the court-awarded \$100 for the first scow and \$30 each for the other three scows, making a total of \$190.

The theory upon which there was a differentiation between the amount allowed for the first scow and the remaining three was that the first scow would bear the blow if the four went on the rocks. Which scow would have suffered the most severe injury is necessarily a matter of speculation, and we are unable to find any basis other than to consider the constituent items of the salved property—i. e., four

scows—as similarly situated.

[2] The service did not involve any danger and took very little time; but it was prompt and effective, and averted the probability either of total loss or substantial injury. In performing the salvage service, the salvors injured the William Turner, as noted supra, and it has been held that such injury was negligently inflicted. This finding by a court of competent jurisdiction cannot now be questioned, and hence The Ashbourne (D. C.) 99 Fed. 111, is inapplicable, and the award in favor of the William Turner should not be added to the award for salvage.

- [3, 4] But in ascertaining the nature of the salvage service it is fair to consider the difficulty of safely landing the tow and the risk run of injuring some other craft, for such risk is an element of hazard quite the same in principle as the risk of injury to the salving boat itself. The circumstances constituting the "main ingredients" in determining the amount for salvage are too well known to need repetition. The Blackwall, 10 Wall. (77 U. S.) 1, 19 L. Ed. 870. The problem usually is not to award so little as to discourage salvage aid, nor so much as to encourage unnecessary or exaggerated service; and, as the trial court, in respect of the quantum has much the duty of a jury, the amount fixed by it will not be disturbed, if within those limits which define the maximum and minimum which reasonably should be awarded.
- [5] In the case at bar, however, we think that the award was wholly inadequate. The case is quite like Stebbins v. Five Mud Scows (D. C.) 50 Fed. 227, except that the danger was greater and the hour later. Taking into consideration the value of the salved property and the nature of the service, we are of opinion that libelant was entitled to three times (in round numbers) the amount decreed below, and therefore that the award should be \$600.

The decree is accordingly reversed as indicated, with costs of the appeal.

#### FORD MOTOR CO. v. CASEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1918.)

No. 5044.

1. Negligence 444—Construction of Passageway to Building—Top of Door to Entrance.

Construction of passageway into automobile assembling building, so that door into passageway was higher than door into interior of building, does not constitute negligence, where building itself was properly constructed for purpose intended.

2. Negligence \$\infty\$66(2)—Driver of Lumber Wagon—Use of Passageway—Contributory Negligence.

Driver of lumber wagon, who was injured while driving on top of load through passageway into building, because top of door into passageway was higher than top of door from passageway into building, where he had several days before driven through same entrance, and knew manner of its construction, and where second door was 15 feet from first, and building was a daylight building, was guilty of contributory negligence.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by George Casey against the Ford Motor Company and another. Judgment for plaintiff, and defendant named brings error. Reversed, and new trial granted.

William F. Gurley and E. G. McGilton, both of Omaha, Neb. (McGilton, Gaines & Smith, David A. Fitch, and L. B. Robertson, all of Omaha, Neb., on the brief), for plaintiff in error.

W. C. Fraser, of Omaha, Neb. (George A. Keyser, R. T. Coffey, and Crofoot, Scott & Fraser, all of Omaha, Neb., on the brief), for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is an action brought by George Casey, as plaintiff, against the Ford Motor Company and C. N. Deitz Lumber Company as defendants, to recover damages for personal injuries received by him through the alleged negligence of Ford Motor Company. The Lumber Company was the employer of Casey, within the terms of the Nebraska Workmen's Compensation Law (Laws 1913, c. 198), and it only seeks in this action to reimburse itself for moneys paid to the plaintiff under that law. The action, then, is really between the plaintiff and the Ford Motor Company, hereafter called defendant. The plaintiff assigns as error the refusal of the court to direct a verdict in its behalf. The trial court did take from the jury, whether rightly or wrongly cannot now be considered, all grounds of negligence excepting one. This ground was stated in the complaint as follows:

"That the Ford Motor Company, defendant herein, shortly before July 26, 1916, had constructed a large building for carrying on its business at Sixteenth and Cuming streets, Omaha, Neb.; that said building was so constructed that the entrance to same for the purpose of delivering lumber, such

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

as that delivered by the plaintiff herein, was on the west side of said building through a door large enough to drive through with a team and wagon; that said building was so constructed that a party driving therein, before reaching the interior of said building proper, was obliged to drive through an entrance or passageway slightly wider than the space required for the passage of a team and wagon, and about 10 feet in length; that at the end of said passageway, before entering into the building proper, there was located a door which was slightly wider than the room necessary for the passage of a team and wagon; that the doorway at the entrance of said building was 8 feet 11 inches high, and the doorway at the entrance from said passageway into the building proper was 8 feet 51/2 inches in height, and said Ford Motor Company negligently and carelessly constructed said passageway and the door leading into the main part of said building in an unsafe and dangerous manner, for the purpose of driving into and through said passageway and door with loads of lumber similar to the one driven by the plaintiff herein."

The trial court, after stating to the jury that this claim of the plaintiff was the one claim on which he was entitled to go to the jury, further said to them:

"The only claim he has got against the Ford Motor Company is in the charge that the entrance was defective. And in the evidence it appears that his claim is that it was built in such a way that, when approaching it with a load, he could not see either, he claims, the second door beyond the first, or the fact that the second door on beyond the first, further into the building, was six inches lower than the one in the outer wall of the building. Now that is his claim."

The jury returned a verdict in favor of the plaintiff.

[1, 2] The evidence shows that Casey had driven into the building through the entrance complained of several days before his injury with a load of lumber and found no difficulty in so doing. On the day in question he had a load of 2,500 feet of lumber piled upon a wagon and Casey himself sat upon the lumber. By ducking his head, he was enabled to pass through the first entrance, but was injured in attempting to pass through the second door; the top of the same being, according to the testimony, 5½ inches lower than the first door. The proposition then is this: There being no evidence on the part of any one that the building was not properly constructed, taking into consideration the purposes for which it was erected, namely, for the assembling and repair of automobiles, is the fact that Casey was injured sufficient evidence of negligence or faulty construction to sustain the verdict of the jury? The defect in the construction of the building, when reduced to its last analysis, is that the top of the second door was 5½ inches lower than the top of the first door. The evidence shows that the floor between the first and second doors slightly inclined toward the second door, the distance between the two doors being 15 feet. Whether the discrepancy between the height of the two door openings was because of this incline does not appear, nor is it material. It was the duty of the Ford Motor Company, in constructing the building, to use ordinary care to see that the passageway which was intended for teams and wagons was reasonably safe for the purpose for which it was intended to be used. The law would not require the Ford Motor Company, in the exercise of ordinary care, to provide an entrance through which all teams and wagons, however loaded, or however high, could

pass with safety. It would be impossible to do so in constructing a building for the purposes mentioned. Whether or not the Ford Motor Company exercised ordinary care in the construction of the passageway cannot be left to depend upon the varying heights of different loads that may attempt to pass through the passageway. Casey passed through safely with one load of lumber, and then, in attempting to pass through with a much higher and heavier load, with himself upon the load, was injured. How can any rule of law be laid down as defining the duty of the Ford Motor Company, if the heights of the loads passing through the passageway in question are continually changing? If the company should find in the exercise of ordinary care that a certain door space was high enough to allow the passage of an ordinary load of lumber through the same, would the law also require them to provide for a high load of lumber, and not only a high load of lumber, but a man sitting on the lumber? As has been said before, there is no evidence tending to show that the passageway was not constructed in accordance with the best knowledge obtainable. If we are to concede, however, that the fact of injury was evidence sufficient to take the case to the jury, we are further of the opinion that, taking into consideration Casey's knowledge of the construction of the passageway, and the further fact that the building itself was what is known as a daylight building constructed of steel and glass, with metallic frames, and that there was a distance of 15 feet between the first and second doors, that Casey was clearly guilty of contributory negligence in attempting to force his way through the second door.

The judgment below should be reversed, and a new trial granted;

and it is so ordered.

# UNITED STATES, for Use of SAMUEL HASTINGS CO., v. LOWRANCE et al.

(Circuit Court of Appeals, Eighth Circuit. June 28, 1918.)

# No. 4924.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by the United States of America, for the use of the Samuel Hastings Company, against W. T. Lowrance and others, composing

the firm of W. T. & E. M. Lowrance & Co., and others. To review a judgment (236 Fed. 1006) sustaining a demurrer to the complaint, plaintiff brings error. Reversed and remanded.

C. L. Marsilliot, of Memphis, Tenn. (Walter C. Chandler, of Memphis, Tenn., on the brief), for plaintiff in error.

Henry Craft, of Memphis, Tenn., for defendants in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. This is an action upon the bond of a contractor for prompt payment "to all persons supplying labor and materials in the prosecution" of a public work. Act Aug. 13, 1894, c. 280, 28 Stat. 278, amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811. The contract was for the construction of a levee along the Mississippi river in Eastern Arkansas. The complaint stated that a subcontractor for a part of the work necessarily used a large number of horses and mules in hauling and dumping earth for the embankment, and that the claimant's demand was for hay, grain, salt, and feed furnished for and consumed by the animals while so employed. The trial court held that the materials were not within the statutory bond and sustained a motion to dismiss. 236 Fed. 1006.

[1] The act of Congress and the surety bonds given according to its provisions should be liberally, not narrowly, construed. The typical lien laws of the states and the decisions of the courts upon them should for the most part be put aside. Generally they limit the labor to direct employment on the work and the materials to those which have become constituents of the completed structure. The language of the act of Congress, "labor and materials in the prosecution of the work," is of broader import and embraces much that is not directly reflected or physically discernible in the resulting permanent structure. It is sometimes difficult to determine whether given labor or materials have relation to the object of the contract and the process of its accomplishment sufficiently intimate for protection. Cases vary so greatly that no definite rule of exclusion and inclusion can safely be stated. Much depends upon the character of the public work, the scope of the contract, and the circumstances of its performance. Sometimes the last of these factors is not given its due influence.

The following have been held included: Trucking from a steamer landing on an island where the work was to be done to the particular locality of the work. American Surety Co. v. Lawrenceville Cement Co. (C. C.) 110 Fed. 717. Coal supplied to a contractor and used to operate hoisting and pumping engines employed in the performance of a contract for the construction of a dry dock. City, etc., Trust Co. v. United States, 147 Fed. 155, 77 C. C. A. 397. Drawings and patterns made for the contractor constructing a steam vessel for the United States, from which to make molds and castings; also towing in the delivery of materials, wharfage paid in connection with such delivery, and the local transfer or hauling of materials. Title Guaranty & Trust Co. v. Engine Works, 163 Fed. 168, 89 C. C. A. 618. The case last cited was affirmed by the Supreme Court. Title Guaranty &

Trust Co. v. Crane Co., 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72. Use of equipment in the erection of a naval training station. United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409. In affirming this case the Supreme Court said:

"The specific objection made to the claim of the United States Equipment Company, for rental of cars, track, and equipment used at the Naval Training Station and the expense of loading the plant and freight thereon to and from the station, is also unfounded. The Surety Company contends that this is not supplying 'labor and materials.' The equipment was used in the prosecution of the work. Material was thus supplied, although, a loan serving the purpose, no purchase of it was made. The expense of loading and freight were properly included with the fixed rental as recoverable under the bond."

Labor in stripping a quarry 50 miles from a breakwater under contract, transportation of the rock, labor of carpenters and blacksmiths in repairing the cars used in the transportation and the tracks upon which the cars moved, also the wages of stablemen who fed and drove the horses which pulled the cars. United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200; Id., 189 Fed. 339, 111 C. C. A. 71, as explained in Brogan v. National Surety Co., 246 U. S. 257, 38 Sup. Ct. 250, 62 L. Ed. 703.

[2] In the case at bar the contractors undertook, not only to complete an embankment or levee according to specifications, but also to furnish the necessary "plant" to the satisfaction of a government official; and power was reserved to the latter to employ additional plant, if progress under the contract was not satisfactory. Although the complaint does not set forth the actual situation at the levee, it may be reasonably inferred on a motion to dismiss that the plant to be assembled for the work included teams as well as wagons, scrapers, axes, stump pullers, and the like. Teams brought together for such work are more naturally classified with implements than with workmen, and feed for the teams so employed with fuel for power than with the board of men whom the circumstances of employment leave free to exercise an independent choice. It is said that it would have been necessary to feed the teams, whether they were working or not. But that is not the test, as is shown by Brogan v. National Surety Co. In that case the location of the work made it necessary for the contractor to provide board and lodging for the men on the ground. He did so under an arrangement by which he was to deduct a stated amount monthly from their wages. Protection under the statutory bond was given one who furnished him with groceries and provisions. It was held that the supplies had a proximate relation to performance of the contract work. Though the circumstances of the case before us are not fully stated, we do not think it can be said from the face of the complaint that the furnishing of the feed for the teams was a casual transaction, but indirectly related to the performance of the levee contract. It is averred that the feed was "used and consumed in the prosecution and execution of the earthwork."

The judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

# DEVOST v. TWIN STATE GAS & ELECTRIC CO. et al. CITY OF BERLIN v. DEVOST.

(Circuit Court of Appeals, First Circuit. June 6, 1918.)
Nos. 1297, 1298.

Costs 5-18-Federal Courts-Lack of Jurisdiction.

Where plaintiff, in order to get jurisdiction in federal court against citizen of same state, impleaded latter after having brought action in first instance against corporation of another state, Circuit Court of Appeals, in reversing judgment of District Court and dismissing action for lack of jurisdiction, may direct latter court to enter judgment, under Judicial Code, § 37 (Comp. St. 1916, § 1019), for costs of both courts against plaintiff.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

On petition for limited rehearing. Petition denied. For former opinion, see 250 Fed. 349, — C. C. A. —

Before DODGE and JOHNSON, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. By petition for a limited rehearing, Joseph O. A. Devost, plaintiff below, seeks to review the order of this court so far as it directs the District Court to enter judgment for costs of that court.

Section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. 1916, § 1019]), by its express terms, is applicable equally to suits commenced in a District Court and to suits removed from a state court, and concludes, "and shall make such order as to costs as shall be just."

In Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462, cited in our former opinion, it was said of Act March 3, 1875, c. 137, § 5, 18 Stat. 472, the basis of section 37:

"These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs. McIver v. Wattles, 9 Wheat, 650 [6 L. Ed. 182]; Mayor v. Cooper, 6 Wall. 247 [18 L. Ed. 851]."

The requirement by section 29, Judicial Code (Comp. St. 1916, § 1011), of a bond in removal cases "for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto," does not give, but assumes and recognizes, power in the District Court to award costs—a power granted by section 37. We find in section 37 no ground for the distinction which the petitioner makes between the power of the District Court to award costs in removed cases and the power to award costs in cases originally brought in the District Court. It may be said, however, that there are many cases in which the courts apparently have overlooked the purpose of Act March 3,

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1875, c. 137, § 3, 18 Stats. 470, as above set forth, and even after the passage of that act have applied the former rule which Act March 3, 1875, was designed to avoid. Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451, gives special emphasis to the rule of the earlier cases, but does not consider the question of the power of the District Court under Act March 3, 1875, and the decision was very carefully confined to the question whether, when a Circuit Court dismisses a suit for want of jurisdiction, it can give a decree for costs, including a fee in the nature of a penalty. We are unable to regard that case as an authority which requires us to ignore the plain language of section 37.

It is to be noted that provision is made for cases in which, when brought or removed, the lack of jurisdiction may not appear immediately, and that if it shall appear, "at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said" court, it may then "dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Phœnix-Buttes Gold Mining Co. v. Winstead (D. C.) 226 Fed. 863, was a suit brought in the District Court, and costs were allowed. That court observed concerning authorities cited:

"While these cases represent instances of remand, the statute puts both classes in the same category, and under its language the provision as to costs is equally applicable to both."

See, also, Robinson v. Anderson, 121 U. S. 522, 7 Sup. Ct. 1011, 30 L. Ed. 1021.

As originally brought in the District Court, the lack of jurisdiction in the present case did not appear, but first arose upon the plaintiff's joining an additional party and amending his declaration to make the action joint.

While it cannot be said that the parties to the suit were collusively joined, it appeared by the record that parties to said suit were improperly joined for the purpose of creating a case wherein a citizen of the same state as the plaintiff should be sued in the federal court in a joint controversy not properly within the jurisdiction of said court.

In our former opinion cases are cited in which the Supreme Court and this court exercised the power to direct the District Court as to what order it should make concerning costs of that court. As the District Court, under section 37, has the same power in removed cases and in cases brought originally in that court, so this court has power to direct the District Court to give judgment for costs in cases erroneously brought, as well as in cases erroneously removed.

We think it just that the costs of both courts should be borne by the party who erroneously invoked the jurisdiction of the District Court (Houston v. Filer & Stowell Co., 105 Fed. 538, 44 C. C. A. 583; Id., 104 Fed. 163, 43 C. C. A. 457), and that we have the same power to direct the District Court to enter such judgment as to costs as

we deem proper, as has been commonly exercised by the Supreme Court and by this court in respect to cases improperly removed.

Petition for a rehearing denied.

# WARD v. CENTRAL TRUST CO. OF ILLINOIS (two cases).

#### In re MORRISON.

(Circuit Court of Appeals, Seventh Circuit. June 26, 1918.)

#### Nos. 2601, 2606.

- 1. RECEIVERS \$\iiiins 16-Protection of Property Pending Littigation.

  The right of a court of chancery, pending outcome of a suit therein, to protect property in issue, as accrued and accruing rents of realty, and preserve its status, by appointment of a receiver, is clear.
- 2. Appeal and Error \$\infty\$=955—Review—Discretion of Court.

  Action of chancery court, in appointing receiver to protect property pending suit, involves its discretion, and its action will not be disturbed, unless the discretion is abused.
- 3. BANKRUPTCY \$\iff 446\)—REVIEW—DECISION OF MOOT QUESTION.

  On petition to review in bankruptcy matter, Circuit Court of Appeals will not decide issues which have been rendered moot by receipt and possession by clerk of District Court of certain rents under order in chancery suit, found on appeal to have been proper.

Petition to Review and Revise Various Orders of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Edward W. Morrison, bankrupt, wherein the Central Trust Company of Illinois was appointed trustee. On petition by James R. Ward to review and revise various orders. Suit by James R. Ward against the Central Trust Company of Illinois, trustee in bankruptcy of Edward W. Morrison. From an order, Ward appeals. Order involved in the appeal in the chancery suit, and orders involved in the petition to review and revise in the bankruptcy proceeding, affirmed.

James R. Ward, of Chicago, Ill., for petitioner and appellant. James Rosenthal, of Chicago, Ill., for respondent and appellee. Before ALSCHULER and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Petition in bankruptcy against Morrison was filed August 8, 1916, and the Central Trust Company was appointed receiver. On representation of the receiver that James R. Ward was holding real estate which actually belonged to Morrison, on August 23, 1916, the court made an order restraining the tenants of the real estate from paying rent to any other than the receiver, and directing its payment to the receiver until further order of the court.

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It does not appear that any of the rents came into the hands of the receiver, and on February 27, 1918, the court entered a further order, modifying the first order, and directing the tenants to pay the accrued and accruing rent to the clerk of the court, in pursuance of an order of same date made by the District Court in a chancery proceeding as hereinafter referred to. The action of the court in entering these orders in the bankruptcy proceeding is the subject-matter of petition for review involved in the first above named cause.

The second is an appeal from an order of the same District Court, entered February 27, 1918, in a chancery proceeding commenced therein by the trustee in the Morrison bankruptcy, who had filed a plenary bill against Ward and the tenants, charging that Morrison had, prior to the bankruptcy proceeding, conveyed the real estate to Ward in fraud of his creditors, as well as by way of preferring Ward in the payment of certain claims which Ward alleges he had against Morrison, and praying for an accounting, and that Ward be temporarily and permanently restrained from disposing of the real estate, and from collecting the rents, and that a receiver be temporarily appointed to collect the accrued and accruing rents, those accrued being alleged to be all the rents earned from and after the date of filing the petition in bankruptcy. The order entered by the court directed the tenants of the real estate to pay to the clerk, and directed the clerk to receive, hold, and deposit in responsible banks all the accrued and accruing rents of the real estate, specifically enumerating those for September, 1916, and each and every month thereafter, for disposition as the court may direct.

[1, 2] It is contended for appellee that appeal does not lie from this order. But assuming, without determining, appealability, we meet appellant's complaint that the order was in any event unwarranted. The right of a court of chancery, pending the outcome of a suit therein, to protect property in issue and preserve its status, is clear. M. & M. Ry. Co. v. Soutter, 154 U. S. 540, 14 Sup. Ct. 1158, 17 L. Ed. 616; Sage v. Memphis, etc., Ry., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694. Such action on the part of the court involves the exercise of its discretion depending upon the particular facts and circumstances of each case, and if upon review it does not appear that the court abused its discretion in that regard, its action will not be disturbed. See cases cited above. Examination of the moving papers upon which the District Court acted in making the order, as appears from the transcript, not only fails to show that its discretion was abused, but, on the contrary, convinces us it was reasonably and wisely exercised; and we find no ground for disturbing the order of the court in chancery from which the appeal herein is taken.

[3] The receipt and possession by the clerk of these rents under the order in the chancery suit being thus found to be proper, there is no need for further considering or deciding the issues raised by the petition for review in the bankruptcy matter, these being now moot, and their decision would serve no useful purpose in this litigation.

The order of the District Court involved in the above-mentioned appeal in the chancery suit, and the orders of the district court involved

in the above-named petition to review and revise in the bankruptcy proceeding, are both affirmed.

Judge Kohlsaat, since deceased, sat at the oral argument, and on con-

ference concurred in this result, but did not see the opinion.

### THE NEPTUNE.

(Circuit Court of Appeals, Second Circuit. April 25, 1918.)

No. 247.

1. United States Marshals \$\infty 11-Fees-Agreement.

There can be no legal agreement for a marshal to charge more than \$2.50 per day for keeping an attached vessel, the fee limited by Rev. St. § 829 (Comp. St. 1916, § 1386); section 823 (section 1375) providing the "following and no other compensation" shall be allowed marshals.

2. United States Marshals \$\iiiin 21\$—Fees—Keeping Attached Vessel.

The \$2.50 per day for keeping an attached vessel, by Rev. St. \$ 829 (Comp. St. 1916, \$ 1386), allowed a marshal, covers only cost of custody proper; and, she sinking without his fault, a charge for raising and beaching is proper.

3. Admiralty \$= 125-Taxation of Costs-Reference-Issue of Fact.

A marshal's charge for raising an attached vessel being contested on the ground that she sank through his fault, the matter must be referred, and cannot be determined on affidavits.

Appeal from the District Court of the United States for the Southern District of New York,

Libel by Verdon & Co. against the steam tug Neptune. From an order retaxing the mashal's fees and expenses, libelant appeals. Reversed and remanded, with instructions.

Appeal from an order of the District Court retaxing the marshal's fees and expenses in the custody of the Neptune, arrested by him on April 19, 1917, and sold on May 28, 1917. While in his custody for a part of the time, he employed one keeper at \$5 per diem, and for the rest two at \$2.50 each per diem. On the day of the arrest the libelant wrote a letter to the marshal, authorizing him to place two keepers on the tug until further notice. The libelant asserts that he was required to give such an authorization as a condition of arrest. This the marshal denies. Other lienors besides the libelant intervened, who claim that as to them in any event the authorization is invalid.

The Neptune, while moored at the pier, sank, and the marshal was at substantial expense in raising and beaching her. The lienors urge that these expenses are not properly chargeable, because the Neptune was left in an exposed place, subject to be pounded against the sides of the piers, so that her seams opened. This disputed issue was presented only upon affidavits.

Mark Ash and J. P. Nolan, both of New York City, for appellants. John Hunter, Jr., of New York City, for appellee.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] The appellee does not contend that, without the libelant's au-

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thorization, the marshal has the right to charge more than \$2.50 per diem for the custody of the vessel. Indeed, such a contention would, if made, be in the face of the statute (R. S. §§ 823, 829 [Comp. St. 1916, §§ 1375, 1386]), which expressly limits the marshal's allowance to that amount. Such has been the uniform ruling of the District Courts for the Southern and Eastern Districts of New York, and the question admits of no debate. The Perseverance (D. C.) 22 Fed. 462; The Captain John (D. C.) 41 Fed. 147; The F. Merwin, 10 Ben. 403, Fed. Cas. No. 4,893. Furthermore, since the fees are fixed by statute, under settled rules no agreement is valid by which they are changed. Hatch v. Mann, 15 Wend. (N. Y.) 44; Gilman v. Des Moines Valley R. R. Co., 40 Iowa, 200; Phœnix Ins. Co. v. McEvony, 52 Neb. 566, 72 N. W. 956; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679; Price v. Lancaster County, 189 Pa. 95, 41 Atl. 987 (obiter); Burke v. Webb, 32 Mich. 173, 182; Carpenter v. Taylor, 164 N. Y. 171, 58 N. E. 53. In Crofut v. Brandt, 58 N. Y. 106, 17 Am. Rep. 213, the limitations upon the sheriff in such matters are discussed with learning. The doctrine goes back to English cases before the Revolution, which may be found collated in Hatch v. Mann, supra. Hence we find that no legal agreement could exist which would authorize a recovery by the marshal of more than \$2.50 per diem for keeping a vessel. The amount may be inadequate under present conditions, but it is fixed by law, and we have no power to change it.

[2, 3] However, this fee comprises only the cost of the custody proper of the vessel; it does not cover the marshal's expenses for wharfage (The F. Merwin, supra), or the like (The Nellie Peck [D. C.] 25 Fed. 463). If the vessel sank without fault of the marshal, he would be responsible for her protection, and his charges for raising and beaching her would be proper. Indeed, the libelant and the lienors do not dispute this, or contend that the charge of \$2.50 per diem would cover such services. Their position is that the marshal was at fault for leaving her where she was. It is clear that this issue cannot be satisfactorily disposed of upon affidavits. If the parties wish to contest the charge, the matter must be referred, so that evidence may be taken and the issue properly determined. If not, the charge must be allowed.

The charge of \$5 is proper when the marshal draws and executes a deed; if the party draws it, as he may, the charge is only \$1. R. S. § 829.

Order reversed, and cause remanded, with instruction to retax the costs as above provided.

# WHITE, Immigration Com'r, v. TAM SEN. (Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

No. 3124,

ALIENS \$\infty 32(13)\to Jurisdiction-Immigration Proceedings.

Where S., applying for admission as native-born citizen of United States, produced, when examined under Chinese Exclusion Acts, certified copy of court discharge in habeas corpus, and commissioner of immigration denied admission upon sole ground that applicant was not person described in court discharge, United States District Court had jurisdiction to adjudicate the matter of identity; decision of immigration authorities not precluding such inquiry.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Proceedings by Tam Sen against Edward White, as Commissioner of Immigration at the Port of San Francisco, Cal. Decision in favor

of the former, and the latter appeals. Affirmed.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

George A. McGowan, of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Under the name Tam Sen, appellee arrived in San Francisco on the steamer Costa Rica February 15, 1917, and applied for admission as a native-born citizen of the United States. After examination under the general immigration laws he was found admissible. He was then examined under the Chinese Exclusion Acts, where he provided a certified copy of a court discharge issued to Tam Sen in a proceeding, No. 6411, before the United States District Court for the Northern District of California upon December 17, 1888. The commissioner of immigration for the port of San Francisco denied admission upon the sole ground that appellee was not the Tam Sen described in the court record No. 6411.

The principal point is: Did the District Court have jurisdiction in this proceeding to determine the identity of the person to whom the proceedings, entitled "In the Matter of Tam Sen on Habeas Corpus," No. 6411, had in 1888 applied? The position taken by counsel for the government is that whether appellee is the identical person referred to in the District Court proceedings had in 1888 was one for determination after hearing by the proper immigration authorities, and that, the matter having been decided by such authorities, the courts have no power to adjudicate in the premises. Of course, it is thoroughly well established in general that in respect to persons of Chinese descent asking admission the decision of the executive officers is final, "whatever the ground on which the right to enter the United States is claimed, as well when it is citizenship as when it is domicile, and the be-

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longing to a class excepted from the exclusion acts." United States

v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

But the exact point involved upon this appeal is to be distinguished, in that the question herein was not as an original matter whether appellant was a citizen or otherwise entitled to enter the United States, but solely whether he is the identical person, Tam Sen, named in the judicial record which he produced, and whose right to enter had been judicially determined nearly 30 years ago by the same court in which the present proceeding was pending. Within this confined issue the parol evidence which appellee offered in connection with the court record was admitted for the purpose of establishing the identity of the individual named in the record produced with the person named in the habeas corpus proceeding before the court. The course taken by appellee was because the action of the executive officers made it necessary for him to show that the former court record had direct relation to the present proceeding, in that the person who, by such former decision, had been held to be illegally detained, was the identical person complaining that he was now unlawfully detained.

Notwithstanding the fact that the executive officers held that there was lack of identity, we believe the court has the power to hear and determine such an issue, to the end that it may protect a person in the enjoyment of his previously legally established right to be in the United States. United States v. Chin Len, 187 Fed. 544, 109 C. C. A. 310. The question of the identity of appellant may have been—doubtless was—properly first for consideration and determination by the executive officers, but in our opinion their decision did not preclude inquiry by the judicial power into the applicability of the court record to the

person claiming to be affected thereby.

Upon the merits of the matter there was a difference in the opinions among those who testified before the court and the immigration officers; but the learned judge of the District Court, after hearing and observing the witnesses and hearing in detail the story of the petitioner, was "thoroughly satisfied" that the immigration officers had made a mistake, and that petitioner is the man whose rights had been adjudged in the former proceeding. We are impressed by the belief that the question of identity was justiciable, and that the correct result was reached.

Affirmed.

# SOLTER et al. v. LEEDOM & WORRELL CO. et al. In re CHARLES WACKER CO.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1918.) No. 1564.

Sales \$\infty 1(4)\to Definiteness of Contract-Price.

Contract of sale of a certain new packer's standard tomatoes, price guaranteed against decline, to date of shipment, of packs of standard tomatoes of named well established and known packers, under rule that that is definite and certain that can be made so, is not too indefinite as to price, which is the lowest market price reached; standard tomatoes having a market value to the same extent and degree as grains.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore, in bankruptcy; John C. Rose, Judge.

In the matter of the Charles Wacker Company, bankrupt. From the District Court decree (244 Fed. 483), reversing the referee's order disallowing claims of the Leedom & Worrell Company and others, the trustees, George A. Solter and another, appeal. Affirmed.

Richard S. Culbreth, of Baltimore, Md., for appellants.

Alexander Hardcastle, Jr., and Carl R. McKenrick, both of Baltimore, Md. (Bartlett, Poe & Claggett, of Baltimore, Md., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and CON-NOR, District Judge.

WOODS, Circuit Judge. In the course of the bankruptcy of the Charles Wacker Company, the District Court held, contrary to the contention of the trustee, that the following instrument constituted a contract sufficiently definite to bind the bankrupt for damages for its breach.

"A. E. Kidwell & Company, Canned Goods Brokers, 125 Cheapside, Baltimore. Md.

"Sold to J. M. Radford Gro. Co., Abilene, Tex., for account of the Chas. Wacker Co., Baltimore, Md.:

"4,000 c/s No. 2 Wacker's Best Brand future 1916 packed

.60 per doz. standard tomatoes, in sanitary tins..... "1,000 c/s No. 3 Wacker's Best Brand future 1916 packed

standard tomatoes, in sanitary tins..... .80 per doz. Prices guaranteed against decline of the following reliable packs of stand-

ard tomatoes to date of shipment: Roberts Bros., Big R Brand, Numsen's Clipper Brand, Langrall's Maryland Chief Brand, Schall's Terrapin Brand, McGrath's Champion Brand, Torsch's Peerless Brand, Foote's Compass Brand, Booth's Oval Brand.

"Terms: Cash less 11/2% in 10 days f. o. b. Balto. Usual guaranty of six months against swells and leaks. Goods guaranteed to comply with the national Pure Food Laws.

"Ship: 100% delivery guaranteed.

"Shipment at packer's option during packing season.

"A. E. Kidwell & Co., Brokers, "J. M. Radford Grocery Co.,

"E. G. Boyer, Sect'y.

"1/24/16 Baltimore. Accepted: The Charles Wacker Co., "Chas. Wacker."

The trustee appeals, insisting that there was no contract because the price was too indefinite.

When parties sign an instrument intended by them to be a binding contract, the duty of courts is imperative to give effect to it, if by any reasonable construction its meaning can be made to appear reasonably definite as to quantity, price, and other essentials. In applying this rule, that is regarded definite and certain which can be made so. By stipulation it was agreed:

"That No. 3, No. 2, No. 1, and No. 10 standard tomatoes have a market value to the same extent and degree that grains and other standard commodities have. That the reason for having these contracts guaranteed against decline in prices was to enable the Charles Wacker Company to introduce its goods in competition with the goods of the packers whose names appear as those against which the declines were guaranteed: they being well-established and well-known manufacturers of canned goods, while the Wacker Company was comparatively new at the business."

# The Maryland statute provides:

"The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealings between the parties." Bagby's Code, art. 83, § 30.

This statute is a formulated statement of the recognized rule. The clear meaning of the instrument, in the light of the admissions in the stipulation, was that the Charles Wacker Company sold the tomatoes for the price stated, but agreed to an abatement to any lower price that the purchaser might be able to show the standard brands mentioned had reached during the life of the contract. These brands being well established and well known, no intrinsic difficulty is perceived in proving the range of prices for the period contemplated. The contract as to price was thus in effect fixed at the prices stated for goods of a recognized market grade, subject to reduction in price to the lowest point reached in the price of such goods within the period. This made the price capable of judicial ascertainment. Ames v. Quimby, 96 U. S. 324, 24 L. Ed. 635; Rutledge v. McAfee, 72 Md. 28, 18 Atl. 1103; Aniel v. Hannah, 106 Ga. 91, 31 S. E. 734; Lund v. McCutchen, 83 Iowa, 755, 49 N. W. 998; Phifer v. Erwin, 100 N. C. 59, 74, 6 S. E. 672. The case of Parks v. Griffith, 117 Md. 494, 83 Atl. 559, and 123 Md. 233, 91 Atl. 581, relied on by appellants, recognizes the rule above stated.

Affirmed.

### WHITMORE et al. v. SWANK.

#### In re WHITMORE.

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

No. 1588.

BANKRUPTCY \$\infty 467\text{—Preferences}\text{-Fact Questions.}

It being conceded that a bankrupt's conveyance to his sons was made within four months prior to the adjudication, while the grantor was insolvent, and that it would secure the grantees a greater proportion of their claims than other creditors of their class would secure, it was a question of fact for the trial court whether the grantees had reasonable cause to believe the grantor was insolvent and that the conveyance would effect a preference.

Appeal from the District Court of the United States for the Western District of Virginia, at Harrisonburg, in Bankruptcy; Henry Clay

McDowell, Judge.

Bill by Ward C. Swank, as trustee in bankruptcy of William C. Whitmore, bankrupt, against William C., Jas. H., and Howard S. Whitmore. Decree for complainant, and defendants Jas. H. and Howard S. Whitmore appeal. Affirmed.

D. O. Dechert and H. W. Bertram, both of Harrisonburg, Va., for appellants.

George E. Sipe, of Harrisonburg, Va. (Sipe & Harris, of Harrison-

burg, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. In this suit by the trustee in bankruptcy of William C. Whitmore, the court below set aside a conveyance by the bankrupt to two of his sons of certain real estate in Harrisonburg, Va., comprising the bulk of his property, on the ground that it was a

voidable preference. The grantees appeal.

It appears to be conceded: (1) That the conveyance was made within four months prior to the adjudication; (2) that the grantor was insolvent at the time; and (3) that the conveyance, if allowed to stand, will give the grantees a greater percentage of their claims than other creditors of the same class will be able to secure. The only question in dispute is whether the sons had reasonable cause to believe that their father was insolvent and that the conveyance to them would effect a preference. But this was purely a question of fact for the trial court to determine, and its decision necessarily implies a finding adverse to the appellants. True, they stoutly denied any knowledge of their father's embarrassment; but direct testimony to the contrary, the relationship of the parties, and the circumstances attending the transaction warranted the conclusion of the learned district judge.

We find no occasion to disagree with that conclusion, and the decree

appealed from is accordingly affirmed.

## SEWARD TRUNK & BAG CO. v. OSTERWEIL et al.

(Circuit Court of Appeals, Third Circuit. May 29, 1918.)

No. 2356.

PATENTS \$\iff 328 - Validity and Infringement - Hanger for Wardrobe Trunks.

The Seward patent, No. 1,135,404, for a hanger for wardrobe trunks, held not anticipated, valid and infringed.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in equity by the Seward Trunk & Bag Company against David Osterweil and others, trading as L. Goldsmith & Son. Decree for defendants, and complainant appeals. Reversed.

Chas. E. Brock, of Cleveland, Ohio, M. G. Buchanan, of Trenton, N. J., Hull, Smith, Brock & West, of Cleveland, Ohio, and Melville Church, of Washington, D. C., for appellant.

Russell M. Everett, of Newark, N. J., for appellees.

Before BUFFINGTON and McPHERSON, Circuit Judges.

McPHERSON, Circuit Judge. This action is for the infringement of letters patent No. 1,135,404, granted April 13, 1915. The District Court dismissed the bill (opinion not reported), holding the three claims in suit to be void for lack of invention. If the claims are good, infringement is plain, so that the only matter we need consider is the question of invention. In our view, the device is patentable, and this conclusion is due so much to the excellent argument for the Trunk Company that we follow its outline in what we are about to say.

The device of the patent is for use in a wardrobe trunk, the well-known trunk that stands upright and opens outwardly on vertical hinges. Usually one side of the trunk carries drawers for smaller articles, while the other side is adapted to carry coats, trousers, dresses, and similar garments; the chief advantage being that such garments can be hung therein, instead of being folded and packed in layers. As soon as the trunk is opened, any one of these garments can be easily reached without disturbing another. Wardrobe trunks were first offered about 1900, and have since come more and more into use; their growing popularity being due to the ready access they afford to the suspended garments, and to the fact that these garments are carried in better condition. As was to be expected, improvements have since been made in several particulars, and we think the patent in suit marks a distinct advance in the art, and deserves the protection of the law.

In the beginning, the usual hanger that carried the garment was somewhat curved and was itself hung by a single hook, placed at the middle of the curve and adapted to engage with a rod or bar in the compartment. Sometimes this rod could be pulled forward, so as to move the group of hangers and the garments together out of the compartment before they were lifted off the rod. These "one-point" hangers (Seaman patent, No. 753,743, applied for in June, 1903) carried coats or other sleeved garments very well, but were not as suitable for dresses or cloaks, since these should be folded or draped over a horizontal support. The trunks were soon improved by using a "two-point" hanger, which was a horizontal bar with a hook at each end and a depending integral portion shaped to carry a coat and other garments. The bar served two purposes: It was the support for the whole hanger, and over its horizontal surface a dress or a cloak or a pair of trousers could be draped or folded, while on the depending portion a coat or other sleeved garment could also be hung. Whichever kind of hanger was to be used, another useful purpose would obviously be attained, if the hangers could be removed from the compartment, either singly or collectively, and accordingly means to accomplish this result were devised, and may be found in the Hawley and Wheary patent, No. 875,811, applied for in 1907, and the Winship patents, Nos. 1,096,675 and 1,115,362, applied for in 1912 and 1911, respectively. But these devices had the fault that, when the hangers with the suspended garments were moved forward, they obstructed the opening of the drawers (as usually arranged), unless the two compartments were spread out in alignment, and this interfered with the trunk's stability, especially with the smaller sizes. The problem was to devise a trunk of any size with horizontal drawers in one side, and a series of hangers in the other side, and to arrange the hangers so as to use all the available room, and to admit of quick and easy movement forward, in order that any hanging garment could be reached without delay, without obstructing the drawers, and without impairing seriously the stability of the open trunk. All these requirements are met by the simple device of the patent in suit, which is essentially a swinging gate with projecting brackets spaced to carry "two-point" hangers.

In brief, the improvement consists of a narrow oblong gate or frame, hinged to the outer side of the compartment, the gate carrying at least two brackets a few inches long, with upwardly projecting ends adapted to support a "two-point" hanger. The gate with its burden of garments can be swung as a whole completely into the compartment or completely outside; when outside, it stands at a right angle, and gives immediate access to the garments without obstructing the drawers. The specification enlarges upon these advantages in the following

language:

"This invention relates to certain new and useful improvements in wardrobe trunks and more particularly to a gate hanger especially adapted to be
used in connection with this class of trunk for supporting the garment hangers
in the hanging compartment thereof; the object being to provide a novel
form of gate hanger having brackets carried thereby, forming a two-point
suspension for the garment hangers, so as to prevent the same from swinging
when the garments are arranged thereon when the trunk is being shipped.

"Another object of the invention is to provide a gate hanger which is so mounted that the same can be swung outwardly from its compartment in order to allow the garments supported thereby to be accessible so that they can be readily placed in position or removed therefrom; means being provided for

locking the gate hanger in closed position so as to hold the garments within the hanging compartment.

"Another object of the invention is to provide a gate hanger which is exceedingly simple and cheap in construction, and one which is preferably formed of a single piece of metal having spaced brackets projecting laterally therefrom, upon which the garment hangers are spaced and supported in such a manner that they are firmly held in position.

"Another object of the invention is to provide a trunk with a body portion having a cover portion substantially the same size forming a hanging com-

partment in which the gate hanger is mounted."

The claims now in dispute are 1, 3, and 4:

"1. In a wardrobe trunk, the combination with a body portion and a cover portion pivotally connected together, said cover portion having a hanging compartment, of a gate hanger pivotally mounted within the cover portion, brackets extending laterally from said gate hanger, and garment hangers having a two-point suspension mounted upon said brackets."

"3. A wardrobe trunk, comprising a body portion and a cover portion pivotally connected together, a gate hanger pivotally mounted within the cover portion and capable of swinging outwardly and away from the body portion, said gate hanger having spaced laterally projecting brackets connected thereto.

"4. A wardrobe trunk, comprising a body portion and a cover portion pivotally connected together, a gate hanger pivotally mounted within the cover portion on the side opposite to its connection with the body portion, said gate hanger being capable of swinging outwardly at right angles to the cover portion, and brackets carried by said hanger having upwardly projecting end portions."

What has thus been said is we think sufficient to explain and to discuss the subject. The device is simple and effective, and has met with immediate and marked success. We regard it as patentable. In the last analysis, the difference between a patentable improvement, and one that is produced by the skill of the calling, rests upon a difference of attitude between the minds that are required to decide. For example: To the district judge, this patent is not the product of invention; to our minds it goes beyond the ordinary skill and deserves a patent. On this point we can add nothing useful.

Only one patent was urged as anticipating, the French patent of 1912 to Coulembier, No. 444,513, and we think little need be said about this. In some respects the device resembles Seward's gate, but on the whole it is cumbrous and ineffective. As was pointed out by two of the plaintiff's witnesses, several reasons support this conclusion. One is that Coulembier loses about half the space in the hanger compartment, owing to the lozenge shape of his gate. This defect alone would make his trunk unsalable. Another reason is that, while "two-point" hangers might be used, although with difficulty, their horizontal surface would be too short, and they would be interfered with by the handle of the gate, and by the diagonal brace on its under side. There are no brackets, and the lozenge is gridironed by three bars, one long, and two short. Moreover, as the gate was obviously intended for "one-point" hangers, to be suspended from the central and longer bar, it would not be easy to place and remove hangers of the "two-point" variety. Still further, the Coulembier device is evidently adapted to a full-sized trunk, and could hardly be used in the steamer size; the difference in thickness between the two being about 10 inches. And, even if the Coulembier hangers were of the "two-point" variety, they would not meet the needs of travelers, for the horizontal surfaces would not be long enough for folding or draping a cloak or skirt properly, and the coat hangers of the same variety would be adapted only for the garments of a young boy or girl, while wardrobe trunks are almost always used by older persons. And, finally, the device as a whole is practically out of the question, because one of the chief requisites of a wardrobe trunk is easy access to the hanging garments and easy removal of a hanger, and the central bar in the Coulembier gate would interfere with such access, if the lozenge were full of other garments.

Nothing in this opinion refers to the defendants' patented improvement that permits the easy removal of the gate and the hangers to-

gether. That matter is not before us.

The decree is reversed, with instructions to enter a decree in favor of the plaintiff.

## LIFE PRESERVER SUIT CO., Inc., v. NATIONAL LIFE PRE-SERVER CO. et al.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

No. 248.

PATENTS 215—OPTION TO BECOME EXCLUSIVE LICENSEE—TIME AS ESSENCE.

Provision of contract giving one privilege of becoming, at a certain time, exclusive licensee to manufacture under a patent, provided he give ten days' notice of intention, and within such period furnish a bond, gives but a mere option, as to the exercise of which time is of the essence.

Specific Performance \$\iff 75\$—Contract Enforceable—Changing Conditions.

Where contract provides for giving by defendant of exclusive license to manufacture under a patent, and for plaintiff giving from time to time, as royalties increase, additional security, specific performance by defendant of the agreement should not be decreed, whereby the court assumes protracted supervision of its performance, but only the giving of the license should be ordered.

Learned Hand, District Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Life Preserver Suit Company, Incorporated, against the National Life Preserver Company and others. Decree for complainant, and defendants appeal. Reversed and remanded, with directions to dismiss bill.

The plaintiff is the assignee of whatever rights here important were possessed by one Keviczky, and we shall hereafter speak as if he, and not his creature corporation, had brought the suit. Defendant (hereinafter called the National) owned the patent of one Youngren for a form of life preserver designed for use at sea. It is a complete covering for the body, intended not only to keep its wearer from sinking, but to maintain the warmth of the body

even in very cold water. This device the National wished to exploit. Its president lived in the state of Wyoming: the directors in New York. To them Keviczky became known as a man having acquaintance with men concerned with maritime affairs, and with him the National made the written contract out of the alleged breach of which grew this action.

With the major portion of that document we are not concerned. By it Keviczky became the National's sole selling agent, agreeing to take a certain number of "suits" monthly and to pay therefor cost plus \$10 per suit. So far as we perceive from this record, the present action has per se no effect on or relation to this selling arrangement. But it was further agreed that six months after the contract date Keviczky should have "the right and privilege of taking over the manufacture of said suits as the exclusive licensee" of the National, he as such licensee to pay a royalty of \$5 per suit on a minimum of 5,000 suits per year, provided, however, that he should also furnish a "good and sufficient bond" in \$10,000, to keep the National "fully secured against default in payment on the part of" Keviczky, and further, as soon as royalties rose above \$15,000 in any one quarter, Keviczky should give an additional \$10.000 bond, and so on for each additional increment of \$15,000 royalties in a single quarter. Then follows the final provise: Keviczky "must give ten days' notice in writing to the [National] of his intention to take over the exclusive license hereinbefore provided, and within the ten-day period must deliver to the [National] the bond aforementioned and described."

On May 5, 1917, Keviczky gave written notice that he elected to become sole licensee under the Youngren patent, and to manufacture as such licensee. On May 10th he wrote the National, stating that he was encountering "red tape" in getting a bond, and asking an extension of "thirty days from date" wherein to get it. His originally agreed time was up on the 15th and on that day he was advised in writing that the board of directors of the National had on the 14th refused "to change the terms of the contract."

Hanson (the president) was then at home in Wyoming, and on the 16th the National, at Keviczky's insistence, sent Hanson, "for consideration and signature," an agreement for extension of time, and then advised Keviczky that, if Hanson and another person interested and named wished it, another directors' meeting would be held to "reconsider the decision" refusing extension. As soon as Hanson learned that the directors in New York had once voted to deny Keviczky's request, he declined to express any opinion or do anything until "I fully understand the situation." He then came to New York, and never either signed or approved Keviczky's proposed extension; nor did the National take any corporate action until June 16th, when notice was served on Keviczky that his right or privilege of becoming sole licensee was terminated or canceled for failure to furnish bond.

No bond was ever at any time tendered or executed. The National having made or intending to make some other business arrangements inconsistent with Keviczky's being sole licensee, this action was begun, demanding that the National specifically perform and make Keviczky its sole licensee, and the lower court so decreed, providing, however, that the bond should first be given by the successful plaintiff. The material ordering part of the decree is that "the said agreement be specifically performed by said defendant." This appeal was taken by the National, the operation of decree having been suspended until decision should here be had.

Francis W. Aymar, of New York City (W. Bourke Cockran, of New York City, of counsel), for appellants.

Edward E. McCall, of New York City, for appellee.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). Of the matters presented by this record, we shall consider only the nature of the contract, or that portion of it here in controversy, and admittedly

plainly expressed in and by the writing before us. That document may be studied, first, as to the rights thereby vested in Keviczky; and, second, as to the legal propriety of attempting to remedy a breach thereof

by decreeing specific performance.

[1] 1. The oral evidence for plaintiff herein consists in an attempt to show that by divers persons, who were also officers of the National, he was deceived into the belief that indefinite extensions of time would be given for the bond due from him on May 15, and thereby lulled into fancied security, from which he was rudely awakened by notice of cancellation on June 16, which notice is presented to us by appellee as the exercise of a "right of forfeiture" by the National, for a breach admitted by Keviczky; but it is asserted (and was so found below) that all such right was waived by defendant, because its proven "acts and declarations" showed an "intent to suspend the exercise of that right," and Keviczky was "reasonably justified in relying" thereupon, and doing nothing regarding the giving of security down to June 16, when notice of cancellation was given.

This is an erroneous view of the contract; it gave Keviczky no estate or right in the patent (Richardson v. Hardwick, 106 U. S. 254, 1 Sup. Ct. 213, 27 L. Ed. 145); he had but an option or privilege to obtain such right or estate, and to the exercise of that option two things were plainly precedent—he had to give notice of election in writing, and within ten days thereafter give a \$10,000 bond. Both of these requirements were of equal importance; added together they constituted acceptance of option or exercise of privilege; nothing else would do; there could be no fractional acceptance, and until there was an accept-

ance completed and perfected, Keviczky had nothing to forfeit.

The proper question is whether he ever complied with the two conditions precedent to his exercise of election or option; and this, perhaps, is but another way of asking whether in this contract time was of the essence. If it were a mere contract of sale, which in respect of lands is the ordinary subject of specific performance, time would not be regarded as essential in the absence of special and controlling language; but it "is different where the contract is a mere election to purchase upon certain conditions." Waterman v. Banks, 144 U. S. 402, 12 Sup. Ct. 648, 36 L. Ed. 479. And see as exactly this case in legal effect Lord Ranelagh v. Melton, 2 Drew & Sm., 278.

It is the general rule that time is of the essence in respect of exercise of options, for unless there is by complete acceptance exactly as agreed on, a contract created, there is nothing, for before acceptance there was but a proposition for a contract. Where, as here, the option is irrevocable by the offerer, there is most cogent reason for the essentiality of time; it would be intolerable to hold an irrevocable offer open indefinitely. Undoubtedly the offerer may extend the time; but in this case there is not the slightest evidence that such extension was given. There is not even proof that prior to May 15 there was any of the loose talk by which Keviczky is said to have been deceived; he simply neglected to produce a bond on or before May 15, therefore on that day his option expired. After that the parties might have made a new contract, but the contract here sued on was dead. We do not in-

timate that there is any proof of deception of or false promises to Keviczky by this corporate defendant; we do regard most of the evidence on this head as irrelevant. It follows that as matter of law plaintiff never duly exercised the option of becoming defendant's exclusive licensee, and, said option having expired, the facts present no cause of action at law or in equity.

[2] 2. If plaintiff had proven fulfillment of contract by himself and refusal to perform by defendant, the contract produced would nevertheless not justify the decree entered. Doubtless it would have been proper to order the execution and delivery of the single document known as a license to manufacture under a patent (Bijur, etc., Co. v. Eclipse, etc., Co., 243 Fed. 600, 156 C. C. A. 298); but much more was directed to be done.

In effect, the court undertook to see to it that an agreement contemplating change of conditions as time went on, calling for additional security from Keviczky as sales increased, and bristling with probabilities of dissension as to the effect on the rights of parties of transfers of title and business acts such as can never be foreseen, was performed according to its terms for a period equal to the unexpired years of Youngren's patent. No such protracted supervision of a business should be assumed. Rutland Marble Co. v. Ripley, 10 Wall. 358, 19 L. Ed. 955; Ross v. Union Pac. Ry., Wool. 26, Fed. Cas. No. 12,080; Berliner, etc., Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99.

Decree reversed, and cause remanded, with directions to dismiss the bill, with costs in both courts.

LEARNED HAND, District Judge, dissents as to the second ground of decision.

#### STUMPE v. A. SCHREIBER BREWING CO.

(Circuit Court of Appeals, Second Circuit. May 9, 1918.)

No. 249.

1. PATENTS \$\infty 328-Validity-Infringement.

The Stumpf patent, No. 1,042,168, claim 1, for an improvement in steam engines, relating to the heating of the steam within the cylinder near the inlet port, by maintaining live steam in the cylinder head, held valid and infringed.

2. PATENTS \$\sim 328-CLAIMS-VALIDITY.

The Stumpf patent, No. 1,042,168, claim 8, for an improvement in steam engines, held so loosely and blindly worded as to be invalid, in view of the prior art.

3. Patents \$\infty\$=165\to Claims\to Sufficiency.

Every claim represents a separate cause of action, and cannot be helped by other good claims, but must stand on the disclosure as interpreted and measured by the prior art.

4. PATENTS \$\infty 328-Infringement-What Constitutes.

The Stumpf patent, No. 1,042,168, claims 2, 3, and 4, for a partial jacket or hollow cover of a steam engine cylinder, held infringed.

5. PATENTS 6-160-GRANT OF CLAIMS-FILE WRAPPER CONTENTS.

The only basis for granting any patent is the specification, and while the meaning of that document can be illustrated by the solicitor's arguments, or the patentee's admissions, which are part of the file wrapper contents, a copy of an advertising publication submitted to the examiner before the patent was issued cannot be considered as evidence of the basis for the grant of the patent.

Appeal from the District Court of the United States for the West-

ern District of New York.

Bill by Johan Stumpf against the A. Schreiber Brewing Company. From an interlocutory decree for plaintiff (242 Fed. 72), defendant appeals. Modified and affirmed.

See, also, 242 Fed. 80.

Appeal by defendant from decree in equity holding valid and infringed claims 1, 2, 3, 4, and 8 of patent No. 1,042,168, issued to the plaintiff herein.

J. C. Sturgeon, of Erie, Pa., F. P. Fish and J. L. Stackpole, both of Boston, Mass., and George E. Tew, of Washington, D. C., for appellant.

C. J. Sawyer, of New York City, J. P. Croasdale, of Philadelphia,

Pa., and J. J. Kennedy, of New York City, for appellee.

Before HOUGH, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

PER CURIAM. The meaning and purpose of the patentee's disclosure, the state of prior art, and the scope of the claims in suit are so fully and clearly discussed in the opinion below as to render unnecessary an opinion here upon the essentials of this cause. As to such essentials we concur with the District Judge, and for the reasons assigned by him.

[1] This court is unanimously of opinion that Stumpf conceived the thought and first disclosed the means of heating the steam within the cylinder near the inlet port, by maintaining live steam in the cylinder head and around a part of the cylinder itself adjacent the head. This inventive idea is broadly embodied in claim 1, which we regard

as plainly infringed.

[2, 3] We likewise hold unanimously that claim 8 is so loosely, if not blindly, worded as to read on some, if not several devices of the prior art. Since every claim represents a separate cause of action, the test of its sufficiency is whether it should prevail, if it were the only definitive statement embodying the patentee's own view of his invention's scope and meaning.

Thus considered, it is plain that this claim could not succeed, and we are aware of no method by which a bad claim can be helped out, or pulled through, by other and good ones. Every and any claim must stand on its own bottom, viz. the disclosure as interpreted and measured by prior art. If it does not demand that to which the specifica-

tion entitles him, so much the worse for the patentee.

[4] A majority of the court are of opinion that defendant's method of heating steam through cylinder head and contiguous parts is a fair equivalent of the "partial jacket" or "hollow cover" of claims 2, 3, and 4, and therefore hold those claims infringed.

[5] One other matter invites comment, not that it is important here, but because it may be in other causes. Stumpf, or those engaged in exploiting his quite numerous inventions, published a book, or catalogue, describing and praising the "Stumpf engine." A copy of this publication was submitted to the examiner while this patent was on its somewhat devious path through the Office. The file wrapper was introduced in evidence below, the book came as a part of it, and it is now sought to be treated as evidence of "the basis for the grant of the patent."

The only basis for granting any patent is the specification; the meaning of that document is often illuminated by solicitor's arguments, or limited by patentee's admissions; hence the frequent importance of file wrapper contents. But this book is an advertisement, its contents not sworn to by any one, and its maker or compiler never subject to cross-examination. It is evidence of nothing, so far as we

can see, except of a curiosity in Office practice.

Green v. Lynn (C. C.) 55 Fed. 516, to which plaintiff refers, relates to the certified record of sworn evidence in another litigation over the identical subject-matter; this book has no legally proven origin, and, no matter what effect it may have had on the mind of the patent granting authority, it is not competent evidence of any statement printed in it. The test is: Should it have been received over objection if offered on the trial hereof, in like manner as it was introduced in the Patent Office? We think the question answers itself in the negative. In arriving at decision, therefore, we disregard this book, as, we understand, did the court below.

Decree modified, by holding the eighth claim invalid, and, as mod-

ified, affirmed, without costs in this court.

Note.—Stumpf is an alien enemy, a fact presented by the record; but, at the request of counsel for appellant, we make no ruling and give no direction based on that fact.

#### MUNGER LAUNDRY CO. v. NATIONAL MARKING MACH. CO.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1918.)

#### No. 4935.

- 1. PATENTS \$\iff 283(2)\$—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

  Equity is without jurisdiction of a suit for infringement, where defendant had used only one of the alleged infringing machines, had ceased its use and disposed of it months before suit, and did not threaten further use.
- 2. Equity \$\sim 41\to Want of Jurisdiction\to Dismissal of Suit.

  Where the main ground of equitable jurisdiction is also the main object of the suit, as injunctive relief, and this object fails for want of proof, the case will not be retained to decide an incidental question of law.

Appeal from the District Court of the United States for the Southern District of Iowa; John C. Pollock, Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in equity by the National Marking Machine Company against the Munger Laundry Company. Decree for complainant, and defendant appeals. Reversed.

Henry S. Conrad, of Kansas City, Mo. (Frank P. Sebree, John D. Wendorff, Sam B. Sebree and Richard H. Manning, all of Kansas City, Mo., on the brief), for appellant.

Ralph Orwig, of Des Moines, Iowa (W. P. Bair, of Des Moines,

Iowa, on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This suit was instituted by appellee against appellant for the purpose of enjoining the latter from selling or using the Bunker Laundry Marking Machine constructed pursuant to United States letters patent No. 860,443, issued to C. A. Bunker on July 16, 1907, and manufactured by the Triumph Manufacturing Company. It was claimed by appellee that the above machine infringed a laundry marking machine constructed by it, pursuant to United States letters patent, Nos. 1,059,657 and 968,537, issued to Chester W. Canine, April 22, 1913, and August 30, 1910, respectively. The complaint also prayed for damages and loss of profits. The defendant answered, alleging that appellee's patents were void for want of patentable invention, and pleaded also anticipation and noninfringement. On the issues joined proofs were taken, and the case was subsequently argued and submitted, both on motion to dismiss for want of equity and for final decree on the merits. The trial court dismissed the complaint without prejudice, but, on rehearing, vacated the order of dismissal

and rendered a decree as prayed for by appellee.

[1] The action was commenced March 17, 1914. The facts concerning the use of the Bunker machine by appellant are as follows: The machine was purchased by appellant from the Triumph Manufacturing Company June 7, 1913. The machine was continually out of adjustment and did not work well. Being dissatisfied with the machine and believing the appellee's machine a better one, appellant, about the last of September, 1913, purchased from appellee one of its machines, and was allowed by it \$75 for the Bunker machine. There is no evidence that the appellant ever used any Bunker machine, except as above stated, or ever threatened to do so. It therefore appears that appellant was not using the Bunker machine when this action was commenced, and had not been for nearly six months. There is no evidence that appellant ever received any notice that appellee claimed that Bunker machine infringed the National marking machine, while it was being used by appellant. We lay aside all evidence tending to show collusion between the parties to this action for the purpose of maintaining a suit, which would put the Triumph Manufacturing Company out of business, and view the case as one where the evidence wholly fails to make a case for injunctive relief. This being so, the prayer for damages and profits, concerning which the court only has jurisdiction as incidental to its equity jurisdiction, must also fail. Root, Ex'r, v. L. S. & M. S. R. Co., 105 U. S. 189, 26 L. Ed. 975; Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520; Kennicott Water Softener Co. v. Bain, 185 Fed. 520, 107 C. C. A. 626; Smith v. Sands (C. C.) 24 Fed. 470; American Pneumatic Tool Co. v. Bigelow Co. (C. C.) 100 Fed. 467; Streat v. American Rubber Co. (C. C.) 115 Fed. 634.

[2] For the purpose of determining whether equity rules 22 and 23 (198 Fed. xxiv, 115 C. C. A. xxiv) or section 274a, Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. 1916, § 1251a]), have any bearing as to the disposition which must be made of the case on the present record, the general nature and scope of the case as made by the complaint must be considered. From such consideration, it does not appear that the suit should have been brought as an action at law (rule 22, section 274a, Judicial Code), or that a matter, ordinarily determinable at law, has arisen in a suit in equity (rule 23). The present suit was essentially a suit in equity for injunction. It failed on the merits for want of proof, and any legal question involved fell with the main suit. In other words, where the main ground of equitable jurisdiction is also the main object of the suit, and this object fails for want of proof, the case will not be retained to decide an incidental question of law. The damages or profits for the two or three months' use of a defective machine would be so negligible that no importance could be attached to that feature of the case.

The order of the trial court dismissing the case was right. The decree below, therefore, should be reversed, with instructions to dismiss the complaint for want of equity; and it is so ordered.

#### WRIGHT v. EIGHT HOUR TOBACCO CO.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3110.

PATENTS 328-PATENTABLE NOVELTY-LABELING MACHINE.

Landfear & Keyes patent, No. 683,651, claim 22, covering a machine for applying labels and stamps to packages of tobacco or other material usually inclosed in paper wrappers, held void for lack of patentable novelty.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by Richard H. Wright against the Eight Hour Tobacco Company. From a decree for defendant, plaintiff appeals. Affirmed.

Melville Church, of Washington, D. C., and Allen & Allen, of Cin-

cinnati, Ohio, for appellant.

Wm. W. Dodge, of Washington, D. C., Robert Fletcher Rogers, of New York City, and Wood & Wood, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

PER CURIAM. Appeal from decree adjudging claim 22 of patent No. 683,651, issued October 1, 1901, to William J. Landfear and James A. Keyes, assignors to Richard H. Wright, invalid, and dismissing the bill. It is stated in the specification that the invention relates to machines for applying labels and stamps to packages of tobacco or other material usually inclosed in paper wrappers. The specification, illustrated by 23 drawings, is elaborate, if not prolix, and is followed by 33 claims. The infringement alleged concerns only claim 22:

"The combination substantially as set forth, with devices for feeding stamps and applying paste thereto, of two paste rollers located at such distance apart that they will apply lines of paste to the opposite edges of a stamp when drawn in contact with their peripheries and means for reciprocating the feeding devices between the rollers to seize the stamp and draw it over them."

Whether, in view of the prior art, the device thus called for involves invention, as distinguished from mechanical skill, is a question of fact. The progress which had been made in this art was plainly suggestive of the device; indeed, our consideration of the record, including the exhibits, convinces us that what is claimed shows simply development of the skilled mechanic, and not patentable novelty. Dunbar v. Meyers, 94 U. S. 187, 195, 24 L. Ed. 34. We think it enough to add that the references pointed out and the reasons given in the opinion of the learned trial judge touching the lack of patentable novelty justify our conclusion. The decree will accordingly be affirmed. The portion of the opinion so alluded to follows:

HOLLISTER, District Judge. Suit brought on claim 22 of Landfear and Keyes patent, No. 683,651, issued October 1, 1901 (application filed December 31, 1900), relating to machines for applying labels and stamps to packages of tobacco or other commodity usually inclosed in paper wrappings (sometimes tin), claiming infringement and asking for injunction and damages. The usual defenses. The defendant is a user of three machines made by the manufacturer. Defendant's device infringes claim 22.

The only question is whether or not plaintiff's device involves invention. That it has, in the form adopted, as shown by the drawings and the purposes for which the device is used, novelty, in the sense that nothing exactly like it was made before, cannot be denied. Its usefulness, as is shown by the machine itself and attested by considerable public demand, as well as imitation by the manufacturer from whom the defendant obtained the infringing machines, is established. Nothing like it is found in the prior art; but I am not satisfied that its novelty raises the patented device to the dignity of an invention

Patterson's patent No. 579,546, March 23, 1897, was excellent, and the first to apply a line or streak of paste to a government stamp by machinery as a part of the process of eventually causing the stamp to be wrapped about the package of tobacco as required by law. The process has the disadvantage of leaving an appreciable part of one end of the stamp free from paste, and the space between the line or streak of paste and the edges of the stamp also free. These disadvantages were real. One of them is overcome by afterward pasting a label around the package, and so covering the free end of the stamp. Its disadvantages are obvious, yet it was an important step in the art to which it relates.

Plaintiff's device is a great improvement, in that the nipper proceeds between the two paste rollers and seizes the stamp in such a way that, in pulling it from the stamp receptacle, both edges of the stamp, from end to end of it, receive the paste from the rollers. If there were nothing in the case but this, there would be no difficulty in finding that the faculty of invention had been actively employed. But there is much more. It must have been apparent to every one in the business of selling tobacco in packages, and to those interested in packing machines, of which there were a number, that it would be better if the paste were on the edges and the entire length of the stamp rather than applied as it was by Patterson.

The idea of doing it is found in Berger's patent, No. 643,621, of February 20, 1900, issued the same year in which the patent in suit was applied for, and prior thereto. There the nipper proceeds past the paste roller and grips the outside cover to be used in wrapping articles (for instance, chewing gum) in such a way as to pull one edge of the wrapper-certainly not more stiff than an internal revenue stamp—over the paste roller, and thus apply paste to one edge of the wrapper completely from end to end. There was no occasion for the use of two rollers in Berger's device. In fact, another would have been out of place; but to a man skilled in mechanics, studying the Berger patent, whose only problem was to paste the other edge of the paper, it would seem a very natural thought, without the operation of any inventive genius, to put another paste roller on the other side of the nipper, so that in the nipper's operation it would pull the paper across both rollers, and thereby cause the paste to adhere to both edges of the stamp throughout its entire length. It may be significant that the patentee's application was made within a year after Berger's patent was granted.

But this is not all one investigating the subject would have found in an analogous, if not directly prior, art. Pratt's patent No. 414.822, November 12, 1889, shows two paste rollers by which paste is applied at the outside edges at the full length of a piece of pasteboard to be used for the bottom of a box. It is true the pasteboard was pushed over the rollers, instead of being pulled; but it is also true that the pusher operated so far within the rollers as to cause the paste to be applied the entire length of the pasteboard. So the patentees had before them two ideas; one embodied in Berger's patent, and the other in Pratt's, as well as Patterson's invention, which required, in my judgment, no invention in applying them to a device of the purposes of plaintiff's. The thought of the skilled investigator would be directed, not to a new problem, but to how, mechanically, he could apply another roller to what was disclosed in Berger's patent in such a way as to have the paste applied to both edges of the stamp as it was to the pasteboard in Pratt's. Moreover, the investigator would have seen in Berger's patent, No. 643,623, of February 20, 1900, the nipper proceeding as far as the axis of a double roller, and between the rollers, although it is true those rollers were not for pasting purposes.

It seems to me what the patentee exercised was mechanical ingenuity, but not inventive ingenuity.

## NORTH AMERICAN CHEMICAL CO. et al. v. DEXTER et al.

(District Court, E. D. Wisconsin. August 1, 1916.)

1. PATENTS ⇐⇒170—CONSTRUCTION—REFERENCE TO CLAIMS OF COPENDING PATENTS.

Where patents were practically concurrent and copending, each one seeking to be contributory to the advance or change in the art, but referring expressly to each other and to the general purpose to be accomplished by all of them, the court, in considering the claims of one patent, must do so in view of the time and conditions under which the copending patents were brought out, in order to ascertain the true intent and construction to be placed on each.

- 2. Patents \$\iff 328\$—Validity and Infringement—Shoe Bottom Filler.

  Thoma patent, No. 832,002, covering a shoe filler package and process of making it, held, valid and infringed.
- 3. Patents \$\infty 328\$—Validity and Infringement—Shoe Bottom Filler.

  Thoma patent, No. 861,555, on inner sole shoe filler, held valid and infringed.
- 5. PATENTS \$\iiiis 328\$—Validity and Infringement—Shoe-Filling Apparatus. The Arnold patent, No. 808,227, for a shoe-filling apparatus, held valid and infringed.

In Equity. Suit by the North American Chemical Company and others against Alvin S. Dexter and others for infringement of patents. On application for injunction, pendente lite. Injunction granted.

See, also, 252 Fed. 169.

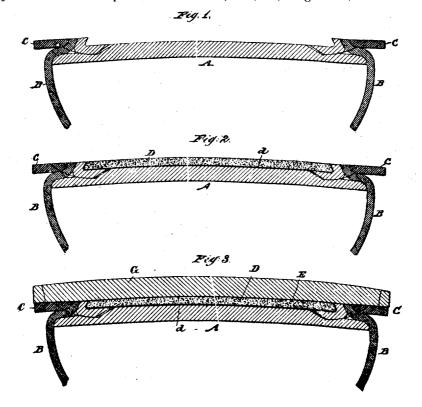
Edward Rector, of Chicago, Ill., and Quarles, Spence & Quarles, of Milwaukee, Wis., for plaintiffs.

Gillson & Gillson, of Chicago, Ill., Clyde L. Rogers, of Boston,

Mass., and E. H. Bottum, of Milwaukee, Wis., for defendants.

GEIGER, District Judge. The plaintiff, as owner of Thoma patents, 808,224, December 26, 1905, covering "art of filling shoes"; 832,002, September 25, 1906, covering "shoe filler package and process of making same"; 861,555, July 30, 1907, "on innersole filler"; and Arnold patent, 808,227, December 26, 1905, covering "shoe-filling apparatus"—has brought this suit against defendants, charging infringement. It is before the court upon an application for an injunction pendente lite, and has been presented upon the bill, the answer, and supporting and opposing affidavits of the parties respectively.

These patents, relating as they do to the shoe-filling art, may be better understood upon brief reference to certain figures and the subject-matter of the patent to Howland, 458,421, August 25, 1891:



Each of these represents a cross-section of an upturned shoe bottom. In each, A is the insole, curved and lipped at the outer edge; B is the lower part of the vamp, or shoe upper; C is the welt; D, the filler; and G is the outersole. The shoe-filling art therefore comprehends the constituency of this filler, as well as methods, means, etc. Howland, after referring to the existing practice of making "fillings of felt, leather, or other materials in sheet form, and securing them by flour paste, which requires considerable skill," etc., declares his invention to consist of a plastic composition of leather scraps and rubber cement, to be spread upon the shoe bottom by a spatula or otherwise. Of rubber cement, he says:

"It is understood to be manufactured mainly from the cheaper qualities of African rubber with petroleum naphtha. Its constituents vary every moment by the evaporation of the naphtha by exposure to the air. Under ordinary conditions, working rapidly in the open air, I think about five pounds of finely cut leather will require ten pounds of rubber cement; but the proportions should be varied, so as to give just sufficient consistence to allow the spreading of the composition."

His claim corresponds with these specifications.

The patents in suit are, without doubt, addressed to the art as it existed after the issue of Howland's patent. Speaking broadly, patent No. 832,002 is claimed by plaintiff to embody his broad and generic claims, as well as a claim for the specific kind of filler which will be referred to as his gutta percha filler. It also contains a set of claims covering the package—the putting up of the filler in loaf form, and incidentally the process of making the so-called "self-contained loaf." Patent No. 861,555 covers the specific kind of filler referred to as the "wax tailings" filler. Consideration of the two patents involves in reference to their specifications and claims, among other things:

(1) The broad purpose, stated in patent 832,002, "to advance the cleanliness, economy, safety, and speed of shoe manufacture, \* \* \* and afford means for improving the shoe in permanent pliability, durability, and waterproof qualities," and, in that connection, the art upon which he is building and the change to be wrought by his

invention are thus referred to:

"The almost universally used filler at the present time is made of comminuted filler material, usually cork mixed with a large quantity of rubber cement (rubber dissolved in naphtha), and on account of the exceedingly volatile nature of the naphtha, as stated in United States patent No. 458,421, of August 25, 1891, each shoe factory is obliged to make its own filler each day, and even then the loss from evaporation is very large, while the inconvenience and difficulty of handling and keeping the cement and adjacent articles clean is a serious disadvantage, and perhaps the greatest disadvantage is due to the danger of fire on account of evaporating naphtha. Moreover, in use this filler is very slow in drying, particularly in humid weather, so that it retards the progress of the entire factory, and in the shoe soon becomes dry and brittle, so that the desired support to the shoe is thereby withdrawn, causing the latter to wear unevenly, and inviting the entrance of moisture, etc. Accordingly I have succeeded in devising a filler which cannot evaporate or change its pliable and elastic, viscous, and waterproof character by use or age, but remains resilient, properly soft or workable, adherent to the leather, and permanently durable for an indefinite period until used, and thereafter continues in proper condition until the shoe is worn out. In order to reach

success, from a practical standpoint, I have found that the greatest difficulty has been to produce a filler in such form that, notwithstanding the fact that it is not hard or solid, it is self-sustaining, and hence can be made into convenient package shape for cheap crating and storing in factories until required for use, thereby rendering it feasible for general use. The conditions of use are peculiarly exacting, as the leather is usually damp, due to the soaking thereof for facilitating turning up the channel lip, and yet the filler material must penetrate and stick to the leather sufficiently to prevent shifting and bunching. The oily repellant nature of leather must also be considered. Besides meeting all these exacting conditions, my filler has the predominating characteristics of being unchangeable, in the sense that it does not keep on drying and oxidizing, as does the naphtha rubber cement filler, but maintains permanently its elastic, moldable, tenacious character, even when exposed, as in an ordinary box or packing case, and is capable of being heated and cooled repeatedly without losing these characteristics, it has a low melting or softening point, so that there is never any danger of charring or injuring the cork or destroying its efficiency, and it rapidly cools or sets when spread thin on the damp shoe bottom; also this filler meets the long unsatisfied demands of the shoe trade for a portable ground cork filler which can be provided ready-made as an article of merchandise. To this end I have at length succeeded in devising a filler loaf which retains its characteristics of pliability, internal stickiness, elasticity, durability, etc., without deteriorating, and which can be transported and handled with impunity, and will be neatly available for instant use whenever wanted."

He further says that, while he has found a number of means of attaining his object, the best results have been obtained through a—"mixture of about five parts gutta percha to three parts of resin and two parts of paraffin oil, and subject this mixture to a melting heat which disintegrates the gutta percha and causes it to unite with the resinous part; the oil helping in the assimilation of both ingredients and giving a temper or smoothness and pliability to the product."

After two to four hours, the product has a consistency adapting it for use as a binder, to be used in admixture with ground cork, and forming therewith, upon cooling, an elastic union. Cork, while preferable, may have as substitute any substance as a base which will give body, provided it be capable of "yielding in all directions under pressure or bending," and that it recover its position when the strain is released. The base, either in and of itself, or in union with the fillers, makes a permanently elastic, unchangeable, and quick-setting filler.

A further specification is use of other "vegetable gums" as substitute for gutta percha; their possible want of stability, their tendency to harden or to lose elasticity or pliability, is met by varying the quantity of oil added. The method of mixing, while in a heated state, then partially cooling, forming into a "loaf," and its use in this form in the factory, according to patent No. 808,224, hereafter noted, are described. The patent adds:

"I regard my invention as broadly novel in certain particulars, as pointed out in the claims, and therefore wish it understood that in those particulars I am not limited to the preferred binder herein described, and also, as already intimated, many other variations may be resorted to, within the spirit and scope of my invention."

The claims here in question are the broad generic claims, such as 1, 4, and 7, viz.:

"1. A shoe-bottom filler, consisting of a base united with a binder into a permanently tenacious, quick-setting, permanently elastic mass, capable of being molded into a thin, pliable layer, filling the shoe bottom."

"4. A shoe-bottom filler, consisting of a normally unchangeable, permanently elastic, quick-setting mass, composed of a base capable of yielding in all directions to pressure, united with a permanently sticky component having a

low melting point and serving to render said mass waterproof."

"7. A shoe-bottom filler, consisting of a normally unchangeable, permanently elastic, quick-setting mass, composed of finely comminuted filler material having each granule thinly coated with a permanently sticky binder, capable of being rendered highly fluid by moderate heat."

The claims, 15 to 29, for the loaf form of package, whereof 15 and 20 may be taken as illustrative:

"15. As an article of manufacture, shoe-bottom filler in the form of a self-contained permanently elastic loaf, composed of comminuted filler material, whose individual granules are thinly coated with a nonvolatile, permanently resilient, and viscous binder; said loaf being normally semiplastic and rendered sluggishly fluid by heat."

"20. As an article of manufacture, shoe-bottom filler in the form of a self-contained permanently elastic loaf, composed of comminuted filler material, whose individual granules are thinly coated with a nonvolatile, permanently resilient, and viscous binder; said loaf being normally semiplastic and rendered sluggishly fluid by heat, and having a dry external, adherent coating

of filler material.'

# Claims specifying gutta percha as a binding, viz.:

"30. As an article of manufacture, a shoe-bottom filler, composed of comminuted filler material mixed with a binder composed of approximately five parts of gutta percha, three parts of resin, and two parts of parafilm oil, in proportion to the filler material sufficient simply to completely coat each granule thereof."

"31. As an article of manufacture, a shoe-bottom filler compressed into the form of a self-contained loaf, composed of comminuted cork, whose individual granules are thinly coated with a binder composed of approximately five parts of gutta percha to three parts of resin and two parts of oil; said cork and binder being in such proportion as to maintain said loaf normally in a semi-plastic condition."

Coming now to patent 861,555, it covers, as above indicated, the species of filler having "wax tailings" as a binder for the cork. Claims 1 and 3 may be taken as illustrative:

"1. A shoe-bottom filler, consisting of a nonoxidizing, permanently plastic, quick-setting mass, composed of finely comminuted filler material having each granule thinly coated with a permanently sticky binder containing resinous

residuum of petroleum in a waxy condition.'

"3. A shoe-bottom filler, consisting of a filler body in a fragmentary condition thoroughly mixed with a binder containing wax tailings of petroleum and a modifying agent so compounded as to render the mixed filler mass permanently elastic, pliable, and tenacious as described, yet sufficiently stiff to prevent shifting or bunching in the shoe bottom and to be self-sustaining for transportation."

This patent, though later in date of issuance, was applied for some months earlier than patent No. 832,002; and what transpired during the copendency of the two in the Patent Office is of some conse-

quence in determining the scope and interpretation of their respective claims—particularly those of patent No. 832,002. The application in the latter disclosed the species of gutta percha binder; whereas the earlier application (new patent 861,555) disclosed the specific form of wax tailings filler, but also contained the broad generic claims now found in the earlier patent, issued upon the second application as above noted. It is urged that, under the law and the practice in the Patent Office, applicant was entitled to a broad and generic claim, or set of claims, covering all of the various species of his new filler and any other species having the physical properties and characteristics which distinguished his filler from the prior art, and was also entitled to specific claim or claims for each species of his new filler; that is to say, it was permissible for him to include in one application a broad and generic claim and a claim or set of claims for one species, but not for more than one. Therefore, so it is urged, full protection to the generic and specific invention demanded that he proceed in accord with such practice, and thereupon this happened: The broad or generic claims appearing in the first application (now patent No. 861,555) were transferred to the second application (now patent No. 832,002)—among them claims 7, 8, 9, and 13—while other broad claims, 1 to 6, were also added to the latter. This action was not only communicated on the record of the proceedings thus:

"We have transferred the broader claims to applicant's copending application, above referred to, as being fully as proper in said application, which contains certain other broadly novel features, thereby getting together in one case the broad features of invention, and leaving the present case to cover the petroleum species of filler"

—but the result thereby sought was further incorporated into the specifications of patent No. 861,555 in this language:

"The present case, however, is subordinate to my copending application, now patent No. 832,002, granted September 25, 1906, in which I have placed the broad claims which are generic to the several different varieties of shoe filler or filler material and compounds; the present case being restricted to that species of my filler which depends upon the resinous residuum of petroleum or sticky wax tailings."

And when the additional broad claims (now 1 to 6 in 832,002) were introduced, this was said of record:

"As explained in our previous amendment, it is intended to make this case the generic case, to cover broadly all the various species of Mr. Thoma's filler."

And in subsequent applications for patents containing claims for specific kinds of filler, Thoma set out the subordination thereof to his "foundation patent 832,002," and apparently such patents proceeded in recognition of that as the character of No. 832,002.

Patent No. 808,224 covers a method. Its specifications also show that it was addressed to the art as left by the naphtha rubber filler of the Howland patent—to the disadvantages noted in the other

patents referred to. For the present, claims 1 and 8 may be taken as illustrative:

"1. In the herein described art, providing a filler composed of comminuted filler material held compactly together in a semisolid mass by a permanently flexible, viscous binder, capable of liquefying under heat, slowly heating said mass until sluggishly fluid, applying the heated filler to the shoe to be filled, and subjecting the same to vertical pressure while still hot."

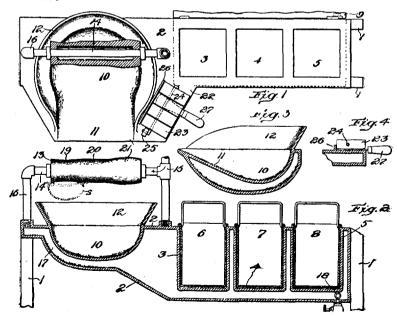
and subjecting the same to vertical pressure while still hot."

"8. In the herein described art of shoe manufacture, providing a filler composed of comminuted filler material held compactly together in a semisolid mass by a waterproof binder capable of liquefying under heat, filling the shoe cavity with said filler, and then applying a sudden and strong heat to said filler for liquefying a portion of its waterproof binder, and applying external pressure to the filler for forcing said binder into the joints and stitches about said cavity."

This reservation with respect to the scope of the claims is made in the specifications:

"I wish it understood that I am not limited to the mechanical details in any way as herein shown, and that the ingredients of my filler may be varied (I have several fillers meeting the requirements of my method), and that the filler and other details herein shown and described are covered in other applications; the present application being limited to the art or method forming part of my new system of shoe manufacture."

This brings us to the Arnold patent, 808,227, issued on the same date as the method patent last above. The invention is declared to be a "machine for rendering feasible the application of the Thoma filler," and, after distinguishing the latter in general terms from the naphtha rubber, the specifications and drawings describe the machine thus:



"In the drawings, Fig. 1 is a top plan view of my filler-applying apparatus, Fig. 2 is a vertical longitudinal section thereof, Fig. 3 is a transverse sectional view showing the shape of the dip pot, and Fig. 4 is a fragmentary sectional view showing the dip knife heater. I provide on standards 1 a steam-jacketed table 2, containing a suitable source of filler supply, herein shown as comprising three compartments 3, 4, 5, each steam-jacketed and adapted to receive filling pots 6, 7, 8, and to be closed by a cover 9 for slowly melting the filler. Adjacent these supply compartments the table contains a shallow dip pot 10, having a wide-open mouth and preferably projecting upwardly and forwardly at 11 and surrounded by a flaring drip guard 12. Above the rear end of the dip pot is a superheating tool, herein shown as consisting of a roll 13, mounted to turn freely on a steam pipe 14, steam entering in the direction of the arrow 15, and after heating said roll passing downwardly at 16, into the table at 17, and thence out at 18. The steam pipes 14, 16, form a heating stand for the roll. This superheating tool constitutes the most important feature of my invention, as I have found that, by providing this highly heated roll close to the delivery end of the dip pot, so that the operator can instantly raise the filled shoe into contact therewith and superheat the top surface of the filler, an exceedingly quick, neat, and satisfactory result can be obtained. The roll has a concave surface 19, a straight surface 20, and a convex surface 21, thereby enabling the operator to give the exact surface and compression desired to the filler and to accurately regulate the quantity left in the cavity of the shoe or in any part of said cavity. To prevent chilling the filler, the dip tool or knife must be kept hot, and accordingly I provide convenient means for this purpose, having shown herein the table as projecting at 22 to form a flat ledge, over which are a series of weights 23, carried by a rod 24, pivoted in post 25 and abutting against a ledge 26, so that a dip knife 27 may be simply thrust quickly beneath said weights, which yield to receive the same, and yet hold the blade of the knife down tightly on the hot table, so that the knives become quickly heated. The table and weights are readily cleaned simply by swinging the weights and rod over forward on the post 25. The ledge 26 serves to limit the free upward tipping of the weights and also prevent them from sliding back on the table when the knives are thrust beneath them. I provide a number of these knives, so that a new one is always ready.'

As illustrative of the claims allowed, we may take Nos. 3 and 8.

"3. In a shoe-filling apparatus, a heating stand provided with a freely rotatable roll maintained uniformly hot thereby and having a free open space at the under side of the roll, constructed to permit the free manipulating of a filled shoe while held pressed upwardly against said roll."

"8. In a shoe-filling apparatus, a heated dip pot for supplying hot filler for a shoe, a stand provided with a superheating tool mounted close to the open end of said pot, in position to permit the shoe when filled to be freely and instantly manipulated in pressing engagement with said superheating tool, and quick-heating means at one end of said dip pot for heating the hip knives used for applying the filler from the pot to the shoe."

This reference to the patent specifications and claims is necessary to a consideration of the contentions of the parties upon the showing made upon this preliminary application, and in order to meet the insistence that the rulings of the District Court and Circuit Court of Appeals of the First Circuit in a case against another defendant—upon patents 832,002, 808,224, and 808,227—should be followed here. See North Am. Chem. Co. v. Keno S. Co., 227 Fed. 63, 141 C. C. A. 611. In brief, this ruling was to this effect: (1) That the broad claims, 1 to 14, of patent 832,002, were of limited validity, and infringed by the defendant, who was making a gutta percha filler; and, upon a supplemental bill which sought to comprehend, as

a like infringement, a wax tailings filler also made by that defendant, the bill was dismissed, on the ground that these so-called broad claims should be narrowed in their interpretation and application to a gutta percha binder filler. The "loaf" claims were not in contest. (2) That the process patent, 808,224, was invalid, disclosing nothing patentably novel. (3) That the apparatus Arnold patent, No. 808,227, was invalid, as being a mere aggregation. The suit, however, involved only claims 1 and 2 of the patent, which do not make specific claim to the "superheated roll."

In the case now here, defendants' answer sets up the determination in the Keno Case, and avers invalidity of patents 808,224 and 808,227 as therein adjudged; invalidity of patent 832,002, or, in any event, its limited scope, adjudged in the Keno Case, which scope would not comprehend a wax tailings filler; and, lastly, that patent 861,555 is invalid, because a wax tailings filler, without a modifying or tempering ingredient, is worthless, and, because the original application contained no specification thereof, its introduction by amendment constituted new matter, rendering the patent invalid.

Taking the proofs in the record, it appears without a suggestion of doubt that, at and prior to 1906, the rubber cement filler was universally used; and the proofs refer to (1) the disadvantages attending its manufacture for use; (2) its use in the factory; (3) its merits as a filler; i. e., its durability and effect upon the shoe product; (4) the introduction of "Besto" (which is the name given by plaintiff to its wax tailings filler, manufactured under patent 861,555); (5) its manufacture; (6) use in factory; (7) its merit in the shoe product; (8) its effect upon the art and practice of shoe filling; (9) the process of Thoma as a distinct or new process; (10) the apparatus as a patentably novel introduction in the shoe filling art.

It is impossible here to summarize the testimony of the several witnesses upon these various matters of fact, or to give any summary of all the testimony in the order just noted. But the case, and persuasiveness of the testimony in reaching the conclusion which has been reached, justifies the extended references following:

The witness Pike, who is president of the firm which, prior to 1906, when naphtha rubber cement filler was universally used by the trade in the United States, testifies in great detail respecting its manufacture, its use in the factory, and its merits as a filler. After giving the proportions of ingredients used, he says:

"Because of the inevitable and rapid deterioration of this kind of filler, it could never be made at the cement factory and shipped as filler; but each shoe factory was obliged to keep its own supply of cork and its own supply of filler cement, and dole these out separately in small quantities to the workmen each time the latter required a fresh batch of filler."

Reference is then made to the changing consistency of the filler, because of the variation of the naphtha and the consequent unsatisfactory condition necessitating taking the time of operators to attend to keeping the mixture of the right consistency. He then adds:

"A more serious objection, however, to this filler, was due to the extremely great fire hazard caused by the excessively rapid production of naphtha

fumes or gases, due to the spreading out in the extremely thin layers of filler in the shoe bottoms of so many shoes in tiers of hundreds of racks tightly packed over a large floor area. The inflammable and explosive fumes from the filler supply barrel was objectionable and dangerous, but it would be hard to conceive of a more effective way of increasing this danger and risk than the congested accumulation of filled shoes, which it was absolutely necessary to hold at this part of the factory for the long period required for the filler to set sufficiently to permit the shoes to be passed on to the next step in their manufacture."

He refers to the provision in factories of power-driven fans and expensive dry-heated rooms to hasten the setting of filler and to dispose of the gases which would otherwise accumulate, and to the injurious effect of the naphtha on the health of operators. He explains in detail the effect of the use of rubber combined with naphtha; the latter being merely an expanding element which, when evaporated, would leave the dried rubber and cork in a position and in a condition to bunch. He says:

"This bunching tendency of the rubber cement filler and squeaking accompaniment were the two most serious disadvantages attendant upon the use of this filler. For many years these two disadvantages were recognized as so serious and important that many inventors got up fillers to take the place of rubber cement filler; but they were all failures. Each one, after a few weeks or months of trial, proved impracticable, and they were successively abandoned."

Of the plaintiff's filler, the "Besto," he says:

"As soon as the Besto shoe filler came upon the market I realized that the shoe-filler problem had at last been solved. Besto filler is an entirely new kind of filler, meeting all the requirements of the trade, both from the shoe factory standpoint and from the wearer's standpoint, and has none of the objectionable features of the old rubber cement filler. It has long since superseded the rubber cement filler, and, in fact, it so rapidly supplanted the latter that by the year 1908, or thereabouts, we quit pushing our filler eement, and have since then considered rubber cement filler as practically a thing of the past, although there are still a very few small manufacturers who occasionally use it. \* \* \* So far as I am aware, the Besto filler was an absolutely new product, and new in kind, and the Besto machine was likewise new, and, in fact, the first and only filler machine that I had ever seen or heard of, at the time of their appearance, in 1905."

The witness Broughton, of large experience in the manufacture of shoes and in making of rubber cement, testifies in connection with the advance of plaintiff's filler upon the market:

"I soon recognized that Besto filler had come to stay, and that the days of rubber cement filler were numbered. The fire risk which had always accompanied rubber cement filler was gone—there was no longer any fire risk when Besto filler was used. Besto filler would dry in all kinds of weather, and there were no longer any 'dog days' for the bottoming room; but the shoe manufacturer could shove his shoes along as rapidly as the filler boys could fill them. In explanation of what I mean by saying that there were no longer any dog days for the bottoming room, it is necessary for me to explain that rubber cement filler in the bottoming room always held up the work of the entire factory. So common was this that shoe factories had the recognized term 'blockades,' with reference to the delays in the bottoming room, made necessary by waiting for the rubber cement filler to dry in the shoes. A 'blockade' means an unusually great number of shoes waiting in the bottoming room for the rubber cement filler to dry out, while the departments

further along in the manufacture are at a substantial standstill because they cannot proceed in their normal course, but are specially held up because of damp weather, which affects the drying out of the rubber cement filler in the bottoming room. Under the best conditions of weather and factory equipment one-half day was necessary for the rubber cement filler in the shoe bottoms to dry out, and in 'dog day' weather I have known the factory to be held up for a whole 24 hours waiting for the rubber cement filler to dry out. This is what I mean by 'dog days' in the bottoming room. Besto filler ended the 'dog days,' because it proceeded on an entirely different principle, namely, that of heat. In fact, to me as a practical man, more skilled in the art of cements and shoe manufacture than in patents, the main invention in Besto is that it depends upon heat. The thing that knocked us out was that Besto set at once, while rubber cement filler had to dry out naturally. When the Besto people came with the new idea of hot filler-a filler used hot and applied through the use of heat in the machine and in the roll—they brought something into the business which had never been heard of or thought of before, and we simply could not compete with them. This use of heat ended all delays and made it possible to use a filler having a totally different character from the rubber cement filler. Heat not only made the filler quick-setting, but it melted some of the binder into the seams and crevices and approached the filler problem from an entirely new angle, so that, instead of having a filler that very slowly found its final condition, we had to compete with a filler that was immediately and always in its final condition, and made a shoe ready at once to proceed in its further manufacture. In short, with the hot Besto filler, the time required between the filling outfit or machine and the sole-laying machine is reduced to minutes, while with rubber cement filler the time was a matter of hours."

The witness Hadley, also engaged in the rubber cement manufacture, testifies:

"Here was a filler whose most striking feature was that it set instantly. This was because heat was used, and when applied it quickly parted with its heat, so that when it became cold, or nearly cold, it was actually set, and then would set no more, but always remained plastic and sticky. It was an absolutely new idea in fillers. The result of this was more far-reaching than it might first appear. It reorganized the factories. Instead of having to time the different departments for a halt or delay of five to ten hours in the bottoming room while the rubber cement filler was getting dry enough to proceed, the shoes were not halted at all, but went right straight forward to the sole laying. This not merely changed the timing of all the rooms throughout the factory subsequent to the bottoming room, but it released a large amount of floor space which had previously been required for the accumulated shoes, and it decreased the number of lasts and the number of racks, and did away entirely with all special drying apparatus, and did away with several cementing processes, including the cementing machines and operators, and it introduced certainty, where previously there was uncertainty. For instance, referring to the last point, the sole leveler with Besto knows that the racks will come along exactly according to the speed of the filler operators, with no delay whatever, whereas, with rubber cement filler there would be an accumulation of say 500 shoes on a dry day in a factory making 1,000 pairs per day, whereas, in a very humid day there would be an accumulation of from 1,000 to 1,500 pairs of shoes on the racks, standing there on the floor, waiting for the rubber cement filler to dry out. All of these shoes were standing there with the lasts in them, thereby requiring just so many more lasts. The point, however, that I am mentioning now, is the point of uncertainty or irregularity. If a humid day succeeded a very dry day, there would inevitably be an actual halt in the normal congestion of shoes in the filling room; whereas, if a dry day succeeded a very humid day, the accumulated shoes would dry out faster than the normal wants of the sole-laying operator, so that he would be unduly rushed. This irregularity, of course, was transmitted all along down the line through the rest of the factory. All this stopped when Besto arrived. Moreover, the untidy and wasteful conditions of the rubber cement filler were

no longer necessary, and the use of the Besto machine made it possible for the operator to fill his shoes more rapidly and accurately, and to waterproof them in a superior degree."

## The witness Knowles testified:

"The delays and difficulties which we used to experience with rubber cement filler kept the whole output and the entire shoe factory in a condition of uncertainty, and largely dependent upon the weather. Hence it was no small boon to the shoe manufacturer to remove all the troubles and causes of complaint at this vital part or center of the shoe factory. Besto filler and the Arnold machine made these troubles a thing of the past, and they effected large economies. In the average large factory the mere elimination of delay by Besto filler saved from 5,000 to 10,000 square feet of floor space; saved many thousands of lasts (depending upon the number of styles carried, frequency of changes, and grade of shoes made); saved expensive drying apparatus or appliances, and in some factories saved an entire drying room; permitted all the machines and shoe-making equipment, subsequent to the filling end of the bottoming room, to be rearranged more advantageously and compactly (because no longer necessary to provide for the congestion always inevitable in wet weather with rubber cement filler); saved considerable labor, and made the use of some of the old cementing machines unnecessary."

## The witness Chamberlain testified:

"In some of our factories we had special drying rooms, steam-heated, into which we would run the racks of shoes filled with rubber cement filler. In some of the factories we had big fans overhead, with big leather board shields or deflectors to direct the wind currents hard onto the bottoms of the upturned shoes. These fans were power-driven. Without these fans and drying rooms we could not get the shoes around the same day. When Besto came in it saved us more than half of the floor space, because the shoes could go right along without any delay. Besto saved in just the drying space alone fully 4,000 square feet of floor space in the Keith Company's factories. Our business was not more than one-fifth as large then as now. Also it gave us uniformity and certainty. By this I refer to the fact that, in spite of our drying apparatus and drying rooms and our utmost care, we would always have trouble with rubber cement on wet days, and everything would get blocked up or 'blockaded.' Nothing of this sort could happen with Besto. It was a big relief to the factory manager."

Other witnesses, to whose testimony particular reference will not now be made upon this branch of the case, testified with the same degree of particularity to the same effect. In view, however, of the reliance placed by the defendants upon the ruling in the Keno Case above noted, it may be observed that the court in that case found upon the evidence before it:

"The use of rubber cement fillers has been almost everywhere abandoned in favor of a filler made and sold by the plaintiff under the name of 'Besto.'"

The testimony of these witnesses, Hadley, Norwood, Barnes, Pike, Broughton, Chamberlain, and others, discussing in detail the various elements of the filler compound, leaves no doubt that the filler is, and is intended to be, a mechanical compound, and in no sense chemical, in whose making there are or can be chemical changes or reactions necessary to produce the desired result. Their testimony, too, is unequivocal in support, not only of the utility, but practically of the indispensability, of the Arnold hot roll apparatus in practicing the art of applying the filler. It may be observed that 1,000 of these

machines have been installed in 400 of the shoe manufactories, and that they are the instrumentalities for applying this filler to a product which is counted annually by well-nigh hundreds of millions of shoes.

This testimony comes from witnesses, some of them of lifelong experience and close application to shoe manufacture and to the shoe industry, and some of them the representatives of a second generation of families in the manufacture of shoes. All of them speak with the authority of those who know what has happened in the great shoemanufacturing industry. They testify unstintedly in praise of the change wrought by the new filler and the necessarily new method and new apparatus of applying it; they testify, not merely to the meritorious advance which it has made as a filler, but to the revolution it initiated in the industry; they testify to it, not as superseding a product or a state of affairs to which there could ever again be a return as a matter of choice, but as a fundamental change of product, of method of use, which had produced a corresponding change or order, organization, and results, in the filler branch of shoe making. It is more than proof of ordinary commercial success; it is proof of a complete supercession of the prior art in respect of product, method, and apparatus. This is what the proof shows, without regard to any of these four patents or their claims or specifications, and upon this testimony the plaintiff is justified in its statement of the facts thus:

"It was the first 'hot' shoe filler which had ever been known or used, or even proposed. It was a hot filler, in the sense that heat had to be employed in its original manufacture, and it was a hot filler in the sense that heat had to be employed in its application to the shoe in the shoe factory. This was something absolutely new in the shoe-filler art, and its advantages were many and far-reaching, as set forth in the affidavits found in the record. first shoe filler which ever was, or could be, manufactured in commercial quantities and distributed throughout the country and carried in stock, ready for Prior to its introduction there was no such industry in existence as the manufacture of shoe filler of any kind. Now it is an important one. It was the first and only shoe filler which was normally, as manufactured and distributed and kept in stock, in the condition in which it was to permanently remain after being placed in a shoe. It was the first and only filler that would instantly 'set' after being applied to the shoe, and which therefore involved no delay whatever in the progress of the shoes through the successive stages of manufacture. It was the first and only filler which would remain permanently unchangeable in the shoe, and never disintegrate and bunch up, and produce squeaking and discomfort to the wearer."

[1] It is my judgment that the court is not only permitted, but is required, to consider the plaintiff's claims, in view of the time and condition under which the four patents were brought out. They were practically concurrent and copending patents. Each one seeks to be contributory in a greater or less degree to the advance or change in the art which it is proposed to bring about. Whatever might have been the course to be pursued in interpreting or construing them, if they appear to be otherwise independent, the court is not at liberty, nor is it fair to the patentee, to ignore the express reference made in these several patent records to the pendency of the other patents and the general purposes sought to be accomplished by the four patents as a whole. If the problem concerned the interpretation of land or

other property grants, each containing references to the provisions or the purposes of the other, the court would not hesitate to fully refer to all of them for the purpose of ascertaining the true intent and the construction to be placed upon each, as well as upon all. Therefore the question in the consideration of these patents really comes down to this: If, as a matter of fact—and that such is the fact I have no hesitation in finding—these four patents were designed by the patentees, as well as by the government, to reach both generic and specific situations with respect to the filler, its application and the method inhering in its use, and if the public during 10 years of the lives of the several patents has in fact accorded such scope and operation to the patents, is there anything in the patents which compels the court, upon the issue here presented, to deny to any or all of the patents the broad as well as the particular intent and scope?

Taking patent No. 861,555, there is no suggestion in the record which can be seized upon in support of any claim of invalidity, and the defendants seek to avoid what would otherwise be an admitted infringement by the claim that others had defied the patent. It suffices to say that there is no merit whatever in this contention, and there is scarcely a scintilla of proof which supports it. The defendants' wax tailings filler is the exact product referred to in these patents, and if the infringement involved nothing further, this phase of the case could be passed with a mere direction for an injunction restraining the defendants from further making and selling the wax tailings filler. The infringement, however, must be considered in connection with the claims of patent 832,002, which are broad and generic; likewise the claims of that patent covering the loaf form of package. This will be done later.

The controversy over patent 832,002 involves the contention that the first 14 claims, which on their face are broad and generic, are invalid for want of definiteness and precision; that they cannot comprehend the wax tailings filler manufactured by defendants, and which, as above noted, is adjudged to be a clear infringement of patent 861,555; that such claims have been adjudicated by the Court of Appeals for the First Circuit in the Keno Case above referred to, and that in any event they can have no broader interpretation or scope, except as covering gutta percha filler; that the loaf claims are invalid, as not disclosing patentable novelty.

The view taken by the court in the Keno Case involves so fully the entire discussion raised upon the claims in issue under this patent that that case of necessity is entitled to extended reference. The trial court considered claims 1 to 14—the so-called broad and generic claims—and, after describing the there defendant's process and product, holds said defendant to be an infringer in the following language:

"The defendant thus omits the gutta percha of the formula whereby the patentee says he has obtained the best results, using instead more resin and pontianac resin. The patentee has stated that other vegetable gums, pontianac among those he names, may be used instead of gutta percha. The aphalt and brown pitch, which are added in small proportion, fall under the description of mineral oils. The defendant, like the plaintiff, has provided a binder for its cork base without using an ingredient containing naphtha, and

has thus done away with the delay due to the slow setting of a mixture containing naphtha, and the objectionable features due to its evaporation. It substitutes, for certain ingredients in the patentee's preferred mixture, only well-known equivalents. I see no reason to doubt that it makes its filler by what is in substance the method of the patent; and, restricting the claims in issue to a shoe-bottom filler produced according to the disclosure of the patent, I think they are infringed if they are valid. It does not seem to me that the patentee's described method of making a shoe bottom filler can fairly be said to be anticipated by the prior patents to Peterson (1882), Grunzweig (1889), or Goodall (1891). In neither of these is the production of a compound adapted for use in filling shoes contemplated, nor does either appear to show how such a compound may be made."

The court then, in declining to give the claims a broad construction and scope, says:

"I do not find sufficient ground to believe that the invention described in this patent is properly to be regarded as 'pioneer' in character, or that the product thereof is 'new' in the sense necessary to support the plaintiff's contention. So far as appears from the disclosure of the patent, the patentee did no more than show how to make a filler free from the disadvantages he mentions involved in the use of fillers containing naphtha. Except for those disadvantages, the rubber cement filler does not appear to have been unsatisfactory. The evidence affords reason to believe that, apart from them, it was little, if any, inferior in any essential respect to that produced by the patentee, provided that the rubber cement was of the best quality and free from adulteration. What the patentee provided, therefore, was an improved filler, but not one sufficiently superior in quality or different in kind from anything before known to justify calling it a new filler, or regarding the patentee as first in a new field of invention."

The court then comments upon the success of plaintiff's Besto filler, that it contains "hardly any of the ingredients mentioned in the patent, and is not prepared according to the method therein described (patent 832,002); that it is made of wax tailings rendered elastic by the addition of paraffin oil according to the disclosure of patent 861,555. Then in dealing squarely with plaintiff's contention for the validity of the broad generic claims of patent 832,002, and the reference contained in the other patent respecting its subordination thereto, the court says:

"No decision is found in which it is held or recognized that the product of a described process, whether it be called a manufacture or a composition of matter, can properly be claimed in terms like these, so as to cover every product to which the same terms are capable of application. If there are any circumstances in which such claims for a product could be held valid to their full extent, I am unable to believe that they can be so treated in a case like this, where the invention is, at most, of an improved filler, not of one wholly different in kind from any that preceded it."

In the final disposition of the matter is found this language:

"In view of the fact he [Thoma] appears to have devised and disclosed an improvement of value, I do not regard the character of his claims in suit as sufficient ground for holding them invalid, as the defendant contends."

On the proposition of holding these broad claims valid or invalid, it really held them valid, but narrowed them to a product composed, as specified, of the gutta percha binder and cork, and then held them infringed because the defendant there was using "well-known equivalents" of elements or ingredients and methods. This attitude of

the trial court is a matter of importance, in view of the subsequent disposition by the Court of Appeals. The latter, after citing the statutory requirement for precision and certainty, and noting the difficulty of application of the rule, doubtless appreciated the situation when it said:

"In the case at bar, which with reference to the claims which absolutely lack any statement of any specific proportions, it is plain that the application of this rule is difficult, because the specification deals at great length with numerous elements necessary to be taken into consideration before it can be determined that the generic expressions in these claims which we have copied are capable of any certain application, or any application except one involving experiments by persons who are only ordinarily qualified in the art, or the use of the spirit of invention."

The court, having stated that its views were "not entirely harmonious" with those of the District Court, disposes of the matter and affirms the ruling in this language:

"The court below seems to have gone outside of the claims for the purpose of finding an interpretation for them, and seems to have accepted the invention intended to be covered, not merely by reading the claims under the ordinary rules of interpretation, but by supplying that in which the claims are absolutely lacking—precision and definiteness. Nevertheless we have carefully examined the positions of the respondent, and we do not find that the claims were asserted to be defective or void by reason of the propositions to which we have referred; so that, notwithstanding what we have said in reference thereto, we do not feel justified here in assuming to be wiser than the parties, or assuming to declare claims void for reasons not asserted. Consequently we have been compelled to draw out from the opinion of the court below for what reason it held this patent valid.

"This seems to come down to the proposition contained in the opinion as follows, referring therein to the inventor, namely: 'In view of the fact that he appears to have devised and disclosed an improvement of value, I do not regard the character of his claims in suit as sufficient ground for holding them invalid; but I cannot give them a construction broader than that adopted above.' This apparently refers to the following paragraph in the

opinion of the court, namely:

"'No decision can be sound in which it is held or recognized that the product of a described process, whether it be called a manufacture or a composition of matter, can properly be claimed in terms like these so as to cover every product in which the same terms are capable of application. If there are any circumstances in which such claims for a product could be held valid to their full extent, I am unable to believe that they can be so treated in a case like this, where the invention is at the most of an improved filler, and not of

one wholly different in kind from any that preceded it.'

"The effect of all this seems to be that the District Court held that it could not sustain the patent to the full extent of the language of the claims which we have cited, but found that the patent contained something narrower in its practical effect than what is called for by the language of the claims as read without restriction. In other words, the opinion seems to have gone through the whole state of the art and the circumstances explained in the specification, and gathered from the whole what it found to be new. Therefore, while we make out that, after all, the language of these claims may be insufficient, within the rule which we have cited from Mr. Walker, yet, in view of the fact that neither the court below nor the respondent stands on propositions of that character, we feel that it is going beyond the province of this court to assert such a proposition, which plainly involve serious difficulties.

"We apprehend, however, the difficulty arising from the fact of sustaining the patent on a narrower reading than the natural reading of the claims in controversy, and that under the circumstances the invention, as we are sustaining it, is a narrow one, while the claims themselves are perhaps broad. It is therefore necessary for us to caution the profession and the public that the patent is always to be read and interpreted in the manner in which the learned judge of the District Court interpreted it, and not with a mere reference to some possible interpretation which may be put on the claims."

The facts, as hereinbefore found, compel the conclusion that the advance wrought by these patents was not a mere "improvement," but, on the contrary, invention of a primary character. No better or other tests can be applied than through inquiries such as those made and answered by the workers in the art, as detailed in the record. Now the circumstances that, in the commercial art, plaintiff's Besto filler has achieved conspicuous success in driving out and completely superseding the naphtha filler, as the witnesses detail, and that it has achieved this because of cheapness, are not at all relevant to the inquiry respecting the validity or scope of the claims contained in patent 832,002; nor do they in the slightest degree countervail plaintiff's contention that Thoma's real invention was broad and comprehensive, or that the wax tailings and the gutta percha binder fillers are but exemplifications—species—of his broader and generic conception. Indeed, when considered in connection with any one patent alone, and when, as here, the disclosure is accompanied by revolutionary changes of the art, they support the claim, not of mere "improvement," a mere differentiation in degree, but radical, inventive departure. And that in my judgment is the credit to be given to plaintiff's filler, notwithstanding the conclusion reached upon that phase of the patents, in the Keno Case. So that the question is: Did Thoma, although his conception and attempted disclosure was and is broad in fact and in spirit, nevertheless fail in his effort to get the protection of the patent laws, because his claims are not written out so that they can be understood and applied for the accomplishment of a broad purpose?

The view of the trial court in the Keno Case, that, except for the disadvantage (of using naphtha in fillers), the rubber cement filler "does not appear to have been unsatisfactory," can obviously be expressed of any article, apparatus, formula, or situation which has been superseded by another. The methods of communication employed prior to the advent of the telegraph, telephone, typewriter, were all, except for their disadvantages, satisfactory. The fact and degree of invention must necessarily turn upon the character and degree of disadvantage which has been overcome by the embodiment of the new conception. And it may be observed that the suggestion of fact, that, if rubber cement of higher quality were used, the rubber cement filler "was little, if any, inferior to" Thoma's patented filler, is not only wholly without support in the present case, but the testimony of all witnesses-particularly Pike, Norwood, and Chamberlain—and the entire history of the new product and the disappearance of the old, indubitably negatives such to be the fact. Indeed, these witnesses establish beyond doubt that the disadvantage resulting from the use of naphtha were insuperable; that all efforts to overcome them were unsuccessful, because of its influence in expanding the rubber, and then, after evaporation of the former, the latter dried, with the result of "bunching" or guttering in the sole. And it is a fact of no small significance that during the 10 years' use of Thoma's filler, no one has succeeded in the apparently simple venture of improving the grade of rubber cement filler, to the end of shar-

ing with the Thoma filler the field monopolized by the latter.

It thus appears upon reading the Keno Case that the Court of Appeals, while concluding that the trial court "seems to have gone outside of the claims for the purpose of finding an interpretation for them, and seems to have accepted the invention intended to be covered, not merely by reading the claims under the ordinary rules of interpretation, but by supplying that in which the claims are absolutely lacking—precision and definiteness"; nevertheless its action in holding the claims valid, but narrowly applied, is affirmed—the court at the same time declining to assert that the language of the claim is "insufficient because of the serious difficulties involved," and with apprehension of the "difficulty arising from the fact of sustaining the patent on a narrower reading than the natural reading of the claims in controversy, and that under the circumstances the invention, as we are sustaining it, is a narrow one, while the claims themselves are perhaps broad."

Now, to my mind, the "serious difficulties" attending the invalidation or the narrowing of these claims, the ample reasons for not so re-

jecting them or cutting them down, may be thus stated:

First. That through such limitation the plain intent and purpose of both the patentee and the Patent Office, the one to disclose, the other

to recognize and protect, a broad conception, is frustrated.

Secondly. That the conception and the disclosure is of a compound, mechanical in its nature, the proportions of whose ingredients may be, and in patents covering that kind of invention frequently are, referable to the skill of the artisan, or to experiment properly within the capability of the skilled worker in the art. The question is not: Are proportions stated in the claims? If not, they are invalid. But rather, does the absence in the claims of a statement of ingredients or proportions render futile the effort of one skilled to practice the invention. This latter question frequently, especially in interpreting broad claims, is, and can only be, determined by recourse to the specifications or drawings. When in a compond not chemical wherein reactions or changes in constituent elements, which depend upon proportions and proportions alone, are sought, but a purely mechanical compound, the ingredients and their characteristics are known, the proportion necessary to produce a certain result is frequently left to be determined, either upon judgment or skill exercised upon the strength of information at hand, or to be found upon reference to the other portions of the patent. Thus scores of patents, covering formulæ for mechanical mixtures, contain no further directions for proportion than such as may prove "suitable" to make a "plastic," a "granular," a "lumpy" mass. Now, with respect to the absence of a statement of ingredients in these broad claims, the same tests must be applied. Obviously, if a patentee's invention is broad, the language of his grant must be correspondingly broad. A cardinal rule of interpretation, that general

words are strengthened by exception and weakened by enumeration, doubtless frequently confronts a patentee in his efforts to state his claim so that its language will coincide with his invention. Thus, if Thoma, in his statement of claim of patent 832,002, had said that it comprehended a base "like cork or its equivalents," or a binder "like gutta percha or wax tailings, or their equivalents," no one would have thought the claim invalid, but, on the contrary, would regard the situation as involving an interpretation of the terms "base" and "filler," or "component," in the light of the doctrine of equivalency, as that doctrine may be applied, and the mere absence of such a statement or statements in a claim does not destroy either validity or the broad scope of the claims, if the latter, upon the two considerations next alluded to, can be ascertained.

Thirdly. These very two patents, \$61.555 and \$32.002, in their specifications apprised the Patent Office of two specific forms of filler and their respective ingredients of indicated proportions, and the patents on their face—aside from the asserted subordination of the one to the other—expressly indicate that the invention comprehends broad equivalents of the specific ingredients. The patents, and the record of their prosecution in the Patent Office, cannot be read without the conviction that recognition to the claim of breadth was intended; that the office regarded the specifications as sufficiently definitive of the broad terms of the claims, and intended, by allowing these broad claims, to recognize the equivalency now demanded. The fact that one patent comprehends a specific nonvegetable binder, while the other refers to vegetable binders, is most striking proof of the purpose on the part of the Patent Office to recognize, in these broad claims, the characteristic of the ingredient to produce the quality of elasticity, pliability, unchangeability, rather than mere origin. In other words, the government framed its grant upon the basis of the information disclosed by the patentee, and trusted to rendering it certain, if need be, by resort to that information now of record in these patents. No rule of interpretation forbids a court from doing that very thing, certainly not as against a defendant who, apparently, is using that same information in his alleged infringement. Of course, if the court were called upon in this suit to answer the question, What do these broad claims include and what do they exclude? by way of enumerating all possible ingredients and their equivalents, or their proportions, it could not be done, any more than it is ever done or required in any broad or generic claim. The problem is no other or different than that arising upon a claim narrow in terms, asserted in fact to be entitled to a broad effect. The question always is: Is the claim susceptible of, and entitled to, an interpretation and scope which will comprehend the act of an alleged infringer? It is my judgment that the government, so far as the present case is concerned, answered that question in the affirmative as between Thoma and the defendant; that the court is bound to affirm that view; and further support is found in this next consideration of patent 832,002.

Fourthly. There is not a suggestion of any fact or circumstance drawn from the prior art which because of that art—i. e., prior dis-

closure of the breadth here claimed—demands that the prior art, and therefore the public, have the credit of the breadth claimed. There is no prior art patent referred to in this case, except Howland, which contains no suggestion that can afford a basis for limiting Thoma either as to kind of filler or method of application—not a suggestion of a filler having ingredients requiring heat for their mechanical union or application. In the Keno Case, neither of the courts found, in the art as shown by such patents, any basis for limitation or for denying to Thoma fundamental differences of characteristics and giving him credit for mere difference of degree. In the present hearing defendant produced, through the witnesses Whitten, Tirrell, Willis, and Hawley, exhibits of filler composed, as they say, of a "layer of comminuted material such as waste flax fiber mixed with a sticky binder of waxy pitch of a bituminous nature. But the inspection of the exhibit will at once refer them to a date in the art prior to even Howland, for they appear to be felt, which could not be used except by cutting out and fitting to the soles. They testify strikingly to the advance in the art wrought by Thoma's compound. The very fact that little, if anything, in the record or practical art, can be cited against these broad claims, is most strongly supportive of the presumption of broad validity.

Fifth. A last consideration arises out of the concession of fact, appearing in defendants' answer and supporting affidavit in this case, that the binder ingredients of patents 861,555 and 832,002 are equivalent. True, this concession is made in support of their contention that, because of such equivalency, Thoma "exhausted his monopoly in taking out patent 832,002, and that there is no further patentable subject-matter to warrant a prolongation of the monopoly of his later patent, 861,555, by merely selecting another well-known binder from a well-known group of bituminous binders"; but that contention manifestly concedes breadth of invention which ought to be recognized somewhere, and any considerations of "prolongation" of monopoly ought not to be assertable by an infringer when neither patent has ex-

pired.

[2, 3] There remain claims 15 to 29 of the patent under consideration, concerning the "loaf" form of putting up the product. Here again the court should take the larger view taken by the government in granting the patent, and recognize the novelty, the utility, and the practical indispensability of this form of product, in its relation to the larger object of the patent. It is a further suggestion of the marked difference between the old and the new filler—that the latter, because of its characteristics, its elasticity and tenacity, could not be put up and handled in ordinary forms of containers. The claims should be upheld as covering a novel as well as—the proofs show—an indispensable feature of the filler invention. The conclusion is therefore reached that the broad claims of patent 832,002, particularly 1, 4, 7, are valid, no matter what support there may be for upholding them as covering independent invention, and are entitled to the broad interpretation claimed by plaintiff, that the filler "loaf" claims thereof are likewise valid, and that both are infringed by the defendants.

[4] In considering patent No. 808,224 covering the method, or

process, whatever may appear as confusion between process, product, or apparatus, there can be no doubt that the disclosure is essentially of a process new to shoe making. The use of heat in applying a filler, and that alone, upon the record here, makes it patentable. It is the disclosure of "a mode of treatment of certain materials to produce a certain result," and as such quite independently of the mechanism necessary to practice or carry it out. Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139, cited in Expanded Metal Co. v. Bradford, 214 U. S. 383, 29 Sup. Ct. 652, 53 L. Ed. 1034. Now, in the case before us, Thoma might have directed the melting of a filler and its application to the shoe bottom with a spoon, followed by pressure with a hot flatiron; and the conception of using heat as a mode of treatment would have been none the less novel. The conclusion is that this patent is valid—infringement is not denied—and I am unwilling to follow the Keno Case.

[5] This leaves for consideration the apparatus patent 808,227. It is needless to say that the views already expressed respecting the Thoma filler patents will permit denial of validity to this Arnold patent only upon a showing that the mechanisms in the art before us demand it. It may be that in the Keno Case, infringement of this patent was evaded because the defendant did not practice the invention disclosed in claims 1 and 2, there in contest. That the defendant here infringes claim 3—we will not consider the others—cannot be contested on the proofs. So it leaves only the question of validity. That this apparatus has been accepted by manufacturers as practically the one instrumentality for utilizing the Thoma filler, and practicing his process or method; that it came into the art as an apparatus which (or whose equivalent) was practically indispensable for using a hot filler; that it has been a "hot filler" machine, respected by the public as enjoying the protection of the patent in questionis not seriously questioned. Doubtless other arts disclosed a steamjacketed table or melting pot, a heated roll; but there is no suggestion in this record of an apparatus used or usable for the purpose of applying filler to shoes in the manner disclosed. The introduction of the mechanism containing the heated roll, the organization of the apparatus as disclosed, is concededly new in the art, and it was neither aggregation nor mechanical skill; and the proofs here not only support the presumptive validity of the patent, but they go far toward eliminating the possibility of question.

The conclusion is that the patent is valid, and infringed by defendants in the manner and by their conduct disclosed in the proofs. If justification for the great, perhaps inordinate, length of this opinion be necessary, none can be given, except such as arises out of a case involving what are conceived to be inventions of much consequence in a great industry; out of contrary views and results in other litigation, which, upon proofs here, do not appeal to me; views and results which, if followed or adhered to, break down in a large degree these inventions, and destroy the fruits of a decade of recognition and development. The proofs on the facts in the case seem not only satisfactory, but their persuasiveness on practically every branch

is accentuated by the absence of serious effort to gainsay them; and the convictions here entertained upon the ultimate questions of validity and infringement are such as prompt the issuance of an injunction against the defendants conformably with the views. expressed.

Such injunction may be prepared by complainant's counsel.

# NORTH AMERICAN CHEMICAL CO. et al. v. DEXTER et al.

(District Court, E. D. Wisconsin. January 22, 1918.)

PATENTS \$\iff 328\$—Validity—Shoe Bottom Filler—Shoe-Filling Apparatus
—Process for Filling Shoe Bottoms.

The Thoma patents, Nos. S32,002, 861,555, and S08,224, and the Arnold patent, No. 808,227, relating to the process, material and apparatus for filling shoe bottoms, *held* not invalid because of prior use.

In Equity. Suit by the North American Chemical Company and others against Alvin S. Dexter and others for infringement of patent. Decree for plaintiffs.

Edward Rector, of Chicago, Ill., and Quarles, Spence & Quarles, of Milwaukee, Wis., for plaintiffs.

Gillson & Gillson, of Chicago, Ill., Clyde L. Rogers, of Boston, Mass., and E. H. Bottum, of Milwaukee, Wis., for defendants.

GEIGER, District Judge. The case is before the court upon final hearing, after an exhaustive presentation of a motion for preliminary injunction. The views of the court upon the latter are embodied in an opinion filed August 1, 1916 (252 Fed. 148) and upon the present hearing there has been a practical concession that, except in the particulars to be now considered and disposed of, there has been no development in the testimony taken for such final hearing which tends or in justice should be considered by the court as demanding or even warranting a conclusion different from that reached upon the former hearing. Reliance is now placed upon a defense not heretofore raised or suggested, namely, that prior to the date of the invention of the patents in suit a shoe filler, alleged to resemble that of the patents, had been made and used at certain places in New England. In other words, prior use defenses are now set up and sought to be sustained by the proofs.

These prior uses, two in number, are: First. The so-called "Dizer" use, alleged to have occurred at East Weymouth, Mass., some time during the years 1897 or 1898; the filler being prepared by a man named Douglas Easton, and therefore referred to as the "Easton" filler. Second. The so-called "Farrell" use, originating with a man bearing that name and at a place called Scituate, Mass., during the years 1900 or 1901, and said to have been supplied to several factories in the New England shoe district.

As in ordinary cases, the consideration of the proofs upon these defenses must be directed to the ultimate question of establishing identity of product or process to the requisite degree of certainty.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Naturally, in the exhaustive preparations made for the former hearing and for the trial of other proceedings involving one or more of the present patents, all having wide publicity, that these defenses were never before suggested must at the outset produce a sort of scepticism respecting their merit. That, however, cannot dispense with an analysis of the testimony and an ascertainment of its legitimate weight and probative force.

The "Easton" filler is ascribed to the "authorship" of one Douglas Easton, who was questioned (he was 80 years of age) to give his recollection of what transpired 20 years ago. His testimony, also that of other witnesses on either side of this issue, may be summarized and considered in its pertinency: (1) To the fact and time of making and using any alleged anticipating filler; (2) character of the filler in respect of ingredients; (3) its consistency; (4) the method and manner of its use and application to shoe bottoms, e. g., whether soft and sticky and whether applied "hot"; (5) the degree of its use, i. e., whether actual public and commercial, or merely experimental.

Taking the testimony of the witnesses:

Easton, while giving emphasis to the infirmity of his memory because of advanced age, and, apparently, because of insignificance of the "filler" incident as an "experiment," gave this answer to a question asking for explanation or description:

"I can tell you better by saying here is the filler (producing two soles with filler on them). The filler will speak for itself a good deal better than my language will. It is made of pitch pine gum tar and bran. I had them on hand in the tannery, and I used them. For one thing, I know the bran was used for a depilatory, or drench, to make a sour of it, to take the lime out."

He identifies a memorandum book containing a recipe:

"Semiflexible filler for shoes. Four parts pitch pine gum, one part tar; melt and add bran, according to your judgment. Apply hot."

This was written into the book in 1898 in response to a request from his employer that he "write off" for him the many things he was "getting up" for use in the shoe factory, etc.—the idea being to preserve them. He expressly disclaims any recollection, except as the recipe furnishes him the fact, and when a call was made for information "how this filler was heated to apply in shoe bottoms," he referred his questioner to "some one who knows better"—in particular to one Orr, a witness, whose testimony is next commented upon.

The observation may be made that Easton was an employé of the Dizer factory, and apparently for many years its "expert." He describes generally the position he held as such; therefore a comprehensive statement respecting the pertinent considerations—the character, consistency, actual or contemplated application, etc., of the filler "discovered" by him and used by his employer—might well have been expected from him as the naturally primary and first-hand testimony; and his inability to give it, necessarily constitutes an infirmity or impairment of the probative force to be accorded to such partial testimony as he gave, and, as will be seen, it must have a like tendency to impair the force of all other testimony which has inherently a sort of secondary quality.

Orr testified to employment by Dizer from 1890 to 1900 as their mechanician; that Easton "made a bottom filler and came to me for something to heat it up, so I gave him \* \* \* a \* \* \* wax pot"; that the hot filler was tried out, and it was found it hardened up too hard; that he had no data regarding the length of time it was used; that it was "tried in the regular line of shoes"; that he does not think it was used six months, and whether it was used as long as three months "Mr. Davis, the foreman, could give a better idea." He testified that there was "quite a good deal of experimenting in different kinds of fillers at that time"; that the Easton filler was heated in the wax pot, applied with a putty knife, but he never actually saw any of it being heated or being applied. He had nothing to do with the manufacture of shoes made in the factory.

His testimony properly draws the comment that he does not endeavor to speak respecting the character, consistency, ingredients, or manner of application of the filler, but confines himself to the single fact of furnishing an appliance to heat up filler. Like the witness Easton, he refers to another, the foreman, Davis, as competent

to furnish other facts which were the subject of inquiry.

Davis, after testifying to employment as foreman by Dizer from 1891 to 1899, says that in the fall of 1897 Easton "got up a shoe filler that was used hot," and that it was used in a regular way in the factory for filling the bottoms of Goodyear welt shoes for a period of three or four months; that his employer was making about 100 dozen a day Goodyears at that time. The Easton filler enabled greater expedition in getting the shoes through the factory, but complaint was made of it because the shoes became inflexible. Whereupon "they returned to the use of the old rubber cement filler," and continued to use it until he left. When asked to explain the manner of use or application of the filler, he said:

"When we first got it up, we tried to put it in as he (referring to Easton) sent it up; but we could not use it. Mr. Orr got me up a machine, or a wax pot, I think it was, and I had some wires across to lay our knives on. We used to use a couple of these, a putty knife or a case knife, and we used to lay them on that wire over that hot steam, and have one heating while using the others."

He further asserted that the knives were kept warm or hot by

steam that was supplied "to the steam-jacketed kettle."

The significance of this testimony is in its substantive and formal pertinency to the appliances and to the methods used by Thoma as described in the patents in suit. I do not understand that Davis professes to know anything about the ingredients; certainly he did not testify to the consistency of the so-called Easton filler. It is a circumstance worthy of note that he never told anybody about it, or tried to introduce it in factories where he was later employed. But the most significant feature of his testimony grows out of its relation to other testimony, hereafter commented upon, respecting the use—the actual daily use and detailed application—of the filler. Obviously, Davis did not himself work as a shoe filler. He was foreman, and, when he was pressed to fix the date of the so-called "Dizer" use, he said, among other things:

"I had two very bright Italians, and that was while we were using Mr. Easton's cement, and we had a strike among the welters and stitchers, and we took a part of them, called the 'Jo Jeff,' and we put them on the Goodyear machines to help us out there, and I know that was before 1898."

The pertinency of this tying-up of his own testimony with that of the two Italians, who subsequently became witnesses, can be appreciated in connection with what has just been said, namely, that Davis, being the foreman, never personally worked at applying the filler, and therefore the detailed facts were obtainable, if at all, from the witnesses to whom he thus referred.

Lewis, who was superintendent at the Dizer factory from 1890 to 1904, claiming familiarity with the bottom filler used in welt shoes, testified that he knew of a bottom filler "that was applied hot"; that they had given more or less thought to finding a substitute for the felt filler, because the latter was expensive and had to be fitted by hand; that they tried dust and cork, putting it on with a putty knife; that the witness saw some stuff advertised in a New York paper, got a sample of it, which was tried "to make a waterproof shoe," and "the outcome was Easton's experiment for the filler to go along with it." He does not remember the ingredients of Easton's filler, saying, "only I know there was pitch and tar or something in it." The date is fixed during the period of the witness Davis' employment. Whether, however, it was prior to 1904, he said that it was back in the '90's-'95, '96, '97, along there. "All along there we experimented all the time on something, and Davis was running the making room during that time the entire period." He professed, however, to speak positively respecting the manner of application of the Easton filler to shoes, viz.:

"Q. Can you state how the Easton hot filler was applied in shoe bottoms? A. It was applied hot in a jacketed kettle. Q. Steam-jacketed? A. Steam-jacketed kettle, and applied with a knife. Q. And were the knives kept hot for use in laying out on the shoe bottom? A. Yes. Q. How were they kept hot? A. Laying on the side of the kettle up there, they had some attachment to keep them hot. Q. So the knives were kept hot with the same steam that heated the kettle? A. I cannot answer that. The kettle was hot, and the knives were on a hot or warm surface."

The witness further says that the Easton filler was abandoned, and the rubber cement filler again used, because the former left the shoes inflexible. He, too, like the witnesses Easton and Davis, does not appear to have ever told any one about Easton's filler.

Keene, who was machinist, carpenter—everything in that line, everything but shoe-making—at the Dizer factory from 1890 to 1900," testified to fitting up a kettle for making "what I always called 'Doug's' filler"; that he was not familiar with the manner of carrying on filling shoe bottoms, but had something to do with "setting up the paraphernalia"; that in 1897 or '98 he fitted up a pipe in what is called a jacket kettle—a steam-jacketed kettle—and the filler material was heated therein; that he did not know what instruments were used to put the filler into the shoes; that the job of fitting up steam-jacketed kettle was done by him personally under the instruction of the witness Orr.

The testimony thus far reviewed was offered on behalf of the defendants, and it is well, at this point, to consider its persuasiveness for even prima facie support of the defendants' contention. The obvious weakness, considering it as a whole, is, first, in not establishing, to a fair degree only, the ingredients actually used by Easton in making any filler; and, secondly, whether the filler used at the Dizer factory was in fact such as was made according to the formula which Easton offers in the "recipe," assuming that such recipe is sufficiently proved as an item of evidence; third, the character of the use is rather clearly—and, by the testimony of some of the witnesses, overwhelmingly—shown to have been experimental; fourth, though this becomes apparent upon consideration of both plaintiffs and defendants' testimony, whether any paraphernalia was ever rigged up for the heating and application of this filler, and not, as is suggested in the testimony of the witness Lewis, to use in connection with a waterproof material for "painting" soles.

As has been suggested, the defendants' case upon this issue was left to await with some eagerness the story of witnesses, if they could be produced, who did the actual work of filling shoe bottoms with this so-called Easton filler; and the plaintiffs did produce the identical two witnesses—the two "bright Italians"—referred to by the witness Davis. It is not necessary that their testimony be given verbatim, except in the particulars which appear to respond to the expectation, produced by defendants' witnesses, that it would be corroborative of their stories. It is evident that these two witnesses were regularly engaged in using rubber cement filler. Both of them gave testimony whose simplicity of recital leaves no doubt that they had in mind the very times, places, and situations which the defendants' witnesses attempted to recall. Both concur in the defendants' testimony in respect of the use of a little "pail" containing some hard, black stuff, one of them giving his experience thus:

"Q. You say 'sometimes'—do you mean that different batches of this filler were brought to you? A. Sure; different ways. Q. Explain what you mean. A. I mean it was hard to use them. They did not stick very good, and I didn't like to use them, and I only tried a few shoes; then they stopped them again and they used the old stuff for a time; and then they came in again, and asked me lots of times to try them. Q. But, when they would bring in a pail of this hard filler, you would stop using the old stuff and use this hard stuff? A. Only for a few shoes, and then they would go on with the old stuff again. Q. Would you use this hard stuff from the pail, or would you put it in something else and use it? A. No; in the pail. I took the pail. It was so big, you know (illustrating), and it was a tin pail, you know, five or six pounds in a pail, you know—I mean the pail weighs so much, but I don't know exactly how much. Q. Did you ever see that hard filler for a whole day at a time? A. No, sir. Q. How long would there be between times? A. Well, sometimes it would stay a week, sometimes two weeks, and sometimes a month—I don't remember well, but he came lots of times, you know. Q. Did he tell you why he brought you some more of this filler? A. No; only he came up to me and says, 'Try them;' that is all. Q. Did he tell you whether it was all alike, all the same? A. Well, he thought he would bring it a little different each time; but I didn't find much difference in any way when I used it. Q. Did you heat this filler to use it, this hard filler? A. No. Q. Was it hot when you used it? A. No; it was not hot."

On cross-examination he denied positively ever having "some stuff brought up hot in pails from downstairs to fill shoes with," and reiterated his statement on direct examination that "the fellow with a little pail" came round to the witness' place and says "'Try this,' and I tried them in a few shoes and then he would go again, and I would not see him for quite a while, and then he would bring some more stuff." He denied having some other stuff, brown, not black, in color; likewise having a kettle heated with steam. His recollection is sought to be refreshed by reference to Keene's alleged fitting up of a kettle, and he answered positively that he did not see anything like that at all. He testified to putting the filler in with knives; that it would not stick well in the shoes.

The other witness testified that he recalled some one's bringing in another kind of filler in a pail—dark stuff, with ground cork, that was put into the shoe cold, dipped right out of the pail; used for a day or two. On cross-examination, when his attention was called particularly to matters suggested by the defendants' witnesses as to the consistency and hot or cold application of the filler, he corroborated the other Italian with great emphasis. When his attention was called to the kettle rigged up by Keene, one of defendants' witnesses, the following testimony was given:

"Q. Don't you remember, about that time, Mr. Keene was up there and rigged up a kettle to be heated by steam in the bottoming room, so that you could warm up the filler and put it into the shoes? A. Yes; I remember that. Yes; he put that right side of me; yes."

# When re-examined, he testified:

"Q. Now, about that steam kettle that Mr. Keene fitted up, do you remember using something like tar— A. To put on inner sole, I remember that. Q. Well, wasn't that what the steam kettle was for, to heat the tar? A. Yes; I remember that, sure. When they put the tar on the inner sole, I remember that I put that in like and put the bottom filler on top."

The importance of this latter testimony is its utter repugnancy to the defendants' testimony respecting the use of a hot filler or the rigging up of an appliance necessary to use Easton's filler similarly to the manner in which Thoma's is contemplated to be used. The testimony shows—indeed, that is suggested by the witness Orr—that certain stuff, like tar or asphaltum, was being used at that time for painting the inner soles prior to the application of the filler, and this had to be heated before application to the shoe bottom; and very plausibly, and in my judgment probably, defendants' witnesses may have confused the paraphernalia rigged up by Keene for that purpose with the subsequent paraphernalia necessary to apply the Thoma filler.

Upon this state of the testimony, it is possible to reach the conclusion, beyond all doubt, of an anticipating use of the Thoma filler at the Dizer factory in the years 1897 and 1898. I have no hesitation in saying that not only is every matter of fact involved in the inquiry open to grave doubt, but I am quite willing to suggest that the testimony as a whole preponderates quite strongly against the truth of defendants' claim. In considering the testimony of the Italians,

no little weight should be given to the suggestion of the defendants' testimony that they speak directly to crucial matters upon the issue. Great weight should be given to their testimony, because of its perfectly evident disclosure of the picture which each of the witnesses had in mind, and their unaffected and apparently disinterested method of recital of facts. There is no suggestion that, when testifying, they were under any stress of zeal, friendship, or bias for or against either of the parties to the case, and their emphatic denials respecting the details of use of the Easton filler, as testified to by the defendants' witnesses, as well as their perfectly clear explanation of the wholly experimental character of the use, not only throws all of the defendants' testimony in doubt, but, as suggested, preponderates quite strongly against the truth as claimed by it on this issue; and I reach the conclusion that the defendants have wholly failed to establish the Dizer use.

With respect to the "Farrell" filler use, a summary of the testimony may be dispensed with, for these reasons: The inquiry, as with the Dizer use, is directed to the primary questions (1) respecting the making and use of any anticipating product; (2) its character, consistency, and ingredients; (3) the manner of its application, i. e., whether hot or with the use of heated implements; (4) the degree of its use, whether public or purely experimental. If it be assumed that Farrell did make some sort of a new filler at the Scituate Mills, what its constituent ingredients were is as a fundamental inquiry susceptible of no answer upon the testimony, other than plaintiffs' counsel gives, i. e., "no living man knows or claims to know." Farrell is dead, and witnesses who knew him in life, who assume that his activities were directed to the discovery or perfection of a new filler, credit him and his activities with total secrecy and mystery, disenabling any and all efforts to elicit reliable information. Those who were interested in the mill—those who worked for or with him—not only attribute to him "a secretive way of wanting to keep his devices to himself, from the man he had there," but all ascribe their inability to testify to the facts inquired about to his apparently complete assertion of that trait. True, one witness volunteers to tell that, as the "backer" of the enterprise, he paid bills for cork, rosin, pitch, or glue; other testimony relates to barrels or containers, marked "Burgundy pitch," purchased and received at the mill; but, except as this gives a basis for inference-more properly conjecture, I believe—respecting their introduction into the filler subsequently claimed to have been used, no witness presumed to speak directly upon ingredients or proportions of admixture entering into the alleged filler.

Now, much testimony not only developed this situation, but, because of it, much more was taken to the end of supplying the defect, through facts disclosing how the filler was used—principally at the Arnold factory. In this way it was aimed to develop facts, respecting not only the consistency and manner of applying the filler, but also, inferentially, its ingredients. But the result, in my judgment, is even more incapable of establishing the defense than that which

arose upon the Dizer issue, for this reason: Witnesses, artisans who claim actually to have applied Farrell's filler, are in utter disagreement pertaining to the consistency of the filler; i. e., whether sticky or pasty, whether it had to be heated before applied, whether a heated knife or other implement was used in its application. The testimony as a whole, as upon the Dizer—and as frequently happens on any—prior use issue, discloses the very frailties and infirmities attending testimony given by witnesses whose recollection must be asserted in the light of perfect knowledge of the present day practice and product. It illustrates again, how the latter, even with perfectly honest witnesses, influences the forgetting of differences which may have been present and the recollection of resemblances in fact absent.

Assuming, therefore, as I think we may, that the testimony of no witness is to be discredited as being deliberately false, the problem involves dealing with testimony relating to occurrences happening in an art where much "experimenting" was evidently being carried on, many years before such testimony was given. The possibility of mistake, always present, ripens into probability, nowhere better exemplified than in the present record, where a witness, apparently credible, at first testified to matters as of the date 1900 to 1901, which, it was afterward shown with considerable certainty, could and did not occur until the time, 1904 or 1905, when plaintiffs' filler had already come into use. So, when we consider, as I think, that defendants' proofs to establish the composition of Farrell's "filler" substantially failed, a conclusion in its favor upon this issue, for that reason alone, must fail. And the conflict which has arisen in the testimony respecting the consistency, method of application, to say nothing of the experimental use of the filler—whatever it was—is, in my judgment, practically incapable of solution upon the basis of ordinary preponderance, wherefore the exclusion of doubt, cannot even be thought of. And in this situation the court may confidently give some considerable weight to the general testimony, given by disinterested witnesses of large affairs, long experience, and intimate association with shoe making, that plaintiffs' was the first acceptable hot filler.

For the reasons—already suggested—that because a summary of the testimony, such as given on the Dizer use, would present no more than a duplication of what is there exhibited, leading to identity of conclusion, no such summary of the Farrell testimony is deemed necessary. The defense has not been sustained.

The defense of want of invention, growing out of the so-called

"Fletcher" incident, has not been supported by any proof.

The general conclusion is that plaintiffs are entitled to a judgment decreeing the patents valid and infringed, conformably to the views herein, and in the former opinion, expressed; and such decree may be entered.

#### Ex parte BEALES.

(District Court, S. D. California, N. D. May 25, 1918.) No. 16368.

HABEAS CORPUS 5-16-JURISDICTION-DRAFT BOARDS.

A United States District Court has no jurisdiction to review on habeas corpus action of a local or district draft board, acting under the Selective Service Act, in calling to service an alien, who has waived his claims for exemption and been duly classified for military service under the rules to class 1.

Proceeding by Thomas J. Beales for writ of habeas corpus. On demurrer to petition. Demurrer sustained, and petition denied.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

George C. W. Egan, of San Francisco, Cal., for petitioner.

DOOLING, District Judge. Petitioner is a subject of Great Britain within the draft age, who has not declared his intention to become a citizen of the United States, and duly registered under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76). In his questionnaire he waived all claim to exemption and was placed by the local board in class 1A. Having been called to service, he now seeks by means of a writ of habeas corpus to be discharged therefrom because he is such alien. The Selective Service Act, however, provides:

"That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in the act provided."

It may be noted that the word used here is not "exempt," but "exempted"; so that it is apparent that something more is required to become exempted than the mere fact of being entitled to exemption. The power to exempt or excuse is, by the act, lodged in the local and district boards, and their method of procedure is, by the terms of the act itself, to be according to rules and regulations made by the President. Under the rules and regulations so made (rule XXVII):

"If neither the registrant nor any person in respect of him has claimed deferred classification, he shall forthwith be classified in class 1, unless he is an alien enemy."

The regulations further provide (note to above rule):

"No alien (not an alien enemy) who has not declared his intention to become a citizen of the United States shall be placed in any class other than class V unless such nondeclarant has stated, in answer to question No. 2 of series No. VII of his questionnaire, that he does not claim exemption on the ground of his alienage."

Construing the act and these regulations, the courts have uniformly held that all persons, save enemy aliens, within the draft age, are subject to the draft, unless exempted or excused therefrom by the local

<sup>&</sup>amp; For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  $252~\mathrm{F}$ .—12

or district board, and that the action of these boards, where there has been a fair hearing, is final, and not subject to review by the courts, either on habeas corpus or certiorari. The petitioner having waived his claim for exemption before the only tribunal empowered to act upon it, and such tribunal having accorded him a fair hearing, and classified him strictly in accordance with the terms of the act and the regulations made by the President by virtue of the authority conferred upon him, this court is not only without power, but also without inclination to interfere.

The demurrer to the petition will therefore be sustained, and the petition denied.

#### NATTERSTAD v. TITLE GUARANTEE & TRUST CO. et al.

(District Court, D. Oregon. June 8, 1918.)

1. Trusts \$\sim 325-Accounting-Evidence.

In a suit for an accounting, where complainant had conveyed property to defendant pursuant to a trust agreement, *held*, under the evidence, that the account stood balanced; the only advances made by defendant having been repaid, and defendant having received no rents, etc., from the property.

2. VENDOR AND PURCHASER \$==44-OPTION-EXTENSION-SIGNING.

Evidence *held* to show that complainant signed certain indorsements on an option to purchase, extending the time within which it might be exercised.

3. Trusts ६==61(3)—Existence of Trust—Termination—Execution of Re-LEASE.

In a suit against the trustee, to whom complainant had conveyed property after giving an option thereon to a third person, evidence *held* to show that complainant of her own free will signed a release in favor of the trustee, which conveyed to her a portion of the property, and that she quitclaimed the remainder, thus terminating the trust.

4. Mortgages \$\sim 294\text{\text{\text{Equity of Redemption-Conveyance.}}}

While the rule is that, once a mortgage, always a mortgage, and that the relationship continues until discharged, the mortgagor, after execution of the instrument, may convey to the mortgagee his equity of redemption.

In Equity. Bill by Jennie C. Natterstad against the Title Guarantee & Trust Company and R. S. Howard, as receiver. Bill dismissed.

James E. Fenton, of Portland, Or., for complainant. Wm. C. Bristol, of Portland, Or., for defendants.

WOLVERTON, District Judge. The bill of complaint sets forth, in effect, that the complainant Natterstad (formerly Jennie C. Kingsboro), entered into an agreement with the Title Guarantee & Trust Company on March 18, 1905, whereby the Trust Company agreed to advance to her upon her order divers sums of money, and to assume the payment in her behalf and on her account of certain indebtedness, etc.; the complainant agreeing to convey by deed to the Trust Company certain property that she owned, including certain timber lands and some lands located near a stream, which are called boom lands, and also the boom privileges and certain stock in the Boom Company.

It is also alleged that the Trust Company was to receive certain rents and profits from the operation of the boom property, and was to account to complainant therefor. In accordance with the terms of the agreement, two certain deeds were made, and this property, consisting of the real estate and the boom property and this personal property, 25 shares of stock in the Boom Company, was transferred to the Trust Company. It is further alleged that the Trust Company, in accordance with the deed and the trust agreement, advanced to the complainant money in about the sum of \$8,000, but that thereafter it derived large sums of money from the operation of the boom property, which exceeded the sum advanced to complainant. Complainant seeks an accounting as to these rents and profits—first, to have them offset against the advances which she alleges the Trust Company made to her; and, second, a decree for such balance as may be found to be due her.

The answer admits the execution of the agreement and the conveyance of the property thereunder, but alleges in effect that the Trust Company has complied with all the terms of the agreement, and has been fully released and discharged by complainant of all further duties and obligations thereunder. In relation to the release, a controversy has arisen as to whether it was obtained through duress and fraud, and it is further asserted that a certain quitclaim deed from complainant, executed at the time, is a forgery. The parties have been heard on all these issues, notwithstanding certain objections that the pleadings do not admit of so broad an inquiry.

The agreement provides, among other things, after stating that the conveyance of the property shall be made, that the property so conveyed is to be held by the Trust Company for the following uses and

purposes, to wit:

"(1) To secure unto the said Trust Company the repayment of the sums which may be advanced or which may become due to it, including interest, for or on account of said property, or any part thereof, or for or on account

of any of the terms and conditions of this agreement.

"(2) Subject to the foregoing for Jennie C. Kingsboro and subject to her written instructions. It is further understood and agreed that said Trust Company assumes no manner of liability for or on account of the care or custody of said property or for the payment of taxes or public charges thereon or for the validity of the title to said premises or depreciation of the value of the same, but it is understood and agreed that it shall be recompensed out of the property, with interest, for any expenses which may be necessarily incurred on its account."

The two deeds were executed simultaneously with the execution of this agreement. One of them, however, bears date the 17th of March, instead of the 18th. The trust agreement (I am calling the paper a trust agreement for the purpose of a short designation thereof) was executed on March 18, 1905. On March 17, 1905, the complainant gave to one Lincoln R. Ferbrache an option to purchase all the property that was conveyed by the two deeds. This is a day previous, now, to the time when the trust agreement was entered into and one of the deeds was made, but contemporaneously with the date and time of the execution of the other deed.

The consideration named in the option for the 140 acres of land and the boom rights and privileges is the sum of \$10,000. Then there was an additional option given by the same paper to purchase 200 acres of land, which is denominated the timber land. So that the option itself is really double, giving the right to Ferbrache to purchase the 140 acres and the boom property for \$10,000, and also the 200 acres, being the timber land, for \$15,000. This option was to be exercised within 30 days. There is no question as to the validity of the option, because it is admitted to have been signed by complainant and executed for the purposes therein indicated.

On March 23, 1905, the Trust Company opened an account with J. C. Kingsboro Trust. This is evidenced by the account, which was offered in evidence by defendants and is marked Defendants' Exhibit K. This was the situation before further transactions were had between the parties; the Trust Company being the holder of the title to the property conveyed to it by complainant, to do with it as the

trust agreement and the complainant directed.

[1] I will first dispose of the claim that the Trust Company advanced to the complainant \$8,000, or thereabouts. Complainant relates that the Trust Company advanced to her three sums of money, and no more, as follows: On April 22, 1905, \$4,220; in July-June or July, I did not get the date exactly—another sum of \$2,000; and in April, 1906, \$1,139, making a total of \$7,359. The evidence conclusively shows that the first amount of \$4,220 was paid into the Trust Company bank by Ferbrache to her account, and afterwards drawn out by her by check. This is shown by Defendants' Exhibit L, which is the deposit tag, and Plaintiff's Exhibits 4 and 5, pages in complainant's passbook. So that this sum was not an advancement to her by the Trust Company, but a payment made to her by Ferbrache. The \$2,-000 was also paid to her by Ferbrache. For this purpose Ferbrache procured from the Trust Bank a certified check for that amount, and paid it to her in that form. This is evidenced by Defendants' Exhibits H and N. Exhibit H is a receipt given by complainant to Ferbrache himself, acknowledging receipt of the \$2,000 from him; and Exhibit N is a tag showing that Ferbrache was charged by the bank with a certified check in amount equal thereto. So that this sum did not constitute money advanced to the complainant by the Trust Company.

The next and last amount, namely, \$1,139, was really advanced to complainant's account by the Trust Company in settlement of a certain claim that one Henry Teller made on account of the bond for a deed mentioned in the trust agreement and one of the deeds. The Kingsboro Trust account shows that complainant received a credit on April 30th, "Check favor Henry Teller for settlement per order her attorney," \$1,139. So that was really an advance by the Trust Company to her. The letter from Spencer & Davis to the Trust Company also evidences the intent on the part of the Trust Company to make this advance, and no doubt the advance was made in accordance therewith. But this amount was repaid to the Trust Company by complainant, with other charges representing the balance due on the Kingsboro Trust account, March 23, 1907. A receipt given to Jennie

C. Natterstad by the Trust Company is so dated, but the item was entered in the Kingsboro Trust account March 26th. That receipt and the item in the account show that she paid to the Trust Company \$1,220.98, which balanced her account with it. In the end, therefore, there was nothing left of any advances made by the Trust Company to the complainant.

As to the rents and profits from the boom property, the evidence shows that the Trust Company never leased the property and never operated it, and consequently received no money from that source to the credit of complainant. The testimony on the part of the Trust Company, and also the testimony of Mr. Holden, who was a witness for complainant, is to the effect that whatever operation of the boom property took place was directed by Mr. Ferbrache, and not by the Trust Company. The Trust Company never went into possession. The only possession taken was by Ferbrache, and he continued to operate it, either for himself or for the Boom Company, which was afterwards organized. So that there were no rents and profits received whatever by the Trust Company from any source to the credit of the complainant here. As it respects the money account, therefore, the complainant owes the Trust Company nothing, and the Trust Company owes the complainant nothing, and the account stands at balance.

[2] Now, as to the property held under the trust agreement: By reference to an indorsement on the option, it will be seen that complainant bound herself to convey to Ferbrache 140 acres of land, with the boom rights, within 90 days from the date of the indorsement, April 19, 1905. The option itself was to mature in 30 days, and this indorsement manifestly was for the purpose of extending it. Mrs. Natterstad denies that she signed this extension. However, she is undoubtedly mistaken about that. The writing is in her hand without question, and one of the subscribing witnesses to the indorsement was here in court, and recognized her signature, and testified that she signed it. So I think that her declaration that she did not sign it is overbalanced by the testimony to the contrary. There is another indorsement on the same instrument, bearing date April 19, 1905, which reads:

"In consideration of the purchase of the property above described and the further sum of \$1 in hand paid to me by Lincoln R. Ferbrache, the option of purchasing the timber lands described on the opposite side of this sheet is hereby extended."

[3, 4] The same testimony applies to this indorsement, and the court is of the opinion that she signed it also. It appears, however, that there was nothing else done particularly about these matters for a considerable length of time. They seem to have run along until March 25, 1907, when the complainant executed a release to the Trust Company. I will read that release, because much depends upon it:

"I hereby acknowledge receipt of a deed to the northeast quarter and the southeast quarter of the northwest quarter of section 28, in township 11 north, of range 7 west of the Willamette meridian, from you to myself; and I hereby authorize and direct you to deed the remainder of the property cov-

ered by the attached certificate, and known as the 'boom property,' a quitclaim deed to which I hand you herewith, to whomsoever L. R. Ferbrache may direct, subject, however, to the Holden mortgage of \$800. I hereby acknowledge that the Title Guarantee & Trust Company has carried out and complied with all of the terms and conditions of this trust, and has accounted to me for all funds and property pertaining thereto, and I hereby release said company from said trust."

Mrs. Natterstad admits the signing of this instrument. She says that it is her signature appended thereto; but she indicates, by innuendo rather than by positive statement, that the instrument itself was procured through duress and fraud. She has testified at some length why she says that, and couples with the transaction the name of Mr. Spencer. The quitclaim deed, which is referred to in the release as having been made at that time, she positively denies that she executed; but in this I am sure she is also mistaken, because not only Mr. Spencer himself, who is a subscribing witness to the deed, says that she executed it—he was not certain as to the place where—but W. E. Farrell, the other attesting witness, says the same, and that it was executed in the office of Spencer & Davis. He remembers it very distinctly, because, he says, he wrote the deed, calling attention to the red lines, which were a matter in which he took some pride in drawing the instrument, and recognizes it fully as being the deed that he drafted. He remembers, also, that Mrs. Natterstad signed the deed, and Spencer says it was duly acknowledged before him. Mrs. Natterstad asserts that what was done in that regard, if anything, was done at her then place of residence; but Farrell denies this, and says the deed was executed at the office of Spencer & Davis. I am induced to believe Mr. Spencer and Mr. Farrell as to the execution of that deed. There is no doubt in my mind that complainant executed it, and she in all probability knew why she was executing it. From a careful consideration of all the testimony, I am firmly persuaded that she executed it of her own free will, knowing altogether what she was doing, and unreservedly intended to do just what the papers indicate was done.

Now, then, there were 200 acres of land that were deeded to her. About this there is no contest, and of course that fulfills the conditions of the trust agreement itself, so far as that acreage is concerned. The land was simply deeded back to her, which discharged that amount of the property from all trust relations whatsoever. At the foot of the release is a direction by Ferbrache to the Title Guarantee & Trust Company to deed the property mentioned therein, known as the boom property, to the Seal River Boom Company, a Washington corporation. It is not controverted here at all that the Trust Company did deed all the property save the 200 acres, to the Boom Company, thereby complying with the direction of Ferbrache, which direction was authorized by the release executed by Mrs. Natterstad. Defendants' Exhibit D is not only evidentiary thereof, but it shows a settlement of the affair between Mrs. Natterstad and Ferbrache.

This, then, is in effect the culmination of the affairs existing between complainant and the Trust Company. The Trust Company has complied, according to her own release, and according to what is ad-

mitted here, in all respects with its trust undertaking, and has fulfilled in all respects the obligations that it took upon itself by entering into this trust agreement. This was all done before the Title Guarantee & Trust Company went into the receiver's hands. The receiver himself took nothing whatever from the Trust Company of this trust property; he assumed no obligations under the trust agreement, because that agreement had, prior to the appointment of any receiver, been entirely fulfilled and discharged; so that there is no present obligation on his part to be observed, either for a money ac-

counting or for a return of any property.

Much has been said about the law of the case, and the principle, "Once a mortgage, always a mortgage," has been invoked. The principle is very well settled that, when parties have entered into an agreement whereby the instrument made and executed is to be deemed a mortgage, the instrument continues to be a mortgage until the relationship is discharged. A mortgagor may discharge the mortgage by a conveyance of the equity of redemption to the mortgagee. I think in this case the agreement was not a mortgage. It was a trust agreement, pure and simple, for the convenience of the parties, and more especially for the convenience of Mrs. Natterstad. For some reason she did not want her property to stand in her name at that time. She was entering into this arrangement with Ferbrache for the purchase by him of her property, and it seemed to be convenient that this trust agreement be made with the Trust Company, so that the property might be put out of her hands and held by the Trust Company in the meantime until her obligation under the option with Ferbrache to sell to him was discharged. The matter was carried through upon that basis, and under the idea that this was a trust arrangement, and not a mortgage. But, if it were a mortgage, the equity of redemption was conveyed by Mrs. Natterstad to the Trust Company by this deed, made on the day that she executed the release, and the mortgage relationship thereafter could not and did not exist.

So the right to demand an accounting is not apparent in the present case, either for money had and received or for other property, and

the bill of complaint will therefore be dismissed.

#### In re KOMINERS.

# (District Court, S. D. New York. October, 1916.)

BANKRUPTCY 5-348-DEBTS-PRIORITIES-"TRAVELING SALESMAN."

Partners, who sold goods for the bankrupt on a commission basis maintaining their own office and not being bound to devote any particular amount of their time to a sale of the bankrupt's property, are not "traveling salesmen," within Bankruptcy Act July 1, 1898, so as to be entitled to priority as such.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Traveling Salesman.]

In Bankruptcy. In the matter of the bankruptcy of Abraham H. Kominers. On review of order of referee disallowing a claim to priority as traveling salesmen. Order affirmed.

Charles L. Greenhall, of New York City, for trustee. Max Lowenthal, of New York City, for claimants.

MAYER, District Judge. I have carefully gone over this record, and the facts are simple enough. The claimants were partners, and represented other houses besides that of the bankrupt. They were not under any obligation to devote all their time to selling goods for the bankrupt, and apparently could control their time as they pleased. They were compensated on a commission basis; that is to say, if their orders were accepted, they were entitled to their commissions. They had an office of their own, with their own business cards, and were, for all practical purposes in their relations with the bankrupt, a commission house.

There doubtless are cases where a salesman carries the lines of several small houses and covers a given territory under some arrangement by which he is a "traveling salesman" for his employers, so as to entitle him to priority within the meaning of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1916, §§ 9585–9656]). But on the evidence in this case it is quite clear that these claimants were not such traveling salesmen. In the case of In re Dexter (C. C. A. 1st Cir.) 20 Am. Bankr. Rep. 47, 158 Fed. 788, 89 C. C. A. 285, the employé agreed to "devote all the time necessary to the proper care of the trade in the territory mentioned," and he was not to "engage in the sale or manufacture of \* \* \* any other materials" that his employer might be "making at the time with any other concern."

In that case it is plain that the employé was a traveling salesman devoted solely to the business of his employer, and that he was expected to give his sole attention to that business. The court held, among other things, that the mere fact that he was paid by commissions, and established an office at his own expense, did not take him out of the category of a traveling salesman. Here, however, the claimants were in business for themselves, and, so far as the agreement between the parties went, these claimants could control their own time and sell as much or little of the bankrupt's goods as they might choose, with no control over them on the part of the bankrupt of a character ordinarily found in the relations between an employer and a traveling salesman.

Claimants sought to introduce testimony as to custom in the garment trade; but such testimony was clearly inadmissible, and the referee properly refused to admit testimony of this character which was offered. I find no error in the other rulings of the referee, some of which went to the substance and others to the form of the questions.

An order may be presented on one day's notice, sustaining the referee.

#### THE O'BRIEN BROS.

# (District Court, E. D. New York. May 3, 1918.)

1. Shipping \$\infty 209(2) - Limitation of liability.

Where a tug, towing scows, ran down a motorboat, the scows, being innocent instruments and in control of the tug, need not be surrendered with the tug in order for the owner of that vessel to obtain a limitation of his liability.

- 2. Shipping \$\iff 209(3)\$—Limitation of Liability—Denial of Any Liability.

  In a proceeding to limit liability to the value of the vessel causing the injury, etc., liability may be denied in toto and that question litigated.
- 3. Collision \$==71(2)—Liability—Vessels at Fault.

  A tug in charge of scows, which ran down a motorboat that had tem-

A tug in charge of scows, which ran down a motorboat that had temporarily anchored because of engine trouble, held solely at fault; it appearing the motorboat had duly lighted its lights, and that the tug was proceeding without care in waters where the presence of small vessels might be expected.

4. Collision 5-75-Lights-Sufficiency.

Where the aft light of a motorboat, temporarily anchored because of engine trouble, was sufficient to comply with Act June 9, 1910, § 3a, and the stern of such boat was toward a tug which ran her down, the sufficiency of the motorboat's bow and side lights is immaterial.

5. Collision \$=75-Liability-Lights.

The pilot rules as to anchored vessels (Act Aug. 19, 1890, § 1, art. 11 [Comp. St. 1916, § 7849]), relating to lights, are applicable to a boat lying at anchor not expecting to move, and not to a vessel drifting with a small anchor dragging, but only for the purpose of retarding her progress and keeping her from going ashore while repairs are being made to her engine.

In Admiralty. In the matter of the libel and petition of O'Brien Bros., Incorporated, owners of the steam tug O'Brien Bros., etc., for limitation of liability. Petition granted limiting liability to the value of the tug.

Foley & Martin, of New York City, for petitioners.

Uterhart & Graham and Charles A. Ludlow, all of New York City, for damage claimants.

Harrington, Bigham & Englar, of New York City, for the Zita.

CHATFIELD, District Judge. This is a petition to limit liability, filed by the owner of the tug O'Brien Bros., which was surrendered in order to stay the prosecution of two claims for death and three other actions for injuries or loss of property, occasioned by a collision between the motorboat Zita and a scow, in Hempstead Harbor, on the evening of the 28th of July, 1916. In the limitation proceedings, opposition was made to the granting of the limitation because the owner of the tug did not surrender the value of the scow which struck the motorboat, and of the two other scows in the tow. The proceedings resulted in the production of a fund amounting to \$15,045 by the sale of the tug alone. The application to dismiss the proceeding for failure to include the scows was denied. In re Transfer No. 21, Otto Schmuck et al., C. C. A., 2d Circuit, Dec. 11, 1917, 248 Fed. 459, — C. C. A. —.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The following claims were filed in the limitation proceedings, viz.:

George A. Leyare, as administrator of the estate of Emma E. Leyare,	
deceased (damages for death)\$50.	00.000,
William Graham (personal injuries)	00.000,
Addison L. G. Price (personal injuries)	,000.00
Toronto A Transpill an administration of the automa of Transpill	

The action was tried in June, 1917, and at the close of the trial the following findings were made:

The facts which the court will find, and which do not raise a serious conflict between most of the witnesses, are substantially as follows:

The Zita on the day in question had been lying off Bar Beach in Hempstead Harbor, anchored by a heavy anchor to her bow. After supper six people came on board, and the bow anchor was slipped and left with its cable attached to a buoy. The Zita proceeded either beyond or around the point of Bar Beach, so that when engine trouble left her drifting she went with the tide to the southward; that is, toward Roslyn, and in the channel. She drifted several hundred feet, because she was definitely located at least as far south as the power house, and probably opposite the southerly end of the power house, before any one particularly noticed her position.

There is no question that Mr. Leyare, the owner, and Mr. Price were in the galley, which is under the forward deck, and that Mr. Howell and Mr. Graham were sitting in wicker chairs facing forward in the cockpit under the awning, which extended from the 3-foot stern deck about 10 feet forward. The other 17 feet of the boat was decked over clear to the bow with mahogany decking, and there were portholes forward of the cockpit, in the mahogany siding of the decked-over portion.

There is no question that Mrs. Leyare and Mrs. Howell were in the cockpit, and that all four persons in the cockpit of the boat were paying attention to those fixing the engine, and estimating whether the engine would be repaired, so that the boat could start, before a tow which had appeared around Bar Beach to the north should reach them, when coming up the channel. All of the persons upon the boat noticed this tow, and the men repairing the engine were endeavoring to get it to work, because all of the persons knew that the boat was anchored in the channel, and their purpose was to get out of the way. The anchor, which weighed 12 pounds, was probably insufficient to hold the boat against the tide without some drag. It ran from a line fastened to the cleat upon the small stern deck. The set of the tide opposite the power house, down to what is called the T wharf, representing a distance along the shore of 170 feet, is somewhat toward the T wharf, although it is substantially directly up the channel toward Roslyn. A boat swinging from an anchor would lie either parallel to the shore or slightly toward the wharf.

The anchor in question had been put overboard at Mr. Leyare's suggestion, and, according to the testimony of the various witnesses, had been on the bottom about 10 minutes when the accident occurred.

A Mr. Salters and his wife and a Mr. Lane were walking up the hill toward the north and east, back of the power house. They were looking directly toward the west side of the harbor, over which, according to their testimony, the sun had just set. They reached a point where the motorboat was visible somewhere opposite the so-called T wharf, as seen by them on a line over the northern end of the T wharf. When they saw the tow coming from behind the power house they watched it (except while it was behind a shed) pass over this distance of 170 feet. A Miss Bauer and her brother, who were at a camp on the bank or shore 211 feet further south, saw the motorboat just before they went in to supper, and saw it again just before the accident. They saw it over, or out from, the southerly end of the T wharf. All of the witnesses in the case agree that the open water between the boat and the wharf was approximately a boat length, that is, 30 to 35 feet; and all of the witnesses in the case who testified as to the movements

of the boats show that the motorboat moved further out, or to the west, just before being struck. Mr. Graham testified very carefully, and, from the standpoint of his position in the cockpit of the boat, seems to have stated the facts in a way that accords with that of every other witness, so far as the situation and movements of the boats are concerned. He agrees with the other witnesses that just before the accident Mr. Leyare ran out and up on the stern deck of the boat. Graham had just before this, and at Mr. Leyare's suggestion, been getting in the anchor. He states that he stood upon the seat in the back of the cockpit until the anchor came in, so that he lifted it over into the cockpit; that then Mr. Leyare went by him, and that he turned to help Mrs. Leyare up on the stern, as evidently the stern of the boat was to the east or inshore of the point where the barge was then plainly going to strike. The motions of all the parties show that they went toward the stern to avoid the scow.

Mr. Price, upon coming out of the cabin, attempted to give the others life-preservers, and, as he immediately followed Mr. Leyare, and had time to hand life-preservers to but three persons, it can be seen that the time elapsing was but a few seconds. Mr. Howell and his wife moved over to the south side—that is, away from the scow—which evidently was the port side of the motorboat, when the blow occurred. There is no question that Mr. Leyare, Mr. Howell, Mr. Graham, and Mr. Price went overboard to the south, or over the port side of the launch, just as the scow struck the launch.

There seems to be no question that the two women never got out from under the awning, and that the awning was immediately forced under water. The boat either rolled over or went clear under, and then righted herself, with the awning hanging over on the port side, and with the body of Mrs. Leyare, at least, in the awning under water, so that it floated off with the awning when Capt. Bouchard shoved the awning away from the boat. Capt. Bouchard's testimony is definite as to the position of the boat and the way in which the awning was put over after the accident. It corresponds exactly with the testimony of all the other witnesses as to the position of the boat and its He contradicts them only in placing the anchor from the bow of the boat, and in stating that he saw a man run out on the bow deck and pull on the anchor. There is no question that Mr. Leyare did run out. He had been tinkering with the engine with a portable electric light, and the man that Capt. Bouchard saw had a light, and was probably Mr. Leyare. The anchor was being pulled in at the time, and I see no reason to question that Capt. Bouchard is mistaken, in the momentary glimpse which he had of the boat, in stating that the anchor ran from the bow of the boat. The movement of the boat was very plainly up the channel toward the anchor, so far as the anchor had power to hold it against the tide, and the boat, very evidently, according to the testimony of all the witnesses, was sucked around and across the bow of the scow as it was pulled up to the anchor, coming across the front end of the scow, with the bow of the launch toward the west. The motion of the boat forward, that is, toward the west, which several of the witnesses observed, was after Mr. Graham had lifted the anchor, and after the suction of the barge moved the boat, as seen by Mr. Bauer, suddenly from the position which it had been occupying.

The mark upon the port side of the boat, and the facts that Capt. Bouchard did not discover Mrs. Leyare's body, that the awning was clear over in the water, and that neither of the women escaped, would indicate that the boat may have turned completely over after Capt. Bouchard turned off the searchlight, because I think that there is no question that the momentary flash seen by Mr. Van Cott may have been this flash of the searchlight, and that Capt. Bouchard's movements in throwing the searchlight upon the boat and immediately starting to go to the assistance of the boat, and apparently the almost simultaneous movement of the motorboat out of the sight of the Gallagher, or out of the range of the searchlight of the Gallagher by going behind the O'Brien Bros. and the scow, would explain why those upon the motorboat did not notice the searchlight. Capt. Bouchard's glimpse of the man pulling in the anchor, followed immediately by the boat's moving bow

forward, confused him as to which end of the boat had the line to the anchor, which must, just at that moment, have been lifted inboard.

I think that these facts show that there is no falsification of testimony, no subsantial disagreement of the witnesses. The O'Brien Bros. was evidently passing up the channel, at a distance, measured from her keel, of about 35 or 40 feet from the face of the dock. Whether she could have cleared the motorboat, if it had not been drifting and if the anchor had held, is immaterial, because the distance would have been too slight to make the position of either boat safe. Therefore we have the O'Brien Bros. passing up the channel substantially on a line which would bring her either against or in collision with the motorboat, and with two scows upon the O'Brien Bros.' starboard hand, and a third scow still over to the westward, or starboard, of the two which were alongside.

The soundings which have been taken, and also the hydrographer's chart which is in evidence, make it plain that there was water enough at half tide for the O'Brien Bros. to pass up safely within 30 feet of the pler, and that on that course the O'Brien Bros. could hold substantially a straight course from the turn at Bar Beach until she reached the narrow point some 1,000 feet further to the south of the point of accident.

The survey shows that this water is deep enough for the O'Brien or the Gallagher, and extends from that point to the west, a varying distance, but that at half tide the barges could safely go over the low points or the edge of the bar, and that it was the custom of the boats to tow in the form indicated, and for the tug to assume the position indicated, because of the depth of the water. The surveys of the chart show that the 6-foot contour works toward the east till it is (at a point between the power house and the T dock) 160 or 170 feet from the face of the dock, while the 12-foot contour opposite the power house has worked eastward to a point 90 feet from the face of the dock. Opposite the shed the 12-foot contour disappears, as the greatest depth is less than 12 feet and at the T dock an 11-foot contour line would have worked over to the east to within 90 feet of the dock.

This shows the general trend of the bottom, and shows why the deep channel, that is, mid-channel, as used by the tug, would be straight down on a line parallel to the easterly shore. It shows that the O'Brien Bros. was not far from the middle of the deep water course up to the point of accident, while the motorboat was anchored in the channel just to the east of the middle of the deep water course, prior to the accident; but evidently the suction of the boats passing would have drawn her into collision if she had remained at anchor

That is about as far as I care to find the facts. I might add that the testimony seems to show definitely that there were lights in the cabin of the motorboat. The witnesses upon the shore were looking at the stern of the boat and saw these lights. They saw lights through the portholes when the boat was evidently broadside to them, and before it swung the stern toward them. This was the light with which the men were seeking to find the engine trouble. The evidence seems to show that a lantern, at Mr. Leyare's suggestion, had been hung under the awning at the stern, in such a situation that it would be directly obscured by Mr. Graham if he were hauling in the anchor, and the persons in the motorboat were in such a position that they would obscure the light from the companionway to any person approximately on a level with the boat, while those up on the hill might have seen the light over the heads of those on board.

There is no question that, as viewed by those looking toward the west and into the glow of the setting sun, the boat would be plainly visible; and there is no question that (as the tug was coming up the channel toward the hill, and navigating neither by lights nor by ranges, but by general familiarity with the shore line and the shape of the objects toward which it was heading) the motorboat would be in the shadow. The hull of the boat would be visible with difficulty, and there seems to be no question in the case that the lookouts, the captain of the O'Brien Bros. and the captain of the Gallagher, which was following behind the O'Brien Bros., failed to see any light on the motorboat till after the O'Brien Bros. had sounded the alarm, and until Mr.

Leyare or Mr. Price had run out from the cabin with the portable light in their hands.

[1] The above findings narrow the case to substantially simple issues. The total amount of recovery must necessarily be limited by the value of the tug, which alone was responsible for the movements of the entire fleet. The barges were innocent instruments in the accident, and a limitation proceeding cannot include their value. Particularly is this so as it appears that the captains of the scows were attending to their duties, and there is no evidence of negligence on their part. The Sunbeam, 195 Fed. 468, 115 C. C. A. 370.

[2] While a petition to limit liability would primarily presuppose some liability to be limited, the language of the statute and the decisions thereunder have made it plain that the petitioner has the right to contest the sufficiency of the claims in the same way and to the same extent as if the actions were being tried in admiralty, upon

pleadings originally filed in this court.

[3] The O'Brien Bros. was using the channel upon the night in question in the customary manner. Her draft was such that at certain points in the channel she could not get through before the tide had risen to some extent. By the time the O'Brien Bros. could get through, there would be water enough over the flats, so that the empty scows could be safely towed on one side of the tug, even though the outer scow should pass over the edge of the flats in so doing. A tow made up in this fashion would thus appear to avoid completely blocking the channel, while if the scows were towed on both sides of the tug, and the tug navigated in the middle of the channel, any boat attempting to pass to starboard would be driven up on the mud flats, and any boat attempting to pass to port would be driven on shore.

But, if boats could not pass safely to port, the tug, which herself needed the depth of water in mid-channel, or even somewhat closer than the center to the shore, would be negligent under the narrow channel rule, and liable for any damage occasioned to a craft which might be met, and which did not voluntarily run ashore or stop until the tow could slow down and the boats maneuver past each other.

Evidently, in order to avoid this liability, the tows used the one-side method of towing, and, as has been said, the whole tow, as it came toward the shore below the power house, worked over beyond the middle line. There was still water space enough between the tug and the dock for the Zita, or any of the power boats which ordinarily navigated that harbor, to pass on the port side of the channel, if under way. The channel was not a locality where boats were ordinarily found anchored. The statute forbids anchoring in a channel, but a boat compelled by emergency to anchor, or to lie in a navigable channel, is entitled to all the protection which the rules of navigation and the admiralty law can give, if she herself is obeying the laws as to lights, signals, and alarms.

The testimony in this case indicates that the Zita had her anchor out purely from necessity, and the mere fact of being anchored had nothing to do with causing the collision. It is evident that the Zita had a light, and that this was sufficient to give notice of her presence.

unless it was obscured by the bodies of some of those in the boat, or by some portion of the awning. But the lookouts on the O'Brien Bros. did not see the Zita until they made her out as a dark object in their path. She must have then been very close to the O'Brien Bros., and the suction of the tow, coupled with the movement of the Zita toward her anchor, as this was raised, brought the boats so close together that the accident could not be avoided.

Evidently the lookouts on the O'Brien Bros. had no thought of meeting a helpless or drifting boat, and it may be that they paid no attention to the Zita's light, as it seemed to be sufficiently over near shore to pass the O'Brien Bros. safely, if on a boat which could con-

trol its own movements.

It was negligence for a tow of the size of the O'Brien Bros. to occupy the greater part of the navigable channel, and to proceed at such a rate of speed that the tug was unable to stop the tow when danger arose to a boat lying in its own half of the channel. The position in which the Zita lay indicates that just at that point the O'Brien Bros. was using considerably more than half of the channel, and certainly her care and watchfulness should have increased under those circumstances, so as not to do damage to any of the craft that might get in the way.

It is impossible to hold that the parties upon the Zita, who continued trying frantically to get the engine to working, in order to get out of the way, and who then rushed for life-preservers and to save the women, can be charged with negligence because the Zita, in being pulled up to her anchor, moved closer to the O'Brien Bros., or because the Zita's lights were temporarily obscured by their movements. If the contention of the O'Brien Bros., that the men on the Zita were so terrified that they all jumped overboard as the scow struck the Zita. is correct, it would not prove negligence on the part of the Zita. The Gallagher, which was following the O'Brien Bros., used her searchlight as soon as she heard a signal from the O'Brien Bros. indicating that there was any trouble. If this was necessary, it would seem that the darkness must have been sufficient to make a strong presumption of negligence against the O'Brien Bros., when a boat was run down within the waters of its own side of the channel, bearing a light and lying at anchor until just before the collision.

[4, 5] The Zita's light aft was sufficient, under the provisions of chapter 268 of the Laws of 1910, § 3 (a), first, 36 Stat. 462 (Comp. St. 1916, § 8279), as the Zita's stern was toward the tug and her red and green side lights and bow light had nothing to do with the situation. The pilot rules as to anchored vessels being article 11 of chapter 802, § 1, Act Aug. 19, 1890, 26 Stat. 324 (Comp. St. 1916, § 7849), require an anchored vessel to carry forward a white light showing clearly around the horizon for the distance of at least a mile. This law is applicable to a boat lying at anchor and not expecting to move from her position. The Zita was drifting, with a small anchor dragging, but only for the purpose of retarding her progress and keeping her from going ashore while repairs were being made to the engine. She was a stationary, but nevertheless navigating, vessel, sub-

stantially out of control, and not an anchored vessel, so far as her

signals were concerned.

If the darkness was so great that there was danger in using the channel, the boat with the searchlight should have proceeded, or the speed should have been reduced so that the tug could easily control her scows, for this channel was not a passage where navigation was constantly expected and met, and which small boats would be expected to avoid. It was a channel infrequently used at night, which had been dredged for the passage of cargo boats. But they should be required to use the greatest care in taking up substantially the whole of that channel at those points where they were under the shadow of the hills, and where the channel passed immediately along the shore, with no escape for a boat that could not manage her own movements, and where the suction from large tows would affect the entire body of the water in the channel.

A decree should be entered granting the petition to limit liability to the value of the tug, and giving judgment to the damage claimants

for such amounts as may be found on further hearing.

# SOVEREIGN CAMP OF WOODMEN OF THE WORLD v. WEBB et al.

(District Court, N. D. Georgia, N. W. D. June 24, 1917.)

No. 41.

Insurance \$\iftharpoonup 815(2)\$—Fraternal Insurance—Conflicting Claims Among Beneficiaries—Answer.

Where a fraternal insurance order admitted its liability and filed a bill of interpleader against the several claimants, one of whom was deceased's daughter, and the others his nephews, who had supported him for some time before his death and had paid premiums, held, that the answer of the nephews, which asserted their rights to the proceeds, though the certificate named the daughter as beneficiary, etc., should not be stricken; it being averred the nephews paid premiums, etc.

In Equity. Bill of interpleader by the Sovereign Camp of Woodmen of the World against Mrs. Sallie E. Webb, John Quinton, and others. On motion by Mrs. Sallie E. Webb to strike the amended answer filed by John Quinton and the unnamed defendants. Motion denied.

Maddox & Doyal, of Rome, Ga., for plaintiff.

Stephens & Sanders, of Gilmer, Tex., and Wright Willingham and L. H. Covington, both of Rome, Ga., for defendants Quinton.

Denny & Wright, of Rome, Ga., for defendant Webb.

NEWMAN, District Judge. This is a bill of interpleader, filed by the plaintiff against the defendants, to have them determine among themselves their respective rights to the fund of \$1,000 paid into court by the plaintiff order, due by it on the life of A. J. Quinton, the father of Mrs. Sallie E. Webb and the uncle of the Quinton defendants. There is a motion made by Mrs. Webb to strike the an-

swer and amended answer filed by the Quintons to the bill of inter-

pleader.

The answer and the amendment together set up: That A. J. Quinton was insured for \$1,000 in the plaintiff beneficial order; the beneficiary in the policy being his daughter, formerly Sallie Quinton, since her marriage Mrs. Sallie E. Webb. That the daughter of the insured, now Mrs. Webb, on her marriage moved from the state of Texas to the state of Georgia, and left her father, A. J. Quinton, in destitute circumstances. That he was taken care of by John Quinton, Albert Quinton, and Emzy Quinton, his nephews, during the balance of his life and up to the time of his death on April 1, 1915. That prior to the death of said A. J. Quinton he made an agreement with the Quintons, his nephews, now parties to this cause, that if they would care for him and support him during the remainder of his life he would have transferred to them his policy in the plaintiff beneficiary order for \$1,000. That he made application for transfer of the policy to the Quintons on June 20, 1914, and notified the local camp of Hartshorn, Okl., that he had lost his certificate and it could not be found, and that he desired a new certificate to be issued to him, and his three nephews, John Quinton, Albert Quinton, and Emzy Quinton, named as beneficiaries, instead of Sallie Quinton, who was named as beneficiary under the original certificate.

It seems from the allegations of the pleadings that this request for change in beneficiaries was made to the local camp at Hartshorn, Okl., and was forwarded to the Sovereign Clerk of the order, John T. Yates, at Omaha, Neb. The paper executed by the insured on the 20th day of June, 1914, was as follows:

"Hartshorn, Oklahoma, June 20, 1914.

"To Whom It may Concern:

"This is to certify that I have lost my certificate No. 28311 in the W. O. W., dated 9/24/06, beneficiary Sallie Quinton, and same cannot be found, and to best of my belief same was lost while traveling overland from Texas to Oklahoma, and I further certify that I want my beneficiary changed, and designate as new beneficiaries John Quinton, Albert Quinton, Emzy Quinton,

related to me as nephews.

[Signed] A. J. X Quinton,

"Subscribed and sworn to before me this the 20th day of June, 1914.

"My commission expires June 7, 1916.

"[Seal.] [Signed] P. M. Willis, Notary Public.

"The name of A. J. Quinton was written by me at his request and in his presence, and mark made by him in my presence.

"[Signed] J. W. ——, Witness to Mark.

"Attest: N. E. ----, Witness to Mark."

It seems from the contention here that the application for the change of beneficiaries did not comply with the by-laws of the order, which required an application for a change of beneficiaries should comply with the following section of the constitution and by-laws.

"Sec. 64. Should a member desire to change his beneficiary or beneficiaries, he may do so upon payment to the Sovereign Camp of a fee of twenty-five cents, which sum, together with his certificate, he shall forward to the Sovereign Clerk with his request written on the back of his certificate, giving the name or names of such new beneficiary, or beneficiaries, and upon receipt thereof the Sovereign Clerk shall issue and return a new certificate, subject to

the same conditions and rate as the one surrendered, which conditions shall be a part of the new certificate, in which he shall write the name or names of the new beneficiary or beneficiaries and shall record said change in the

proper books of the Sovereign Camp.

"In event the beneficiary certificate is lost or the possession thereof is for any reason withheld from the member desiring such change of beneficiary, before the change shall be made, the member shall furnish the Sovereign Clerk satisfactory 'proof under oath of the loss of the certificate, or proof under oath of the facts and circumstances of the withholding of such certificate from his possession, as the case may be, and waiving for himself and beneficiary or beneficiaries all rights thereunder, whereupon on payment of twenty-five cents the Sovereign Clerk, if such proof is satisfactory to him, shall issue to said member a new certificate in lieu of the old one with the desired change of beneficiary, and shall at once mail to the last known post office address of the former beneficiary or beneficiaries notice of such change."

It seems that this application for change of beneficiaries did not contain the words which are italicized above, and for that reason the Sovereign Clerk sent him a proper form, which was received by him two days before his death. He had received no notice, prior to that time, of any action on his application for change of beneficiaries. The receipt of the proper form from Yates, Sovereign Clerk of the order, by A. J. Quinton, was two days before his death, and it seems from the papers, and indeed it is alleged, that it was not in time for him to execute and return the same to Yates.

The Quintons allege in their answer that for two years prior to the death of said A. J. Quinton they had been paying his premiums on the policy and supporting him and waiting on him, he being practically an invalid, and at this time they were under the impression and believed that they had been substituted as beneficiaries in lieu of Mrs. Webb. The question for determination now is on the motion by Mrs. Webb, as stated, to strike the answer of the Quintons, on the ground that on their own showing it would not be a case entitling them to any relief or to any part of the fund in court.

Counsel for Mrs. Webb cite the case of Smith v. Locomotive Engineers' Mutual Life & Accident Insurance Association, 138 Ga. 717, 76 S. E. 44, and Page v. Bell, 146 Ga. 680, 92 S. E. 54, and other authorities, in favor of their position that a failure to comply with the by-laws and rules of an association with reference to beneficiaries gives the Quintons no right to the fund in court here, and that the same should be awarded to Mrs. Webb. The case of Supreme Conclave, Royal Adelphia, v. Cappella et al. (C. C.) 41 Fed. 1, decided by Judge Brown, afterwards Mr. Justice Brown of the United States Supreme Court, is relied upon somewhat by counsel for both parties in this case. Counsel for the Quintons rely mainly upon the case of Brown v. Modern Woodmen of America et al., 97 Kan. 665, 156 Pac. 767, L. R. A. 1916E, 588.

The case now is in equity and between the claimants to this fund. The beneficiary order has no further interest in the matter, as it has paid the money into court, thus absolving itself from any further liability; so I do not think the omission from the request for change of beneficiary by J. A. Quinton of the language which has been referred to above is so material as it would be if there was a suit against

the order to recover the amount of the policy. If the three Quintons paid the premiums and kept this policy alive for the assured during the last two years of his life, I do not see how it could be possible, in a court of equity, to decline to repay them the amount so advanced to him. As to the amount claimed by them for caring for him, supporting him, and looking after him during the last two years of his

life, the rights of the parties are not so clear.

Of course the Quintons are claiming the entire fund, upon the ground that they kept the policy alive and that it was substantial compliance with the rules of the order to make the request he made for a change of the beneficiary, although certain language required by the by-laws was not in it. At all events, for the present I am perfectly satisfied that the motion by Mrs. Webb to strike the answer of the Quintons should be overruled, because they are at least entitled to receive back what they advanced for premiums on the policy, and possibly also what they actually expended in caring for him during the last two years of his life, if they can establish by proof what that character of support was worth.

Therefore the motion to strike is hereby overruled.

# THE KENNEBEC.

# SEABOARD & GULF S. S. CO. v. BALTIMORE DRY DOCKS & SHIPBUILDING CO.

(District Court, D. Maryland. July 3, 1918.)

- 1. Wharves \$\iff 20(1)\$—Dry Docks—Negligence of Owner—Liability.

  Where ship undergoing repairs to engine and hull was placed in charge of her master in dry dock for work on the hull, without notice that a freezing temperature without supply of steam would result in damage to her engines and pipes, the owners could not recover from the dry dock owners the cost of repairing damage resulting from the bursting of pipes so caused.
- 2. Wharves \$\iff 20(1)\$—Dry Docks—Negligence of Owner—Liability.

  Where ship was placed in dry docks for repairs to hull, without request that steam be supplied to prevent damage from bursting pipes, owing to the freezing temperature, and with only a casual request from the master that steam or stoves be supplied, so that he could keep his crew, the dock owners were not liable in tort for the damage resulting from bursting pipes.

In Admiralty. Libel by the Baltimore Dry Docks & Shipbuilding Company against the steamship Kennebec, with cross-libel by the Seaboard & Gulf Steamship Company, owner of the steamship Kennebec, against the libelant. Original libel sustained, and cross-libel dismissed.

George Weems Williams and L. Vernon Miller, both of Baltimore, Md.: for libelant.

Milton Roberts and Clifton S. Brown, both of Baltimore, Md., for respondent.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ROSE, District Judge. The libelant will be called the "dry docks;" the respondent, the "ship." It is admitted that the former repaired the latter, and that its bill of \$2,988.90 for so doing is fair. It has not been paid, because the ship says that a breach of duty incumbent upon the dry docks cost the ship upwards of \$23,000, \$4,329.65 of which was the expense of repairing the physical injury done; the balance being in the nature of demurrage. Whether the dry docks was so in default is the question to be determined.

The ship was turned over to the dry docks in the late afternoon of December 27th last, and was taken away three days later. During that period, the water which was in its pipes and engines froze, and did the damage mentioned. For some time prior to going to the dry docks, the ship had, with fires drawn, been lying at the wharf of the W. S. Cahill Company, who will be hereinafter referred to as Cahill. It was there undergoing repairs. During a considerable part of that time the temperature was low, and the ship was kept heated by steam sent through its pipes by Cahill. For a part of the time at least the steam was supplied from a floating welder of Cahill moored alongside of it. When the ship was taken to the dry docks, Cahill's work was still unfinished. Physically it would have been possible to have continued the engine repairs while the ship was at the dry docks, as the work the dry docks was to do was upon the ship's hull. Cahill was willing to go on with his task while the ship was at the dry docks, but the dry docks forbade, in accordance with its general rule of refusing permission to any one else to work upon a ship while on its premises. Its adherence to this policy is in part due to the trouble it would otherwise, during wartime, have in making sure that the governmental regulations for the protection of the water front and the property owners are complied with, and perhaps more largely to its unwillingness to afford any facilities to actual or potential competitors in business.

Had Cahill been permitted to continue its work, it would have kept steam in the ship's pipes. There is nothing in the record which suggests that this particular benefit which the ship would have received from Cahill's presence while in the dry docks was ever, in any way, brought to the attention of the dry docks, or was ever considered by it.

The day after the ship arrived at the dry docks, it was comparatively mild; the thermometer rising to about 40 degrees. At that temperature, the pipes were in no danger; but the living quarters upon an unheated ship were very uncomfortable. Accordingly, in the forenoon of that day, the captain of the ship asked the superintendent of the dry docks to furnish steam, saying, unless he had it, he feared he could not keep his crew. He now thinks he had also in mind the protection of the pipes against the possibility of a cold wave. If he had, he kept it to himself, and said nothing to the dry docks superintendent about it. It would have been quite troublesome and inconvenient for the latter at that time to have furnished steam. I doubt not that it could have been done at a price, but it did not seem worth while, for the mere purpose of retaining the crew on board, instead of sending them to a boarding house on shore. Moreover, the superintendent then supposed that the repairs to the ship could be finished in 24 hours, or there-

abouts, and that elaborate arrangements for so brief a time were un-

necessary, and so told the captain.

In consequence of the refusal to furnish steam, an application was subsequently made to the dry docks for oil stoves for the crew's quarters. It so happened that there were none available. When the engineer of the ship learned that steam would not be furnished, he had the pipes drained, so far as that could be done without breaking connections and taking apart certain portions of the machinery. To have done everything necessary to get all the water out of the pipes would have taken, with the force he had at hand, 24 hours and perhaps more. At least that much time would have been required to have put them back, so that the engines could be operated.

As the dry docks went on with the work, it perhaps found there was more to be done in the way of repairs than had originally been apparent, and for that or some other reason the work was not finished until December 30th. During the night of December 28th, the temperature fell rapidly, and on the 29th and 30th went down nearly to zero. On the morning of the last-named day it was discovered that the water, left in the pipes and engine, had frozen, and that the damage for which

the ship seeks to recover by its cross-libel had been done.

[1] Had the ship been delivered into the care of the dry docks with notice to the latter that the pipes had not been thoroughly drained, it is quite likely that it would have been responsible for any injury which resulted from its failure either to furnish steam or to drain the pipes effectually. But no such delivery was made. The ship's master and its company remained on board, and the former retained his command. The dry docks had undertaken to make certain repairs, and had assumed no other obligation. If the captain thought that his machinery was in danger without steam, he should have made the fact known to the dry docks, preferably before his ship went there, or at all events before the damage was done. That he did not do. The dry docks did not bind themselves by any contract to furnish steam. The work they were employed to do had nothing to do with the ship's pipes or engines.

[2] It is equally impossible to discover any ground for holding the dry docks liable in tort. The record does not show that they hold themselves out as equipped to supply steam to any of their patrons who have need of it. The fact is quite clear that the master did not have, at any time before the damage was done, its possibility in mind, and consequently had not busied himself to protect the ship against it, either by having the ship's pipes disconnected, or by doing his best to secure a supply of steam. His almost casual request to the dry docks for steam, in order that his crew might be kept comfortable, fell far short of imposing any duty upon it to take steps to protect the pipes, if indeed it was possible for him at that time by any notice to impose

any such obligation upon it.

It follows that the libel of the dry docks for the amount of its bill must be sustained, and the cross-libel of the ship dismissed.

#### In re SIEGEL.

#### Ex parte QUINTO et al.

(District Court, S. D. New York. July 19, 1918.)

1. BANKBUPTCY \$\ightarrow\$376—Investigation by Creditors—Liability of Bankbupt.

Where bankrupt offered settlement, and creditors' committee hired attorney to conduct inquiries into his affairs, without express or implied request of the receiver, but with his knowledge and without his dissent, the bankrupt should not pay, as part of the composition, the fees of the attorney who conducted the investigation.

2. BANKRUPTCY \$\ightarrow\$376—Investigation by Creditors—Liability of Bank-RUPT.

Notwithstanding investigation into bankrupt's affairs by attorney employed by creditors' committee, without request, but with knowledge and without dissent of the receiver, benefited the estate, the attorney's fees did not constitute a claim against the estate, payable as part of the bankrupt's composition, since the creditors, in employing him, were volunteers, and an estate in the custody of the court is not in need of voluntary services, but is presumably being cared for adequately.

In Bankruptcy. On motion by Oscar Quinto and others, creditors, to require David Siegel, bankrupt, to repay moneys expended by a creditors' committee on reorganization of the bankrupt's affairs. Motion denied.

The case was this: The bankrupt was adjudicated in the Southern district of New York, and on the 14th day of February, 1918, the first meeting of creditors was held before the referee in bankruptcy. At that time the bankrupt's attorney announced to the referee that the bankrupt offered a settlement of 37 cents in cash and proposed to pay all priority claims and expenses of the proceeding, including \$1,000 to the creditors' committee in repayment of the amount paid to its counsel. The creditors' committee represented some 90 per cent, in amount of all the creditors of the bankrupt, and accepted the terms of the composition so offered, upon the understanding that the sum mentioned should be repaid. The committee had paid this sum to an attorney who conducted inquiries into the affairs of the bankrupt and disclosed facts which probably led to the discovery of preferences to some of the creditors. The examination was conducted without the request of the receiver, either express or implied; it took place, however, with the receiver's knowledge and without his dissent. It may be assumed that the results were in some degree beneficial to the estate. Upon applying for a confirmation of the composition, the District Court declined to allow the payment of this sum, and the order was signed without such provision. Thereafter the bankrupt distributed the consideration of the composition in accordance with the order of the court, and has since that time returned the sum of \$1,000 to the persons from whom he borrowed it at the time to meet the supposed necessities of the composition. The order of composition itself was signed on April 9, 1918, and this motion was made upon the 25th of June following. At that time the bankrupt did not have the sum in question, and swore that he would be unable to comply with the order of the court for the payment, if made.

David Kahn, of New York City, for the motion. Maurice L. Shaine, of New York City, opposed.

LEARNED HAND, District Judge. [1] Judge Mayer decided (In re M. & H. Gordon [D. C.] 245 Fed. 905) that a bankrupt might not pay as part of a composition the expenses of a creditor who had employed a public accountant to investigate the bankrupt's affairs. I concur in that case and in its reasoning. Courts have been extremely zealous to secure equality of distribution among creditors, quite independently of whether the added payment to any one of them came from the fund to be divided. Bell v. Leggett, 7 N. Y. 176; In re Dietz (D. C.) 97 Fed. 563; In re Palmer, 14 Nat. Bank R. 437, Fed. Cas. No. 10,678; Ex parte Briggs, 2 Lowell, 389, Fed. Cas. No. 1,868. In all these cases the payments came from sources that could not possibly have been distributed among creditors. It might seem, indeed, that the solicitude for equality was in such cases overzealous. In compositions, however, the motive is much stronger, since the bankrupt commonly procures the consideration divided, at least in part, from sources outside the estate. Obviously the measure of the dividend he offers will in part be determined by the "cost of the proceedings" in the language of section 12b. If the court permits him to include in that amount the several expenses of creditors, it diminishes pro tanto the available residue for dividends. Hence there is a stronger reason to apply the rule strictly in compositions than upon discharges, where the funds which will actually be distributed are already in the custody of the court and cannot be affected.

[2] This case may perhaps be thought to fall within an exception indicated obiter in Re M. & H. Gordon, supra; that is, the case where the efforts of the creditor have benefited the estate. In such a case, as it seems to me, the creditor so assisting establishes no claim against the estate, unless he acts at the request, express or implied, of the receiver, at least when there is a receiver. The court must look to the receiver as the adequate custodian, and the sole person who can establish any claims for administration, except such as are otherwise expressly authorized by statute. Any services rendered by those not authorized by the receiver must be deemed to be on the account of the creditors who undertake them. They are merely volunteered, and the estate, even though actually benefited, owes nothing for them. There is no hardship in this, but absolute justice. Any creditor may apply at any time to the court upon suggestion that the receiver should authorize him to assist, and the court can so direct. But to allow claims to be established for benefits, supposititious or actual, without some initial indication that the services upon which they are based will be the subject of a charge, is wrong in principle and mischievous in application. An estate in the custody of a court is not in need of voluntary services; there is no room for the doctrine of salvage. It is presumably being cared for adequately, and those who seek to impose upon it the benefit of their assistance do so at their own account, unless they secure some consent at the outset.

The motion is denied, without regard to the defense of laches. I need scarcely add that the disallowance of the item did not depend in the least upon any disapproval of the conduct of the committee, nor did it constitute any reflection upon their integrity.

#### In re FROSTEG.

(District Court, S. D. Georgia, S. W. D. August 3, 1918.)

No. 889.

1. Bankruptcy \$\infty 415(2)\$—Master's Report—Effect.

The master's report, stating that no demurrer to the specifications of objections to the bankrupt's discharge was filed, must prevail, especially where the bankrupt's allegations that exceptions to sufficiency of objections were dictated, and were to have been considered, were not verified by the master.

2. Bankruptcy \$\iff 407(1)\$—Exemption—Ruling of Referee—Res Judicata. Ruling of referee, on objections to allowance of homestead exemption, that bankrupt had concealed property in violation of Code Ga. 1910, §§ 3377, 3380, is not res judicata against the bankrupt's right to discharge, since Code Ga. 1910, § 3386, permits a creditor to object to an allowance of homestead exemption for fraud of any kind at any time, whereas Bankruptcy Act, § 14b (4), being Comp. St. 1916, § 9598, requires the fraud to have occurred at any time subsequent to the first day of the four months immediately preceding the filing of the petition.

In Bankruptcy. Proceedings in the matter of the estate of L. Frosteg, bankrupt, wherein the bankrupt excepts to the master's report denying his discharge. Judgment reversed, and matter ordered reheard.

Franklin & Langdale, of Valdosta, Ga., for trustee. J. J. Hill, of Pelham, Ga., for bankrupt.

BEVERLY D. EVANS, District Judge. [1] In his exceptions to the master's report the bankrupt avers that his counsel dictated to the stenographer of the special master, in the presence of the latter and of the attorneys of the bankrupt's trustee, certain stated exceptions to the sufficiency of the objections to the bankrupt's discharge, with the understanding that the same should be considered by the master, and that the master did not consider such exceptions in making his findings of fact and conclusions of law. In his report the master states that no demurrer to the specifications of objections was filed by the bankrupt. The master's report on this issue must prevail, especially as the allegations of fact concerning the circumstances attending the dictation of the demurrer to the objections to the discharge are not verified.

Other exceptions challenge the sufficiency of the evidence to uphold a judgment denying a discharge to the bankrupt. The bankrupt had previously applied for a homestead exemption. This was resisted, on the ground that the bankrupt had not made a full and fair disclosure of his property in his petition to be adjudicated a bankrupt, and had willfully and fraudulently concealed large sums of money and quantities of merchandise. The creditors also prosecuted a rule for contempt because of the bankrupt's failure to produce the alleged concealed assets. On the hearing of these proceedings the referee found:

"That the bankrupt should account for at least \$3,000 in goods or cash, or goods and cash, and inasmuch as such amount has been withheld from the

trustee the referee finds that the bankrupt is guilty of fraud, and that he has not made a full and fair disclosure of his property, but the same has been withheld and concealed in such a way that he would not be entitled to his exemption of \$1,600 as contemplated in sections 3377 and 3380 of the Code of Georgia."

The rule for contempt was discharged on the ground that no evidence was—

"adduced to show positively that the bankrupt had in his possession or control either the goods or the money unaccounted for by him, and alleged to have been fraudulently concealed."

In passing on the objections to the discharge, the master reported that the judgments in these proceedings adjudicated that the bankrupt had concealed assets, and made out a prima facie case for denying a discharge, which had not been overcome by any evidence, except that considered by the referee at the time his judgments refusing an exemption and discharging the rule for contempt were entered. It is apparent that the special master bases his judgment denying a discharge on the footing that the bankrupt had been adjudicated by the referee to have willfully and fraudulently concealed assets from his creditors.

[2] I do not think the principle of res judicata in its full scope is applicable to the present case. Before a judgment in a former case between the same parties shall be conclusive in another and later case, it is necessary that the point in issue shall be the same. Henderson v. Fox, 80 Ga. 479, 6 S. E. 164. Under the Georgia statute (Code 1910. § 3386) a creditor is permitted to object to an allowance of homestead exemption for fraud of any kind, and the time in which the alleged fraud was committed is not restricted. Under Bankruptcy Act July 1, 1898, c. 541, § 14b (4), 30 Stat. 550 (Comp. St. 1916, § 9598), it is ground for objection to a bankrupt's discharge that he "at any time subsequent to the first day of the four months immediately preceding the filing of the petition" concealed any of his property with intent to defraud any of his creditors. Thus it will be seen that a fraudulent transfer of assets, made more than four months before the filing of the petition for bankruptcy, may, under the Georgia statute, defeat a homestead, though such transfer would not defeat a bankrupt's right to a discharge. The referee, in his judgment refusing a homestead to the bankrupt, recited that it was impossible to make an account of the bankrupt's expenditures during a six months period previous to the filing of the petition for bankruptcy. The report of the master in the present case was predicated solely on the record of the former proceedings.

I am of the opinion that the evidence is insufficient to deny a discharge to the bankrupt, and that the judgment of the master should be reversed, and the matter be reheard by him; and it is so ordered.

#### THE VESTRIS.

(District Court, E. D. New York. May 9, 1918.)

1. SEAMEN 5-7-ENTERING UPON DUTIES WITHOUT SIGNING ARTICLES—BENEFITS

A person who enters upon the performance of duties as a seaman, and who through no fault of his own, has not as yet signed articles, would not be thereby deprived of the benefits accruing to him as seaman.

2. SEAMEN \$\infty 29(5)\$—Injuries Before Signing of Articles—Damages.

Where libelant was injured after being member of vessel's crew for six days and before articles had been signed and vessel had left port, he could not claim his wages for the voyage, nor for loss of time in getting back to his home port.

 SEAMEN \$\inserce{2}\$=11\to Injuries Before Signing of Articles\to Maintenance and Cure.

Where libelant was injured after being member of vessel's crew for several days but before articles had been signed and ship had left port, he was entitled to recover what he had spent for maintenance and cure and wages for two weeks; such period being sufficient to enable him to seek new place.

4. Seamen & 3—Personal Injuries—Actions—Jurisdiction of Court.

In seaman's action for personal injuries, whether court had jurisdiction to consider the charge of negligence was governed by laws of place where accident took place.

5. SEAMEN \$\iiiist\text{3}\$—JURISDICTION—AMERICAN SEAMAN ON BRITISH VESSEI.

The rights of an American seaman in the harbor of New York upon a British vessel can properly be adjudicated in a court of the United States according to the admiralty law, when this admiralty law is in exact accord with what his contract rights would be under the British statute.

In Admiralty. Libel by Harry C. Ferguson against the steamship Vestris, her tackle, etc. Decree for libelant.

Silas B. Axtell, of New York City, for libelant.

Burlingham, Montgomery & Beecher, of New York City, for claimant.

CHATFIELD, District Judge. The libelant sued for injuries received at New York October 13, 1915, on the steamer Vestris, on which he had entered for service October 7, 1915. His claim was apparently based upon the liability of the vessel for the negligence of a fellow servant, although the libel, upon further examination, shows the amount of damage claimed by the libelant to be limited to expenses of maintenance and cure. An opinion was filed on the 1st day of August, 1917, in which it was held that no unseaworthiness was shown, and no negligence, except that of a fellow servant, for which the boat was not responsible in damages. The libel was therefore ordered dismissed. Before entry of decree, reargument was asked, upon the ground that maintenance and cure alone had been prayed for.

[1, 2] The claimant on reargument contests the right of the libelant to be classified as a seaman. The claimant's answer expressly admitted that the libelant was a member of the crew, and, as decided in the previous opinion, a person who enters upon the performance of duties as a seaman and who, through no fault of his own, has not as yet

signed articles, would not be thereby deprived of the benefits accruing to him as a seaman. But, on the other hand, until the articles were signed and the vessel had left the port, the libelant might have quit the vessel without loss of time or expense in returning home. For this reason he certainly cannot claim his wages for the voyage, nor for

loss of time in getting back to his home port.

[3] He alleges that he spent for maintenance and cure the sum of \$195. and this has not been controverted. His wages for two weeks would be sufficient to enable him to seek a new place and may be included in the decree. The Bouker No. 2, 241 Fed. 831, 154 C. C. A. The libelant was a seaman, and was entitled to the benefits of the English Workmen's Compensation Act in so far as it applied. The accident occurred on the 7th day of October, 1915, which was before the passage of the law of October 6, 1917 (40 Stat. 395, c. 97), making the Compensation Law of the state of New York applicable to persons injured under admiralty jurisdiction in New York Harbor, if otherwise within the New York state law. The English Compensation Act was interposed as a defense and by way of suggestion that the libelant was not entirely deprived of remedy if the libel was dismissed. Reargument has now been had, and the libelant cites the case of The Teviotdale (D. C.) 166 Fed. 481, as authority for asking to be allowed cure and maintenance. The claimant has contested the libelant's right to obtain the relief, but has interposed no technical objection to the hearing of the question.

[4] There seems to be no question that the court had jurisdiction to consider the charge of negligence; that is, of unseaworthiness. The laws of the place where the accident occurred control this. Sherlock et al. v. Alling, 93 U. S. 99, 23 L. Ed. 819; The Teviotdale, supra; The Ester (D. C.) 190 Fed. 216; The Cuzco (D. C.) 225 Fed. 169. The English Workmen's Compensation Law would seem, also, to be cognizable, and, if the libelant were in England, he might be entitled to compensation, even for an accident happening within the port of another country and not on the high seas. Whether since the Compensation Laws of New York have been expressly made applicable to occurrences within the admiralty jurisdiction, and since by the act of Congress federal jurisdiction thereover has been relinquished, the jurisdiction of one or the other Compensation Law—that is, the domestic and the foreign—is exclusive, so that no admiralty cause of action for neg-

ligence could be urged, need not be considered.

except the amounts which the owner of a vessel must advance for cure and maintenance to any seaman injured while on the vessel. These sums he was entitled to under admiralty law in general and also under the Statute of 6 Ed. VII, c. 48, § 34, par. 1. If the statute just cited be taken as the rule governing the contract rights of the seamen upon the vessel, it does not materially differ from the rule which would be applied to sailors upon an American vessel under the same conditions in this harbor. It would be useless to suggest that the libelant now pursue his case before the British consul or in the courts of Great Britain, even though those courts might have jurisdiction if he were

in England. The rights of an American seaman in the harbor of New York upon a British vessel can properly be adjudicated in a court of the United States according to the admiralty law, when this admiralty law is in exact accord with what his contract rights would be under the British statute. There is certainly no reason for relinquishing jurisdiction of the case.

The libelant may have a decree as indicated.

#### THE PINNA.

(District Court, E. D. Louisiana. July 8, 1918.)

No. 15584.

1. SEAMEN \$\infty 24\to Wages\to Right in General.

Under Seamen's Act, § 4, sailors are entitled to demand, at every American port, one-half of wages earned, but not one-half of wages due.

2. SEAMEN \$\infty 23\$—Contracts for Advances—Validity.

Advances made in a foreign port to sailors on a foreign vessel, legal where made, are not unlawful under the Seamen's Act.

3. SEAMEN \$\infty 26-DEMAND FOR WAGES-GOOD FAITH.

Where sailors, after master of ship had informed them that he had no money to meet their demands, accepted his orders on a store and had their wants satisfied, their subsequent demand for wages when the snip was about to sail was not in good faith, and they cannot recover.

4. SEAMEN €=24-WAGES-PAYMENT.

The master of a ship is entitled to a reasonable time in which to comply with crew's demand for wages, and where he delays only a few hours in procuring the necessary funds he is well within his rights.

In Admiralty. Libel by Charles David and others against the steamship Pinna. Dismissed, except as to libelant named and another.

W. J. & H. W. Waguespack, of New Orleans, La., for libelants. Terriberry, Rice & Young, of New Orleans, La., for claimant.

FOSTER, District Judge. This is a libel for double wages and transportation and subsistence by 14 members of the crew of the British steamship Pinna. The men were shipped in London for a voyage to the Gulf of Mexico and any ports between 65° N. L. and 58° S. L., and back to a final port of destination in the United Kingdom, not to exceed one year. They signed the usual British articles on November 26, 1916, at which time all received certain advances and some made allotments of pay.

The vessel touched at Port Arthur, Tex., on January 9, 1917, where she docked at 3 p. m., and subsequently loaded two tanks of oil as cargo. It was not contemplated the vessel would remain at Port Arthur more than 24 hours, and she in fact departed within that period. Shortly after the ship docked, the crew presented lists to the master, asking for various amounts, one or two wanting \$5, one \$15, and the rest \$10 each. The master explained he had no money on

board, and it was too late to get it from the bank, but offered the men orders on the Gulf Refining Company's store on the dock in the amounts of \$10 each. All accepted and were granted shore leave. On going ashore they used these orders for their purchases, but also came in touch with representatives of the sailors' union, who informed them the advances in London were illegal, and they were entitled to one-half of the pay due them on demand, and, if not paid, were entititled to quit and receive full pay. Early the next morning they again went to the master and demanded half their wages due. The captain again advised them he had not enough money on board to meet their demands, offered them each \$5, and told them he would get more money from the bank as soon as possible. Libelants declined to wait, and went on shore without leave, and consulted a lawyer for the purpose of libeling the ship. The captain then went ashore and procured the money necessary to meet the demands of the crew. Some of them returned and took their belongings off the ship, but none of them afforded the master the opportunity to pay the wages. The ship then sailed for New Orleans at 1 p. m., without libelants and before any process was served. The captain logged all the libelants as deserters, but states in his testimony he did not consider Herbert Clark and Chas. David intended to desert. Clark followed the ship to New Orleans, but a substitute had been shipped. David had gone to consult a dentist. Libelants constituted three of their members a committee to represent them, which committee came to New Orleans and instituted this proceeding.

- [1, 2] If the advances in England were lawful, and the orders on the commissary to the extent used are considered, all but two of the men had received more than one-half the amount earned by them at the time of their second demand in Beaumont, and in each instance the additional \$5 offered was more than the balance they were entitled to. It has repeatedly been held that under section 4 of the Seamen's Act (Act March 4, 1915, c. 153, 38 Stat. 1164) sailors are entitled to demand in every American port one-half of the wages earned, but not one-half of the wages then due. This accords with my own views. It has also been held by the Circuit Court of Appeals for the Fifth Circuit that advances made in a foreign port to sailors on a foreign vessel, legal where made, are not unlawful under the Seamen's Act. The Talus, 248 Fed. 670, C. C. A. That decision I am bound to follow.
- [3] While these views would dispose of the case adversely to libelants, aside from them, however, there are other cogent reasons for so deciding. In making their requests for payment of wages, sailors are bound to act in good faith. The Belgier (D. C.) 246 Fed. 966. It is evident these men were not in good faith. They were not obliged to accept the orders on the commissary; but they did so, and their wants were satisfied. They had reason to know the captain had no funds on board, and their further demands the next morning, as the ship was about to sail, could have had no other object than to provoke a breach of their contract. Under such circumstances they should not recover.

[4] Furthermore, the master was not obliged to comply with their demands instantly. He was entitled to a reasonable time to do so, and when he expressed his desire to comply, and delayed only a few hours in procuring the necessary funds, he was well within his rights.

The master has testified he did not consider Herbert Clark and Chas. David as deserters; therefore they are entitled to recover the balance of wages due them. In all other respects the libel will be dismissed, at libelants' costs.

#### In re RADLEY.

## (District Court, N. D. New York. July 13, 1918.)

1. BANKRUPTCY \$\ightarrow\$387\to Composition Proceedings\to "Proceeding in Bankruptcy."

Composition proceedings had by a bankrupt, adjudicated to be such on his voluntary petition, being regular in all respects, constituted a "proceeding in bankruptcy," and were part of the voluntary proceedings instituted by the bankrupt.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Proceeding in Bankruptcy.]

Under Bankruptcy Act, §§ 12, 14 (Comp. St. 1916, §§ 9596, 9598), a bankrupt who on his voluntary petition within the six years last past has been granted a discharge from his debts, having made composition with his creditors and had the proceeding dismissed, is not entitled to his discharge; his discharge in the composition proceedings being a "discharge in bankruptcy."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discharge in Bankruptcy.]

In Bankruptcy. In the matter of Frank Radley, bankrupt. On review of an order of the referee sustaining objections to the bankrupt's discharge. Report of referee confirmed, and order directed refusing discharge.

This is a hearing on review of an order of the referee in bankruptcy, Hon. James A. Van Voast, sustaining the objections to the discharge in this proceeding of the above-named bankrupt, on the ground that in voluntary bankruptcy proceedings on his part in this district within the six years last past said Radley had been granted a discharge from his debts.

Charles E. Hardies, of Amsterdam, N. Y., for bankrupt. Thomas R. Tillott, of Schenectady, N. Y., for objecting creditors.

RAY, District Judge. [1,2] April 17, 1913, Frank Radley, the above-named bankrupt, filed a voluntary petition in bankruptcy in this court, and was adjudicated a bankrupt April 17, 1913. In that proceeding he thereafter made an offer in composition to his creditors, which was accepted by the requisite number of creditors, and April 28, 1913, an order was made by this court confirming such composition. The moneys to pay the amounts offered in composition were

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duly deposited, and after the composition was confirmed same were distributed to the creditors and the proceeding dismissed. These composition proceedings were regular in all respects, and constituted a proceeding in bankruptcy, and were a part of the voluntary proceedings instituted by said Radley.

Section 14c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat.

550 [Comp. St. 1916, § 9598]) provides that:

"Confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

The offer of composition in this case was confirmed and distribution made, and the bankrupt was discharged from his debts in the bankruptcy proceedings instituted by him pursuant to his own request made in such proceeding and as a part thereof under the terms of the Bankruptcy Act. There can be no question that this discharge of Radley from his debts was a discharge in bankruptcy. Composition proceedings are provided for in the act itself. Section 12, Bankruptcy Act (Comp. St. 1916, § 9596). Radley was discharged from his debts because of and under and pursuant to this section of the Bankruptcy Act. These composition proceedings were not outside of the bankruptcy proceedings, but a part of them, and this was one mode pursued by the bankrupt of obtaining his discharge from his debts. He might have gone on without making an offer of composition, and on complying with the terms of the act have obtained a discharge in the other manner pointed out. This he did not do. He pursued one of the two courses, and obtained his discharge, and he pursued and availed himself of the mode provided for in sections 12 and 14 of the Bankruptcy Act.

Quite early under the administration of the present Bankruptcy Act it was found that certain persons became what may not inaptly be called professional bankrupts; that is, at frequent intervals they were found filing voluntary petitions in bankruptcy and obtaining discharges from their debts. Congress wisely saw fit to put an end to this practice, and hence provided in substance and effect in section 14 of the act, as amended, that a second discharge shall not be granted the same person where in voluntary proceedings he has been granted a discharge in bankruptcy within six years. This same section, in subdivision "c," provides that the confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge, and it cannot successfully be contended that a bankrupt has not been discharged, within the meaning of the other provisions of that section, when he has filed a voluntary petition in bankruptcy, availed himself of the provisions of the law, offered composition, which has been accepted by his creditors, and approved and confirmed by the court, and the proceeding thus closed. I think it very clear that the decision of the referee on the application for a discharge is right, and that his report should be confirmed, and an order made refusing a discharge in this proceeding.

It is so ordered.

MARTIN v. KENNECOTT COPPER CORPORATION. (District Court, W. D. Washington, N. D. July 11, 1918.)

No. 3820.

1. Pleading \$\infty\$122-Denials-Sufficiency.

A person cannot deny existence of a statute upon information and belief.

2. MASTER AND SERVANT \$\iiint 348\to Workmen's Compensation\to Superseding Common-Law Remedies.

Workmen's Compensation Act Alaska, §§ 7, 21, 22, supersedes the common law, and no action can be brought for injuries in any court, federal or otherwise, outside the territory of Alaska.

3. MASTER AND SERVANT \$\igcress 348-Workmen's Compensation-Operation.

The Alaska Workmen's Compensation Act enters into and becomes part of the contracts of employment in such territory as fully as though stipulated therein.

At Law. Action by Mike Martin against the Kennecott Copper Corporation. On motion by defendant to strike denials filed by plaintiff to the answer and for judgment on the pleadings. Motion granted.

John T. Casey, of Seattle, Wash., for plaintiff. Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiff seeks to recover from the defendant damages for injuries received while being employed in the mine of the defendant in Alaska, alleging negligence on the part of the defendant. The defendant answers with certain denials and admissions, and pleads affirmatively chapter 71, Session Laws of the Territorial Legislature of Alaska for the year 1915, commonly called the Workmen's Compensation Act of Alaska, praying that the said law be declared the law of this case, and that by virtue of section 22 of said act the plaintiff be declared not entitled to maintain this action in this court, and that the same be dismissed. The plaintiff has filed a denial upon information and belief with relation to this act, and further states:

"That if said act was regularly passed, and is a valid and constitutional enactment, in whole or in part, and held to be the law of this case, plaintiff hereby elects to accept the compensation which a jury may award under the provisions of said compensation act."

A motion has been made to strike the several denials as insufficient and evasive, irrelevant, and immaterial, and for judgment upon the pleadings.

[1] I think the denials are insufficient, as the privilege granted must necessarily be subject to the limitation that acts presumably within the personal knowledge cannot be thus denied, nor is this privilege extended to denial of a matter of public record.<sup>1</sup>

131 Cyc. pp. 200-202; Raymond v. Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908; Sumpter v. Burnham, 51 Wash. 599, 99 Pac. 752; Belknap Glass Co. v. Brown, 69 Wash. 127, 124 Pac. 390; Olympia v. Turpin, 70 Wash. 581, 127 Pac. 210; Canyon Lbr. Co. v. Sexton, 93 Wash. 620, 161 Pac. 841.

[2] Section 21 of the Alaska Workmen's Compensation Act provides that:

"Actions for the recovery of compensation due under this act may be brought, maintained and determined in and by the courts of this territory, and when so brought shall be governed by the law of procedure applicable to other actions for the recovery of money except as herein otherwise expressly provided."

# Section 22 provides:

"No action for the recovery of compensation hereunder shall be brought in any court holden outside of the judicial division in which the injury occurred, out of which the right to compensation arises except in cases where service cannot be had on the employer in the judicial division where the injury occurred. Any attempt to bring such action in any court outside of the territory of Alaska shall work a forfeiture of the right of the plaintiff in such action to compensation under this act."

# Section 7 of the act provides:

"The right to compensation for an injury and the remedy therefor granted by this act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this act, shall accrue to employés entitled to compensation under this act while it is in effect; nor shall any right or remedy, except those provided for by this act, accrue to the personal or legal representative, dependents, beneficiarlies under this act, or next of kin of such employé."

The Alaska statute, by express provision, supersedes the common law and by comprehensive provision covers the field of liability in this case. The plaintiff's right of recovery is statutory and the limitations of the parties are fixed by the act. The remedy provided for the omissions of duty charged in this case is dissimilar to that afforded by the common law, and recovery under the Alaska law cannot be enforced in this proceeding (Slater v. Mexican National Railroad Company, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900), since the cause of action is made local by the express terms of the statute. The only source of liability is the law of Alaska, which determines the extent. Smith v. Condry, 1 How. 28, 11 L. Ed. 35. The action is not transitory, but local, and the forum is fixed, and the remedy may not be sought here. Southern Pac. Co. v. Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766.

[3] The act in issue has been sustained by the Circuit Court of Appeals of this circuit. Johnston v. Kennecott Copper Corp., 248 Fed. 407, — C. C. A. —. The provisions of the law enter into and become part of the contract of employment as fully as though stipulated therein. McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397. The motion of the defendant must therefore be granted.

#### THE VINDEGGEN.

## (District Court, D. Maryland. July 3, 1918.)

Shipping \$\sim 81(1)\to Negligence of Pilots\to Liability of Vessel Owner.

Where Norwegian vessel, having no choice under the law but to take Virginia pilot, was anchored by him in vicinity of government cables shown on charts as prohibited, and the anchor fouled the cables and caused damage, the ship was liable for such default of the pilot.

In Admiralty. Libel by the United States against the steamship Vindeggen. Decree for the United States.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md. George Forbes, of Baltimore, Md., for respondent.

ROSE, District Judge. In this case the United States seeks to recover against the Norwegian steamship Vindeggen for costs of repairing damage done to a submarine telephone cable belonging to the government, and underlying the waters of the James river in Hampton Roads, near Fortress Monroe.

There is practically no dispute as to the material facts. The ship was in charge of a Virginia pilot. He brought it to anchor in the immediate vicinity of the cables, and in a place in which anchorage of ships was forbidden. This prohibition was clearly shown upon the ordinary charts used by navigators. The ship's anchor fouled the cables, and in consequence of the high wind which was blowing at that time it was unusually difficult to disengage the ship from them, and by reason thereof one of the cables was not only broken, but some hundreds of feet of it were very badly damaged. The ship is liable for the defaults of its pilot, although it had no choice under the law but to take him.

It follows that the government is entitled to a decree against the ship for the cost of repairing the damage.

#### THE ELLENORA.

(District Court, W. D. Washington, N. D. July 8, 1918.)

No. 4116.

SHIPPING \$\iff 21\to Jurisdiction of Court—Sale of Vessel—Failure of Joint Owners to Agree on Employment of Vessel.

Where part owner of vessel seeks to employ it in a dangerous and hazardous enterprise without the consent of and over the objection of owner of other half, a court of admiralty, upon application of latter, may order that vessel be sold and proceeds distributed.

In Admiralty. Libel by Joseph Jefferson against the gas boat Ellenora, her engines, tackle, apparel, and furniture, and others. Respondents' motion to dismiss denied.

Winter S. Martin, of Seattle, Wash., for libelant. Daniel Landon, of Seattle, Wash., for respondents.

NETERER, District Judge. Libelant, half owner, charges that the owners of the other half seek to employ the vessel against his consent and over his objection in a hazardous voyage in "British Columbian and Alaskan waters," in a dangerous and hazardous enterprise, that will "involve said vessel with unwarranted expense and liens, which will impair and destroy the value of libelant's interest in said vessel," and prays that the said vessel may be sold and the proceeds brought into court, to be divided and distributed according to law. The respondents have moved to dismiss on the ground that the court is without jurisdiction, that the libel does not state a cause of action, and that

the procedure is improper.

It has long been held that, where moiety owners of a vessel cannot agree as to her control and employment, on application therefor a court of admiralty should decree a sale and division of the proceeds. Coyne v. Caples (D. C.) 8 Fed. 638; The Emma B. (D. C.) 140 Fed. 771; Henry's Admiralty Jurisdiction and Procedure, § 23, p. 55; The Ocean Bell, Fed. Cas. No. 10,402. The power of the court does not rest in the right of a party to sell the vessel, but is an essential part and function inherently resting in the court, for the purpose of extricating the vessel from a condition which deprives commerce of an instrumentality in carrying forward the necessities of the people. The B. F. Woolsey (D. C.) 7 Fed. 108. That a half owner of a vessel may invoke the aid of admiralty in protecting his investment, by decreeing a sale and distribution is a proper procedure, is said by Benedict's Admiralty, § 187; Flanders on Shipping, c. 1, p. 368, § 375; Conkling's U. S. Admiralty, pp. 250, 251; Dixon's Law of Shipping, p. 23.

This rule found basis in the fifth and sixth articles of the Marine Code of France, Ordinances of Louis XIV, published to the maritime nations of Europe as early as 1681, which are said to be substantially the same as the first rule of the Roman Marine Code, and which pro-

vides:

"No person may constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage."

This was quoted by Justice Washington as early as 1829 (The Seneca, Fed. Cas. No. 12,670, 23 Myer's Federal Decisions, 363), in which he held that a sale of the vessel ought to be decreed where two equal joint owners of a ship could not agree upon the agency of employing it or the manner of employment. This case reviews the various Marine Codes. And in Head v. Amoskeag Mfg. Co., 113 U. S. 9, at pages 22, 23, 5 Sup. Ct. 441, 447 (28 L. Ed. 889), the Supreme Court, through Justice Gray, said:

"If the part owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds distributed among them."

The motion is denied.

#### THE HANNINGTON COURT.

#### (District Court, E. D. New York. July 2, 1918.)

1. SEAMEN 5-7-EMPLOYMENT-ARTICLES-DISAVOWAL.

Where seamen, signing in Italy, accepted services of man who could speak some Italian in making known to them the terms of the articles, they cannot disavow terms of the articles.

2. SEAMEN \$\sim 3-Articles-Law Governing Contract.

Where seamen signed articles in Italy before British consul, the contract is governed by British law and not the La Follette Act.

In Admiralty. Libel by Bushe Sherale and others against the steamship Hannington Court, her tackle, apparel, etc. Decision in favor of claimant.

Silas B. Axtell, of New York City, for libelants. Kirlin, Woolsey & Hickox, of New York City, for claimant.

CHATFIELD, District Judge. Four of the libelants signed as firemen at the port of Savona, Italy, about the 1st day of June, 1915; the fifth libelant joined her at Genoa. All claimed that the articles were explained to them by some one who could understand a few words of Italian, which was not understood by the libelants, who are Arabs, and who testified that they understood that they would be paid off in Italy at the end of a single voyage. The articles read that the men signed for a voyage to America, not exceeding three years in duration. The vessel proceeded to Algeria, thence to Newport News, Va., and from there back to Genoa, where they claimed the right to be paid off, on their understanding that the voyage was a single trip to America and back. The libelants were not allowed to land, were brought to America on another voyage to Galveston, and thence to New York, where the vessel loaded and proceeded to Bordeaux, France. At this port the libelants were put in jail for attempting to go ashore, but were replaced upon the vessel and brought to New York, where she arrived on March 13, 1916. On March 23, 1916, they consulted the Legal Aid Society and made a demand for half of the wages due. This demand was made under the provisions of the La Follette Act (Act March 4, 1915, c. 153, 38 Stat. 1164), and they received onehalf of the total amount then earned, less certain fines and advances. The libelants then left the ship, in order to get higher wages, and were marked off as deserters, forfeiting the balance due.

There is no evidence that the libelants left the vessel for any failure to meet their demand for half wages or for payment of money already advanced. After being properly marked off as "deserters," they cannot justify their conduct by making a new demand in the pleadings of this action.

[1, 2] But in addition the libelants do not make out their right to disavow the terms of the articles as signed at Savona. They accepted the services of a man who could speak some Italian, in making known to them the terms of the articles, which were signed before the British

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consul at the time of signing, and the evidence does not support the charge of fraud, which could be made the basis of disavoidance or rescission of the contract. British law governs the contract, and the La Follette law does not apply.

#### UNITED STATES v. SCHUTTE.

(District Court, D. North Dakota, June 13, 1918.)

1. STATUTES \$\infty 241(1)\$\to\$Construction\$\to\$Criminal Statutes.

It is a cardinal rule that criminal statutes should be strictly construed.

2. WAR \$\sim 4\to OFFENSES\to STATUTE.

Espionage Act, § 3, declaring that whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces, etc., does not apply to every disloyal utterance, but only to those affecting the military or naval forces, etc.

3. War &-4—Offenses—Violation of Espionage Act—Indictment—"Willfully."

An indictment charging a violation of Espionage Act, § 3, denouncing the offense of willfully making or conveying false reports with intent to interfere with the success of military operations, etc., must allege that the language was "willfully" uttered; that is, with intent to accomplish the forbidden purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willfully.]

4. WAR \$\infty 4-\text{Violation of Espionage Act-Indictment.}

An indictment charging a violation of Espionage Act, § 3, denouncing the circulation of false reports, and statements with intent to interfere with the success of military operations, etc., must show that the language itself was of such a character as to cause the results denounced, and so the language should be set forth, or, if too obscene, should be described.

5. WAR \$==4-Espionage Act-Indictment.

An indictment charging a violation of Espionage Act, § 3, denouncing the circulation of false reports intended to interfere with the success of military operations, etc., should show that the language was uttered on such an occasion that a reasonable man could say it might produce one or more of the results denounced, although it is unnecessary to allege or prove that any particular person was induced by the language to commit acts of disloyalty.

6. WAR \$\infty 4\$—ESPIONAGE ACT—JURY QUESTION.

In a prosecution for violating Espionage Act, § 3, denouncing the willful circulation of rumors with the intent to interfere with the success of military operations, etc., the question whether the language used had the effect denounced is one of fact for the jury.

7. WAR \$\infty 4-Espionage Act-Violations.

In view of the amendment of May 16, 1918, to Esplonage Act, § 3, denouncing the circulation of false reports tending to interfere with the success of military operations of the United States, etc., an indictment charging that accused willfully stated that "this is a rich man's war, and it is all a damn graft and swindle," but which did not allege the circumstances under which the language was uttered, is insufficient to charge an offense, not showing that the language was uttered under circumstances tending to interfere with the success of military operations, etc.

- B. H. Schutte was indicted for violation of Espionage Act, § 3. On demurrer to the indictment. Demurrer sustained.
  - M. A. Hildreth, U. S. Atty., of Fargo, N. D..
  - D. T. Youker, of Ellendale, N. D., for defendant.

AMIDON, District Judge. [1, 2] The indictment in this case charges a violation of section 3 of the Espionage Act of June 15, 1917 (chapter 30, 40 Stat. 217), which reads as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

On its face this statute is confined to a limited class, namely, the military and naval forces and persons subject to the recruiting and enlistment service. Who these persons are is defined by law. Language, to violate the statute, must directly and proximately affect one or more of the limited class mentioned, in the manner specified. To stretch this law so as to cover all disloyal utterances, regardless of whether they affect the military or naval forces, or the enlistment and recruiting service, would not only violate the cardinal rule that criminal statutes should be strictly construed, but would defy the limitations which the statute itself expresses with unmistakable clearness. Such a perversion of law would itself be a supreme act of disloyalty, though done for the avowed purpose of suppressing disloyalty.

A valid indictment under the act must embrace three facts:

- [3] (1) The language must have been willfully uttered. That excludes what is spoken in the heat of passion, without deliberate purpose. The term "willfully," as construed by the courts, necessarily imports a deliberate purpose to accomplish one or more of the things forbidden by law. St. Joseph Stockyards Co. v. United States, 187 Fed. 104, 110 C. C. A. 432; United States v. Sioux City Stockyards Co. (C. C.) 162 Fed. 556, 562; Felton v. United States, 96 U. S. 702, 24 L. Ed. 875; Potter v. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214.
- [4] (2) The language itself must have been of a character to cause some of the results denounced by the law. It should be set forth in the indictment, or, if too obscene for a judicial record, it should be described so that the court can determine whether it possesses the forbidden quality.
- [5, 6] (3) The language must have been uttered on an occasion such that a reasonable mind could say that it might produce one or more of the results mentioned in the act. By this I do not mean that the government must prove that some particular person was induced by the language to commit acts of disloyalty in the military or naval

forces, or fail to perform some step in the enlistment or recruiting service. All that is necessary is to show that the language was of such a character and was spoken within the hearing of one or more persons belonging to one of the classes specified in the act, so that a reasonable person might infer that it could produce one of the forbidden results. It will then become a question of fact for the jury to say whether in truth it did produce that result.

[7] The present indictment contains three counts, based respectively upon each of the three clauses of the statute. After stating the date and venue, the second count charges the offense as follows:

"That at said time and place the said defendant B. H. Schutte did willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States (the same being then and there as now a time of war between the United States of America and the Imperial German government), by willfully stating to divers persons whose true names are to the grand jurors unknown that 'this is a rich man's war and it is all a damn graft and swindle,' stating, 'if you do not believe it, just look at the cost of wheat.'"

The language attributed to defendant is offensively unpatriotic and is charged to have been willfully uttered. The first two requirements of a valid indictment are therefore clearly alleged. The pleading fails, however, to set forth in any manner the circumstances under which the language was used. So far as the indictment discloses, it may have been spoken to persons who have and could have no relationship to the military or naval forces, or the recruiting and enlistment service of the United States. If it were spoken under such circumstances, it would not be a violation of the statute. Suppose the language had been spoken to men all of whom were past 40 years of age, or to a woman's club; would any one claim that the purpose of the speaker was to produce the results forbidden by the statute? It is elementary criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is incumbent upon the government to specify in the indictment the circumstances under which it was uttered sufficiently to show that its utterance would probably produce the forbidden result. This cannot be left to speculation or inference, but must be clearly and directly charged. The circumstances are an element of the crime. It is not enough to charge that the language was uttered with intent to violate the law. That would be a mere legal conclusion, when proper pleading requires a statement of facts. The question is not for the pleader, but for the court, and the facts must be set forth, so that the court can say whether or not they constitute the crime. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Carll, 105 U. S. 613, 26 L. Ed. 1135; Armour Packing Co. v. U. S., 153 Fed. 1, 16, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; United States v. Kessel (D. C.) 62 Fed. 59; Floren v. United States, 186 Fed. 961, 108 C. C. A. 577; Knauer v. United States, 237 Fed. 8, 150 C. C. A. 210.

The statute deals only with a willful purpose to cause the results which it forbids. It is indispensable to the crime that facts be charged

and proven which reasonably lead to the inference that such was the purpose of the defendant. Remote and secondary results, not intended by the defendant, arising from a fair and truthful discussion of matters of public concern, do not fall within the purview of the act.

Congress has not left its purpose to be ascertained solely by a judicial interpretation of the act of June 15, 1917. It has interpreted the act itself. By the statute recently passed and approved May 16, 1918, (chapter 75), it expressly makes the mere utterance of disloyal language on certain subjects a crime. If such utterances were already forbidden by the act of June 15, 1917, why the amendment? The recent statute repeats all of the first act as quoted at the beginning of this opinion, and then adds the following new provisions:

"Whoever, when the United States is at war. \* utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States. or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both: Provided, that any employe or official of the United States government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in any abusive and violent manner criticizes the Army or Navy or the flag of the United States, shall be at once dismissed from the service. Any such employe shall be dismissed by the head of the department in which the employé may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official."

This amendment, so soon after the passage of the former act, is a clear legislative interpretation that the mere use of language, unpatriotic though it may be, is not in and of itself a crime under the act of June 15, 1917, unless it is spoken to or in the hearing of some person specified in the act.

The Supreme Court of Minnesota has recently had this whole subject under examination in construing a statute of that state which is much more comprehensive than the federal law under which the present indictment is framed. The case referred to is State v. Spartz, 167 N. W. 547, decided May 17, 1918, but not yet officially reported. There the indictment charged the defendant in the following language:

"The said Jake Spartz, at Dundas in the county of Rice and state of Minnesota, did speak and use the following language to the witnesses hereinafter named and to others: 'Louis Seimers was wounded and should be dead long ago.' That at said time the said Louis Seimers was a soldier in the army or navy of the United States government and was wounded while so engaged as such soldier in assisting the United States government in prosecuting the present war against Germany. That it was intended to express contempt by such language for the soldiers of the government of the United States, and to thereby discourage others from giving their full and unqualified support to said government in carrying on and prosecuting the present war."

The sections of the state law (chapter 463, Laws of 1917 [Gen. St. Supp. 1917, §§ 8521—1 to 8521—6]), under which the indictment was framed, reads as follows:

Section 2: "It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled to advocate or teach by word of mouth, or otherwise, that men should not enlist in the military or naval forces of the United States or the state of Minnesota."

Section 3: "It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

A demurrer was interposed to the indictment and overruled by the trial court. This ruling was brought before the Supreme Court and reversed. The court sets forth the reasons for its decision in the following instructive language:

"It will be noticed that the gravamen of the offense under each section of the law is the teaching or advocating that men should not enlist, or that citizens should not aid. That would seem to show that the Legislature did not attempt by this act to punish every idle casual remark, wicked though it be, but only those utterances which on their face show a purpose to teach or advocate what the statute forbids, or which are made under such circumstances that it would be permissible for a jury to find a like purpose. The so-called innuendoes, and recitals in this indictment do not tend to show that the words uttered might be interpreted by the jury as teaching or advocating that citizens should not aid the government in the prosecution of the war; \* \* \* nor are there any averments of accompanying circumstances showing that the spoken words were intended to advocate or teach, or could be understood by the hearers as advocating or teaching that citizens should not render such aid or assistance in the prosecution of the war as the government requires or has indicated as proper."

This decision is quite in harmony with the long-established principles of the Circuit Court of Appeals of this circuit, and of the Supreme Court of the United States, as will be seen from the cases above cited.

The uniform practice in framing indictments under the act of June 15, 1917, has been to charge that the seditious language was either spoken personally to men belonging to one of the classes mentioned in the act, whose names are given, or that it was spoken to a public audience composed in part of such men. The Attorney General has printed in leaflets all charges to juries and opinions of courts in cases arising under the act since its passage. So far as these disclose, the practice has been as I have just indicated. As the indictment in the present

case fails wholly to state that the language complained of was spoken to named persons belonging to one of the classes mentioned in the act, or to an audience at which such persons were present, it is fatally de-

fective, and the demurrer must be sustained.

The grand jury that found the indictment is still in session. If the facts justify indicting the defendant under the law as explained in this opinion, a new indictment can be returned without serious trouble. Such a course is much better than to go to the expense of a trial, and then, if a conviction is obtained, have it set aside on appeal because of a mere defect of pleading.

Let an order be entered sustaining the demurrer.

### UNITED STATES v. NAGLER.

## (District Court, W. D. Wisconsin. July 25, 1918.)

1. Criminal Law 

304(1)—Judicial Notice—War Activities—Red Cross.

The government having constituted the American Red Cross an important factor of the national war activities, the court must take judicial notice of many Red Cross activities.

2. WAR \$=4-Persons in Service-Red Oross-Espionage-"Military and

NAVAL FORCES OF THE UNITED STATES."

The American National Red Cross, having been employed as a part of the sanitary service of the army and navy, is a part of the "military or naval forces of the United States," within the meaning of Act June 15, 1917, c. 30, § 3, as amended May 16, 1918, providing punishment for those making false statements with intent to hinder the success of such forces.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Military Forces; Naval Forces.]

3. WAR & 4-MILITARY AND NAVAL FORCES OF THE UNITED STATES-PERSONS IN SERVICE-ARMY Y. M. C. A.

The Y. M. C. A., as recognized by the President of the United States and engaged in raising funds for and in serving the soldiers and sailors, is a part of the "military and naval forces of the United States," within the terms of Act June 15, 1917, c. 30, as amended May 16, 1918, prohibiting interference with the successful operation of such forces.

4. WAR \$\infty 4\$—MILITARY AND NAVAL FORCES OF THE UNITED STATES—RED CROSS—INTERNATIONAL TREATIES—MILITARY OF NAVAL SERVICE—ESPIONAGE.

The official recognition of the Red Cross by international treaties, particularly the Treaty of Geneva of August 22, 1864, whereby members captured were to be treated as neutrals, does not prevent recognition of the Red Cross as a part of the "military and naval forces of the United States," under Act June 15, 1917, c. 30, as amended May 16, 1918, prohibiting interference with the operation of such forces.

5. WAR —4—MILITARY FORCES—ESPIONAGE—INTERFERING WITH RAISING MONEY FOR ARMY Y. M. C. A. AND RED CROSS WORK.

The making of false statements concerning the Army Red Cross and Army Y. M. C. A. and the government's management of the war, to persons soliciting funds to carry on war work, if intended to interfere with raising such funds, and with "the operation or success" of the "military or naval forces," is punishable under Act June 15, 1917, c. 30, as amended May 16, 1918.

Louis B. Nagler was indicted for violation of Espionage Act, § 3. On motion to quash the indictment. Motion denied.

Albert C. Wolfe, U. S. Atty., of La Crosse, Wis., and B. R. Goggins, Sp. Asst. Atty. Gen., for the United States.

Crowhart & Wylie and Burr W. Jones, all of Madison, Wis., for defendant.

EVAN A. EVANS, Acting District Judge. Defendant moves to quash the indictment returned against him, because it fails to state facts sufficient to charge him with the commission of a crime. Section 3 of the Espionage Act, in force at the time the offense is alleged to have been committed, approved June 15, 1917 (40 Stat. 219, c. 30), reads as follows (the paragraphing, as well as the figures in parentheses are mine):

"Whoever, when the United States is at war,

"(1) Shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies,

"(2) And whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States,

"(3) Or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, "Shall be punished by a fine of not more than \$10,000 or imprisonment

for not more than twenty years, or both."

The indictment charges defendant with having spoken the following words in the presence of numerous people whose ages do not appear, to wit:

"I am through contributing to your private grafts. There is too much graft in these subscriptions. No; I do not believe in the work of the Y. M. C. A. or the Red Cross, for I think they are nothing but a bunch of grafters. No, sir. I can prove it."

"I wont give you a cent. The Y. M. C. A., the Y. W. C. A., and the Red Cross is a bunch of grafters. Not over 10 or 15 per cent. of the money collected goes to the soldiers or is used for the purpose for which it is collected."

"Who is the government? Who is running this war? A bunch of capitalists composed of the steel trust and munition makers."

From the entire indictment it is apparent that defendant, in referring to the Y. M. C. A. and the Red Cross, was referring to these organizations and their activities in the present war. Upon this motion to quash, the defendant, for the purpose of the argument, admits the utterance of the words, as well as the other allegations of fact set forth in the indictment.

A consideration of this motion to quash requires an analysis of section 3 of the Espionage Act as it was originally enacted, and also an analysis of the statements by the defendant made. Section 3 of the Espionage Act naturally divides itself into three subdivisions, represented by paragraphs (1), (2), and (3), above set forth. We are interested primarily with subdivision (1), for it is this subdivision that defendant has violated if any violation has occurred. Subdivisions (2) and (3) are worthy of consideration only in so far as they throw light upon the construction to be given to the words "military or naval forces of the United States" as they appear in subdivision (1).

An examination of the words spoken by defendant leads to an an-

alysis of what was said into-

(a) What was said about the Red Cross,

(b) About the Y. M. C. A.,

(c) About the government and those who are running the war, and

the influence of the capitalists in the conduct of the war.

Defendant calls for a strict construction of the statute, and denies that the utterance of any words spoken of the Red Cross or the Y. M. C. A. can be construed as a violation of this subdivision (1) of section 3 of the act. This position is based upon the premise that the Red Cross and Y. M. C. A. are no part of "the military or naval forces of the United States." He further contends that words spoken to parties not members of the Red Cross or Y. M. C. A. in reference to subscriptions to these organizations were not reasonably adapted to accomplish the result of interfering with "the operation or success" of either organization, conceding that such organizations are a part of the military or naval forces of the United States. In support of their contention they cite the recent decisions of Judge Bourquin in U. S. v. Ves. Hall, 248 Fed. 150, of Judge Amidon in U. S. v. Schutte, 252 Fed. 212, of Judge Lewis in U. S. v. Hitt, Bulletin No. 53, and of Judge Anderson in U. S. v. Zimmerman, (no opinion filed).

The government contends, on the other hand, that the language spoken by the defendant to various individuals when a "drive was on" for the Red Cross and the Y. M. C. A., with the intent to interfere with the success of such drives was a clear violation of subdivision

for the Red Cross and the Y. M. C. A., with the intent to interfere with the success of such drives, was a clear violation of subdivision (1) of said section. While contending that such language, in view of the activities of and the part taken by the Red Cross and the Y. M. C. A. in this war, is actionable, it especially contends that it is actionable to speak of the Red Cross in such manner, because that organization is a national corporation, incorporated January 5, 1905, and created for the purpose of perfecting a permanent organization as an agency of this government needed by it to carry out the purposes of the treaty entered into at Geneva, Switzerland, August 22, 1864 (22 Stat. 940), the general objects of which treaty were to mitigate the evils inseparable from war, and to ameliorate the conditions of soldiers wounded on the field of battle; that the governing body of the American National Red Cross consisted of a central committee, six chosen by the President of the United States, six elected by delegates from states and territories, and six elected by the board of incorporators; that the President of the United States is the president of the corporation; that the various states and territories within the United States have been organized as a part of this corporation, the membership in which now exceeds 300,000, organized locally into chapters; that a further purpose of the corporation is to furnish voluntary aid to the sick and wounded of our army and navy in time of war, and, to carry out such object, to equip and manage hospitals, hospital ships, trains, transportation for the sick and wounded, to manufacture, col-

lect, store, and distribute war relief supplies, and to serve as a means

of communication between the people of the United States and their army and navy; that in time of war the President of the United States may use and employ the Red Cross, with the sanitary service of the land and naval forces of the army and navy, in conformity with such rules and regulations as he may prescribe; that prior to the utterance of the words set forth in the indictment by the defendant the American National Red Cross tendered its assistance to the government, and the President of the United States, pursuant to the authority upon him conferred, accepted and employed the same under the sanitary service of the army and navy, and promulgated rules and regulations governing the status, organization, and operation of the Red Cross; that among the rules and regulations which the President thus announced the Red Cross units serving with the land forces were made and constituted a part of the sanitary service of the land and naval forces of the United States.

[1] Other facts are set forth in the indictment, showing the official action of the government in constituting the Red Cross an important factor of the war activities of the nation, and the court must take judicial notice of many other activities of this worthy organization in these times. Appropriate allegations appear in the indictment showing the nature of the Y. M. C. A. and the character of the services rendered by this organization as an agency of the government of the United States, and particularly its activities in bettering the moral conditions surrounding its military and naval forces in field and military camps. Among other things it is asserted that the Y. M. C. A., as such an agency of the United States government, "had heretofore received official recognition by Woodrow Wilson, as commander in chief of the army and naval forces of the United States and President of the United States, as a valuable adjunct and asset to the military and naval service of the United States."

In support of its position the government cites numerous cases, among others the following decisions: Of Judge Munger, U. S. v. Frerichs, Bulletin No. 85; of Judge Munger, U. S. v. Pundt, Bulletin No. 82; of Judge Neterer, U. S. v. Zittel, Bulletin No. 90; of Judge Dayton, U. S. v. Kirchner, Bulletin No. 69; of Judge Neterer, U. S. v. Wells, Bulletin No. 70; of Judge Van Valkenburgh, U. S. v. Stokes, Bulletin No. 106; of Judge Aldrich, U. S. v. Taubert, Bulletin No. 108; of Judge Ray, U. S. v. Pierce, Bulletin No. 52, and others. These decisions have not as yet appeared in the Federal Reporter, but the government has published them in pamphlet form, numbering the bulletins. Adopting the language of Judge Munger in U. S. v. Frerichs, the government's position is that if a remark is false in character and reasonably capable of producing resulting action by others which would interfere with the operation or success of the government's military or naval forces, and such remark "is made with the intent that it shall influence the hearers, so as to dampen their ardor in the war and to deter them from subscribing to bonds or thrift stamps or aiding the Red Cross, or to giving their active and loyal support to the activities of the country in the prosecution of the war, \* \* \* the jury could say that that was with the intent to interfere with the operation and the success of the military forces, because whatever interferes with the loyal support at home interferes with the success of the forces abroad."

[2, 3] Defendant argues for a strict construction of this statute, because it is a criminal statute, and further that Congress by amending the act (Act May 16, 1918, c. 75) in the manner in which it was amended, thereby construed its own act and adversely to the now asserted position of the government. It does not appear to me that the term "military or naval forces of the United States" can fairly be defined or construed so as to exclude either the Red Cross or the Y. M. C. A. This result defendant asserts would lead necessarily to the conclusion that a violation of the act occurs when one speaks falsely and with bad intent concerning the Knights of Columbus, the Salvation Army, or the

Jewish Relief organization. With this position I agree.

Not only would it be a violation of the law to interfere with the drives conducted for the raising of funds for the Y. M. C. A., but it would likewise be a similar offense if the opposition was directed to the work of those engaged in raising funds for the Knights of Columbus. the Jewish Relief, or the Salvation Army. Of course, in speaking of these organizations, I am speaking of the war organizations under these names, recognized by some department of our government, and not of these organizations in time of peace. No other conclusion would be logical. In a republican form of government, like ours, with war conducted as it is to-day, there should and can be no refined or limited definition of the term "military or naval forces." The forces that actually fight on the battle field, and the forces that produce the food and arms and munitions at home, are so related and interdependent that it is impossible to say one belongs to the military forces and the other does not. The doctor who fits the recruit for life in the camp or trench renders a service very similar in nature and character. to the officer who trains the recruit in the rudiments of warfare. The surgeon who mends the injured limbs that the fighter might return to the trench is not different from the aides who examine and repair the aeroplane that is used by the flier to drop bombs on the enemy. Yet the doctor belongs to the sanitary department of our army and navy, and defendant admits that under his construction of the act doctors cannot be included as a part of the army and navy.

[4] It is, however, strenuously contended that because the Red Cross was officially recognized by international treaties, and particularly in the treaty concluded at Geneva, Switzerland, wherein and whereby members of the Red Cross are to be treated as neutrals and in case of capture, are to continue in their same occupation, it would be illogical and embarrassing in the extreme if this court were to give such construction to this act, so as to make members of the Red Cross belligerents. In my opinion recognition of the Red Cross as a part of the "military or naval forces" of the United States would not relieve any country that is a party to this treaty from according such members the treatment required by the terms of the treaty. The important provisions of the treaty concluded at Geneva on August 22, 1864, pro-

vided:

"Article I. Ambulances and military hospitals shall be acknowledged to be neuter, and as such shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force."

"Art. III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfill their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong."

"Art. VI. Wounded or sick soldiers shall be entertained and taken care

of, to whatever nation they may belong.

"Art. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuations. It must, on every occasion, be accompanied by the national flag. \* \* \* The flag and the arm-badge shall bear a red cross on a white ground."

I find nothing in this agreement, even if it were not in any way affected by the act of Congress organizing the Red Cross, as well as the subsequent acts of the same body granting authority, power, and official sanction to the work of the Red Cross, that justifies the conclusion that the members of the Red Cross are not a part of the army and navy of the United States. It is true this branch of the service is entitled to special protection, and was the legitimate subject of consideration by the various countries that signed the treaty aforementioned. The countries that signed this treaty merely recognized the humane purposes for which military hospitals are created, provided protection for them during the siege, and gave those connected therewith special privileges and immunities in case of capture.

Nor do I think the amendment to this act in 1918 justifies the court in giving the narrow construction to section 3 for which defendant contends. An examination of the debates in Congress, as well as a study of the section, warrants the conclusion that a part of the amendment was to make more clear and definite and specific the intent and purpose of Congress in enacting the original act. Viewing the situation as it existed in May, 1918, Congress was confronted with the necessity of making the act so specific and definite that the doubt (which existed only in certain localities by reason of certain adverse decisions) would be entirely removed.

[5] The argument that the words spoken were not capable of doing injury to the army and naval forces of the United States, because no army or navy camps existed in the vicinity of Madison at the time these words were spoken, obviously falls, in view of what has heretofore been said. To hold otherwise would lead to most intolerable and illogical conclusions. Can a man who contaminates the spring at its source avoid responsibility because the resulting damage occurs at the mouth of the stream? Can a resident of this country avoid responsibility for remarks, the effect of which is to interfere with the raising of the funds by which the Red Cross is maintained, when he would be liable if he interfered with the same organization in its field of activity? Without funds the organization cannot successfully carry on its work. In fact, one of the chief purposes of the organization is to convey from the giver (the citizen at home) to the citizen in arms that which means to the latter greater comfort and greater efficiency. This is possible only by the judicious use of the moneys donated by the supporters of this war. To cripple the force collecting the funds by the spreading of false reports interferes with "the operation or success" of the work and is actionable.

What of the words: "Who is the government? Who is running this war? A bunch of capitalists composed of the steel trust and munition makers." These words cannot be dissociated from the other words spoken and quoted above. These words were spoken, it is charged, at a time when a "drive was on" for the Red Cross and the Y. M. C. A. in the city of Madison, and were uttered with the avowed purpose of interfering with the success of the drive. That such words might well accomplish such a purpose must be conceded; the asserted intention of the speaker, on this motion to quash, must likewise be taken as true. It appears, from what has been said before, that the Red Cross and Y. M. C. A. are a part of the "military or naval forces of the United States," and it follows that the defendant must plead to the indictment.

The motion to quash the indictment is denied,

#### UNITED STATES v. NEARING et al.

(District Court, S. D. New York. August 1, 1918.)

1. Army and Navy \$==40-Espionage Act-Offenses.

Espionage Act June 15, 1917, § 3, making it an offense for any person to make or convey false statements intended to cause insubordination, etc., on the part of the military or naval forces, etc., must be construed as forbidding those publications which would make the authors accessories before the fact to insubordination, etc., and it is doubtful whether the section adds to the common law responsibility of such persons, as insubordination is an offense.

- 3. CRIMINAL LAW \$\infty\$72—Principals and Accessories.

  At common law the utterer of written or spoken words is not criminally liable merely because he knows they will reach those who will find in them the cause for criminal acts.
- 4. Army and Navy \$\iff 40\to Offenses.

  Under Esplonage Act June 15, 1917, \\$ 3, one uttering written or spoken words calculated to cause insubordination and obstruct enlistment, etc., with that intent, is guilty of an offense, though the utterances in themselves do not amount to advice to violate the law.
- 5. Abmy and Navy \$\iff 40\$—Espionage Act—Indictment—Sufficiency.

  An indictment averring a conspiracy to violate Espionage Act June 15, 1917, \\$ 3, by causing insubordination in the military or naval forces of the United States, by means of a pamphlet distributed to persons in part belonging to the military forces, and also to obstruct the recruiting service, etc., held sufficient to charge those offenses.
- 6. Army and Navy \$\iff 40\)—Espionage Act—Offenses—"Obstruct."

  Under Espionage Act June 15, 1917, § 3, denouncing the making or conveying of false reports or statements with intent to obstruct the en-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

listment service, etc., one who utters statements tending to obstruct the recruiting service is guilty of the offense denounced, though no enlistments were actually prevented; the word "obstruct" meaning to hinder or impede.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

7. ARMY AND NAVY 5-40-ESPIONAGE ACT-INDICTMENT-SUFFICIENCY.

Two counts of an indictment, charging attempts to cause insubordination in the military and naval forces of the United States and attempts to obstruct the recruiting and enlistment service by writing and publication of pamphlet, held insufficient, under Espionage Act June 15, 1917, § 3, because of failure to allege specific intent with which defendants wrote and published the pamphlet.

S. Conspiracy \$\iiii 43(6)\$—Indictment.

An indictment charging a conspiracy to violate Espionage Act June 15, 1917, § 3, by causing insubordination, etc., in the military forces held to sufficiently aver the conspiracy.

9. Conspiracy \$\infty\$ 43(3)—Espionage—Offenses—Indictment.

An indictment charging that defendants, in violation of Espionage Act June 15, 1917, conspired to urge and pursuade persons subject to military discipline to disobey, etc., *held* sufficient; it not being necessary to aver all the means for carrying out the conspiracy.

10. Conspiracy \$\sim 43(6)\$—Espionage Act—Indictment—Sufficiency.

An indictment charging conspiracy to violate Espionage Act June 15, 1917, § 3, by causing insubordination, etc., by the circulation of a pamphlet which averred it was circulated among persons subject to military discipline, and also to persons already in the service is sufficient, though not naming the individuals.

11. ARMY AND NAVY 5-40-ESPIONAGE ACT-OBSTRUCTION OF ENLISTMENT.

Espionage Act June 15, 1917, § 3, denouncing the uttering of false statements intended to interfere with the enlistment service, if deemed limited to voluntary enlistment, applies to actual gratuitous advice, counsel, or command not to enlist, though it does not apply to advice against enlistment given by near relatives.

12. Corporations 529—Criminal Responsibility.

A publishing company may, on the theory of responsibility for its agents, be held criminally responsible for the printing and publication, in violation of Espionage Act June 15, 1917, § 3, of a pamphlet containing statements tending to cause insubordination in the military service, etc.

Scott Nearing and the American Socialist Society were indicted for conspiracy to violate and attempted violation of the Espionage Act. On demurrer to the indictment. Demurrers overruled as to all counts, save 3 and 4 of the first indictment.

Demurrer by both defendants to two indictments—the first found on March 21, 1918, and the second on May 13, 1918. The first indictment is in four counts. The first count alleges that the two defendants, of whom one is a New York corporation, conspired with certain unknown persons to violate section 3 of the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 219), while the United States was at war with Germany; i. e., to cause insubordination, disloyalty, mutiny, and refusal of duty on the part of the military and naval forces of the United States, by means of a pamphlet entitled, "The Great Madness," and by means of its distribution throughout the United States to persons unknown to the grand jury, but who are described as "in part belonging to the military and naval forces of the United States and in other part liable to service therein." The said pamphlet contained "statements and

arguments calculated and intended to create and promote insubordination, disloyalty, mutiny, and refusal of duty" among persons belonging to the military and naval forces of the United States and among those liable to service therein. Various overt acts are alleged, which need not be stated. The second count is of the same character, except that it alleges a conspiracy to obstruct the recruiting and enlistment service of the United States by means of the same publication, and further alleges that the pamphlet contains statements and arguments "calculated and intended to embarrass, obstruct, and interfere with the administration" of the Selective Service Act May 18, 1917, c. 15, 40 Stat. 76, "and to induce persons available and eligible for enlistment and recruiting in the military forces to fail and refuse to en-The third count alleges that Scott Nearing wrote the list for service." pamphlet in question and the American Socialist Society printed and published it, and offered it for sale. This count is for attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States. The fourth count is the same, except that it is for "willfully attempting to obstruct the recruiting and enlistment service of the United States."

The second indictment consists likewise of four counts. The first count alleges a conspiracy between the defendants to cause or attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States by urging, inducing, and persuading members of the military and naval forces of the United States and persons liable to service under the Selective Service Act, when such persons should be inducted into the military service, to disobey their superiors and the like, and that it was a part of the conspiracy of the defendants to effect their purposes by the publication of "The Great Madness," written by the defendant Nearing, and distributed by the corporation defendant, which was designed to contain statements calculated and intended to create and promote insubordination, disloyalty, mutiny, and refusal of duty among persons belonging to the military and naval forces of the United States and among those liable to service therein. The overt acts, as in the former indictment, need not be detailed. The second count alleges a conspiracy to obstruct the recruiting and enlistment service of the United States, by retarding the increase of the military establishment, and that it was a part of the conspiracy for the defendant to distribute the pamphlet written by the defendant Nearing to persons who are described in part as liable to service in the military forces of the United States under the Selective Service Act and in part to persons available and eligible for enlistment and recruiting in said service; said pamphlet being designed to contain and containing statements intended to persuade, encourage, and solicit persons liable to service to refuse to submit to registration and draft and to induce persons liable and eligible for enlistment and service to fail and refuse to enlist for the same. The third count is for the substantive violation of the Espionage Act in attempting to cause insubordination by encouraging and soliciting members of the military and naval services and persons liable to the draft after induction to disobey lawful commands of their superiors and the like. This attempt was made by the publication of the pamphlet, which contained statements calculated and intended to promote insubordination, disloyalty, mutiny, and refusal of duty among such persons. The fourth count is for obstructing the recruiting and enlisting service of the United States by the publication of the pamphlet among persons who are described as in part liable to service under the Selective Service Act and in other part available and eligible for enlistment and recruiting; the pamphlet containing statements calculated and intended to induce, encourage, persuade, and solicit persons liable to service in the military service of the United States to refuse to submit to the draft and persons eligible for enlistment and recruiting to fail and refuse

The pamphlet in question undertakes to show that America's entrance into the war was the result of capitalist intrigue. The "plutocracy," as it is called, finding its hold upon the political and economic life of the nation en-

dangered by changes in public opinion, seized upon the instinctive martial responsiveness of the people to rehabilitate its falling power. There was no cause at issue which could in the least concern the interests of the people; they were tricked and caloled into the most destructive of all wars by a stealthy and dishonest propaganda, which played upon their primitive sense of tribal gregariousness and involved them in a conflict whose issues would only serve to fasten more securely upon them the domination of the capitalist That class, in pursuance of this design and through the fear of "labor solidarity," with its accompanying shortage of cheap labor, secured conscription. It was a device which at once struck at the power of organized workmen and offered a means for the economic exploitation of Central and South America. It fastened upon America that militarism which the capitalists who contrived the war affected to condemn. It was a victory for "plutocracy," which was at once reflected in the acclaim of their venal press, and the increase in value of their bonds and stocks. The political measures which the author recommends as remedies do not involve any disobedience to existing law; they consist of political agitation by discussion and in the press, the "capture" of the schools, "industrial and political solidarity," "the elimination of all profit from industry," "equal opportunity and justice for all." A complete analysis of the whole pamphlet, which consists of 44 pages, would be too extended to set out in detail, but the substance is as The manner and diction is intolerant and violent, after the common tradition in revolutionary propaganda. It is obviously inflammatory to the feelings of such readers as believe themselves unjustly treated by the existing order, which it presents as unqualifiedly noxious to the body politic and proper only for immediate destruction.

The defendant's argument upon this branch of the case is substantially as follows: The pamphlet does not cross the line of political agitation; there is no suggestion, direct or indirect, that any means shall be employed in violation of existing law. On the contrary, the recommendations of the author can only be read to include recognized political means. The only possible effect which can fall within the statute is that some readers, subject to the draft or already in the military service, may be stimulated to evade, or disregard, their obligations. This is a possible result of any political agitation, since many will not distinguish between the mischief of the existing order and the fact that it is supported by law. To prosecute those whose propaganda is directed towards the repeal of such an order involves a perpetuation of that order, whether right or wrong, since it chokes the opportunity for any expression of opinion that might in the end change it. Whatever the war powers of Congress in the suppression of public discussion, at least they must be explicitly exercised. It is contrary to every canon of statutory construction to extend the scope of a statute only prohibiting incitement to mutiny and obstruction of the recruiting and enlistment service, so as to include the indirect effects of a public discussion, in itself quite

Morris Hillquit, of New York City, for the demurrer. Vincent H. Rothwell, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] The two first counts of both indictments allege a conspiracy to cause insubordination in the army and to obstruct the enlistment service by the publication of the pamphlet above described. We are to suppose that the conspiracy contemplated and intended that the pamphlet should be circulated among present or future members of the army, and persons subject to the draft and to voluntary enlistment, and that the pamphlet was chosen as a means apt to cause the first to become insubordinate and the second to evade the draft or refuse enlistment. If the conspiracy had been successful, these results

would have followed. Hence the question is necessarily presented whether the accomplishment of that result in that way would have made the author criminally responsible for the results against which the statute is directed. It must be remembered that, in so far as the statute forbids causing insubordination, it forbids incitement to the commission of crime, since all insubordination is a crime committed by the independent will of others. It must therefore be taken as forbidding those acts which would make the authors accessories before the fact to insubordination, disloyalty, refusal of duty, and the like. Indeed, it is doubtful whether that clause adds to the criminal responsibility at common law of those who should cause or attempt to cause others to commit such crimes.

- [2] The same thing is true of the second count, for obstructing the enlistment service. Construing this as including only voluntary enlistment, I shall show later that the statute meant to cover at least active and gratuitous advice, counsel, or command not to enlist; and by analogy I should say that the measure of liability should be the same as though the refusal to volunteer were a crime, and as though the question were whether the defendants were accessories. The result—i. e., refusal to volunteer—the statute does not positively forbid, but it deprecates it. At least we may safely say that the measure of liability ought not to be larger when the result is not a crime than when it is. For the present I shall leave it so, and assume that in both clauses the question is: What words make their utterer responsible for crimes which in the course of nature, including the wills of others, may be expected to follow from them?
- [3-5] That the author of words may in fact be the cause of the commission of crime by others is a trite enough observation. Any discussion of existing laws, designed to show that they are mistaken in means, or unjust in policy, may have that result. Every one knows that the obligation of law in the minds of many men depends altogether upon their approval of its purposes, and that to arouse their disapproval is to terminate their obedience. Indeed, there are few whose allegiance to any given law is not modified by their opinion of its justice, and the measure of whose obedience does not turn in some degree upon that factor.

At common law the utterer of written or spoken words is not criminally liable merely because he knows they will reach those who will find in them the excuse for criminal acts. On the contrary, the rule has always been that, to establish criminal responsibility, the words uttered must amount to counsel or advice or command to commit the forbidden acts, and this is the classic form of expression. 4 Blackstone, 36, 37. Of course, the counsel or advice need not be explicit, since the meaning of words comprises what their hearers understand them to convey. Yet the terms, "counsel" or "advice" have a content which can be determined objectively, and do not depend upon the subjective intent of their author. I tried unsuccessfully in Masses Pub. Co. v. Patten (D. C.) 244 Fed. 535, to suggest an analysis of what is included in those terms, and shall not attempt it again. It is enough here merely to suggest that they must have limits determined by the

character of the words themselves. That there may be language, as, for instance, Mark Antony's funeral oration, which can in fact counsel violence while it even expressly discountenances it, is true enough; but that raises only the situation, familiar enough everywhere in the law, and already mentioned, of the actual meaning of words to their hearers.

Now, there is nothing in the pamphlet in question which can, as I read it, be understood to constitute any counsel or advice or command to obstruct the draft or to become insubordinate. At least, if it be the pleader's purpose to allege that they reached persons who so understood them, and that the defendants knew of this likelihood, that must be especially alleged. Taken with any interpretation which they can fairly bear, they remain entirely within the range of discussion, and at common law would not, I think, subject their author to crim-

inal responsibility for the results, no matter what his intent.

Whatever may be the rule at common law, I understand Masses Pub. Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, Ann. Cas. 1918B, 999, to lay down an added measure of criminal liability under this statute to the utterance of words which may cause insubordination, or may obstruct the enlistment service. In that case, it is true, there is language which, taken broadly, can be made to mean that the author is liable if he merely knows that his words will so result. This I can hardly think can have been the significance of the decision, since, as I have already shown, the inevitable consequence would be to imperil any discussion of public matters. It certainly was not the purpose of that case to do so, or indeed to insist that the style or manner of the discussion must measure with any standard of taste or temperance. Such a result would be foreign to the whole history of the subject. The test as laid down in that case was, I think, this: That though in the form of public discussion words, which might not themselves amount to advice or counsel to violate the law, would nevertheless make their author criminally responsible if they were in fact the cause of the results forbidden, and if they were uttered with the specific intent of producing those results. In short, the test was made, not objective only, but in part subjective, as is indeed often the case in the definition of crime. At least this is as I understand that case, and it is in this sense that the rule was applied in the trial of the first indictment against the Masses Publishing Company, which was the direct result of the decision of the Circuit Court of Appeals.

Now, in the first two counts of each indictment, the defendants are alleged to have intended by the words used to cause insubordination and to obstruct the enlistment service. It is certainly true, and can hardly be denied, that the pamphlet might be an efficient argument, and so a cause in the minds of men, to secure that result. Such utterances and such a manner would produce a state of mind prone to insubordination and to evasion. Thus both conditions are fulfilled which are required, not, to be sure, under the common-law rules in such matters, but in the decision mentioned.

[6,7] Similarly of the third and fourth counts of the second indictment. The third is for attempting to cause insubordination by

publishing the pamphlet with the requisite intent. A conspiracy is indeed hardly less than a joint attempt, at least if the overt acts are considered as a part of the crime. The fourth count is somewhat different, since it alleges the substantive crime of obstructing enlistment. If for that crime success was necessary, or indeed any results upon enlistment, the indictment would be insufficient; but I think it is not. The statute obviously forbids the effort, not the result. One obstructs when one hinders or impedes, and it is no answer that the obstruction is successfully passed over. If words are enough, and they surely are, under this clause nobody would hesitate to say, I think, that a man who went about persuading others not to enlist, or to evade the draft, was not obstructing the draft, though he did not succeed in a single case. In any event this was specifically held by the Circuit Court of Appeals in Masses Pub. Co. v. Patten, supra.

It follows, however, from the foregoing discussion, that the third and fourth counts of the first indictment are bad, for omission to al-

lege the requisite specific intent.

[8] The defendants make several other objections. They say that the conspiracy is formally not well laid. The pleader has in each case first proceeded to lay the count in the words of the statute, which might not have been sufficient, though often it is; but he has not stopped there. In the first count of the first indictment he has charged that the conspiracy contemplated the publication of the pamphlet. Since the expression of opinion is not absolutely privileged, but is conditional only upon intent, under the doctrine mentioned, the defendants, if they succeeded in their purpose, would be guilty of the substantive crime. The same is true of the second count of that indictment. Nothing is lacking to make the pleading specific and to avoid the allegation of conclusions of law.

a conspiracy by which the defendants were fo urge and persuade persons subject to military discipline to disobey their superiors, to be unfaithful to the government, to rebel against the authorities, and to refuse their duties. The conspiracy might have been as general as this language. An agreement to violate the law need not go into specific acts; it may not have gone so far, and yet be certain enough to comprise in its general terms unlawful conduct. Thus a conspiracy to stir up insubordination and mutiny would be complete, though the parties had not determined on all the means. In this count, as a part of the means, the publication of the pamphlet is set forth. If the conspiracy included only this, the count would be ample, just as the counts in the first indictment. It is not necessarily true that any other means had been settled upon; but, if there be such, they may be reached only by bill of particulars. The same is true of the second count.

The third and fourth counts are also sufficient in this regard. They set forth the pamphlet as the means by which the results were to be accomplished and no other means could be proved. As the pamphlet may be a sufficient means, under the rule mentioned, the counts do not lack specification, nor are they faulty as involving any legal conclu-

sions.

- [10] Again, the defendants allege that the pleadings are faulty in failing to allege that the pamphlet was to be circulated among those who could be debauched in their duty. I think not. In the first indictment the pleader says that the pamphlet was to be circulated among those subject to military discipline and to the draft, and to those eligible to enlistment. The description is of persons described as so subject and so eligible, but unknown individually. This is good pleading under any rule. In the first and third counts of the second indictment these allegations are a little more specific. They include persons already in the service and those subject to the draft when inducted. The names are not necessary. The second and fourth counts follow the form of the earlier indictment.
- [11] Further, the defendants insist that "obstructing the recruiting and enlistment service" does not include the draft in any event, and as to voluntary enlistment that it includes only the officers charged with the duty of recruiting and enlisting. The question whether the word "enlistment" covers drafted men is certainly not free from doubt. The Oxford Dictionary defines "enlist" as "to enroll on the list of a military body; to engage as a soldier"-apparently including both voluntary and involuntary enrollment. In Babbitt v. U. S., 16 Ct. Cl. 202, 213, it was said to apply only to voluntary enlistment; but the contrary was ruled in Sheffield v. Otis, 107 Mass. 282, and Bouvier's Law Dictionary defines it inclusively of any form of listing. In Tyler v. Pomeroy, 90 Mass. (8 Allen) 480, there is a long historical discussion, not directly touching the question, but showing how the term was used in England, where there was no conscription. However it may be, I think that the question is not raised here, because the pamphlet obstructs the voluntary enlistment service, always assuming the existence of the rule in Masses Publishing Co. v. Patten, supra. Even if I were to accept the limited construction of the defendants, that that "service" includes only those officials concerned with voluntary enlistment, the same result would follow. These officials stimulate voluntary enlistment by advertisement, publicity, and every imaginable device. To persuade or advise or counsel eligible persons not to volunteer certainly obstructs the purposes of that service, whether the effort be successful or not. This is at least one of the evils at which the statute aims. It means to prevent the undoing of the work of the "service"; perhaps it means more.

It will perhaps be asked if this includes all bona fide advice to an eligible not to volunteer, as, for example, by a wife or a father, on the score of duty. Obviously not. If an eligible asks advice of any one, or if a gratuitous adviser has an interest or duty to give advice, the law does not forbid him. But the statute does not recognize it as a duty imposed upon every citizen, no matter how strong his convictions may be, gratuitously to intervene in the decision of its citizens. The purpose is good in the view of the statute, and such tolerance as it allows to those who do not think it good does not extend to spontaneous persuasion of those who are eligible. So far the statute enforces its decision, regardless of differences of opinion among its citizens; they must not meddle because they do not agree.

The statute, therefore, would in any event extend to advice or counsel which had not the excuse of interest or a recognized duty; but under the rule in Masses Pub. Co. v. Patten, supra, it must be held to go further, and to include also the utterance of words which do not advise or counsel, but which are apt to dissuade eligibles and are uttered with that specific intent. Hence the counts for obstruction are good, no matter how "enlistment" be understood.

[12] Finally, the defendants urge that a corporation cannot be guilty of the crime of conspiracy, or of any crime involving specific intent. This question simply turns upon how far the law has gone in imputing to a corporation the acts of its agents. Specifically it turns upon how far a publishing company, authorized to publish a pamphlet, is responsible for the acts of its officers, when actuated by the requisite intent. It is a question upon which the law has always tended towards larger and larger liability. In torts the liability is now established in the kindred case of libel (Evening Journal v. McDermott, 44 N. J. Law, 430, 43 Am. Rep. 392), as in malicious prosecution (Cornford v. Carleton Bank, [1889] 1 Q. B. 392). Certainly corporations may be guilty of criminal frauds. Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113; Kaufman v. U. S., 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466. Now, there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents. It was, it is true, for long supposed that the criminal liability of corporations could not extend beyond the neglect of those positive duties imposed by law; but that depended upon the theory that acts of malfeasance being illegal must be ultra vires. It did not survive a more generous view of the doctrine of ultra vires. Joplin Mercantile Co. v. U. S., 213 Fed. 926, 935, 131 C. C. A. 160, Ann. Cas. 1916C, 470, a case affirmed without consideration of this question in Joplin Mercantile Co. v. U. S., 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705. That the criminal liability of a corporation is to be determined by the kinship of the act to the powers of the officials, who commit it is true enough, but neither the doctrine of ultra vires, nor the difficulty of imputing intent or motive, should be regarded any longer to determine the result. Bishop, New Criminal Law, § 417(4).

I conclude, therefore, that the demurrers to the first and second counts of the first indictment must be overruled, and to the third and fourth sustained. The demurrers to the second indictment must be

overruled.

### UNITED STATES v. EASTMAN et al.

(District Court, S. D. New York. August 2, 1918.)

1. INDICTMENT AND INFORMATION \$\infty 121(2)\$\to Bill of Particulars\$\to Right Thereto.

Where an indictment charged that defendants conspired to impede enlistment service by public speeches, private solicitation, and the publication of a magazine, held, that they were entitled to a bill of particulars of the speeches etc., relied on.

2. Army and Navy €==340—Conspiracy to Cause Insubordination in Military Service.

The same rules govern an attempt to cause insubordination in the military forces that apply to an attempt to impede enlistment, and where the words likely to cause insubordination are used with intent the result is immaterial.

3. Army and Navy \$\infty 40\to Offenses\to Causing Insubordination\to Indict-

While an indictment charging an attempt to cause insubordination in the military service must allege that the words were uttered under such circumstances that they were in the course of events likely to reach members of the military force, an indictment alleging publication of magazines calculated to cause insubordination and their distribution throughout New York and the United States is sufficient.

Max Eastman and others were indicted for conspiracy, in violation of the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217), to impede, hinder, or retard enlistment service, and also for conspiracy to cause insubordination in military service, etc. On demurrer to the indictment. Demurrer overruled.

Earl B. Barnes, Asst. U. S. Atty., of New York City. Morris Hillquit, of New York City, for defendants.

LEARNED HAND, District Judge. [1] The disposition of the main issues in this case follows that in United States v. Scott Nearing, 252 Fed. 223, just filed. The first count alleges a conspiracy in which the contemplated means is not specific, except as regards the publication of the magazine. The defendants will be entitled by bill of particulars, if they wish it, to a statement of the "public speeches" and "private solicitation" which are alleged, and to those parts of each number of the magazine relied upon as constituting a part of the conspiracy. They will be also entitled to particulars of the other means, if any, contemplated by the defendants to impede, hinder, or retard the enlistment service. The allegations as they stand would, however, support a prosecution. The agreement, though in its terms no more particular than the allegations, would be an agreement to commit a crime, for the reasons already given in the earlier case.

The second, third, and fourth counts are for obstructing the enlistment service, and the validity of the second is determined by the decision in Masses Pub. Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, Ann. Cas. 1918B, 999, which I so often referred to in the earlier case. That decision could not have been made unless there were portions of the August number which, given the requisite intent, violated section

- 3. The third and fourth counts refer to the September and October numbers, respectively. Most of these appear to me innocent under any interpretation; they do not contain utterances which any one could suppose would obstruct enlistment. However, in the September issue there are one cartoon, "Having Their Fling," and one poem, "Young Lads First," which fall within the ruling, and in the October number there is the cartoon on page 9. The defendants may have, as before, bills of particulars, if they wish, of any other objectionable matter in all the numbers.
- [2] The three last counts are for attempting to cause insubordination by the publication of the August, September, and October numbers, respectively. The count for conspiracy to cause insubordination Judge A. N. Hand dismissed on the first trial, and normally I should, of course, follow the ruling of a colleague in the same case; but upon consultation with him I learn that he based his dismissal upon the form of the pleading, and did not mean to draw a distinction between the two classes of crimes, which he does not perceive to exist in substance, any more than I do. It is true that the decision of the Circuit Court of Appeals expressed a doubt about the application of this clause of the statute, yet, with deference, it seems pretty clear that under the rule there laid down no valid distinction exists. The principle now established, and for that matter recognized elsewhere in the District Courts, depends upon the likelihood of the words to produce the result, coupled with the specific intent. So long as that remains the rule, the resulting insubordination is on the same basis as the resulting impediment to enlistment. Therefore I shall not make any difference between these classes of counts.
- [3] There is an apparent difficulty in these counts, which turns out, I think, not to be real. It is certainly true that a pleader must allege, even in laying an attempt to cause insubordination, that the words were uttered under such circumstances that they were in the course of events likely to reach members of the military forces. Here the allegation is of distribution "throughout the city and county of New York and throughout the United States." However, we must distinguish between the substantive crime and an attempt, for which any act which was a step in the completion of the crime will serve. I may take notice of the fact that in August, September, and November the country was already subject to the draft, and that large numbers of men were under arms in New York and elsewhere. That being so, it is certainly true that any one in his senses, distributing a magazine generally throughout New York and the United States, must have supposed it would probably reach soldiers. Since the fact that he did reach soldiers is not a necessary allegation, and since an attempt need involve only an uncompleted act, which in the course of events would in fact tend to produce the forbidden results, the allegations are sufficient. The whole matter is of course technical, but even when taken strictly the pleading is good.

The result is entirely in accord with Judge Amidon's decision in U. S. v. Schutte, 252 Fed. 212, where the utterance of spoken words was not connected in any way with the military forces.

Demurrer overruled.

#### FITZHUGH et al, v. REID.

(District Court, E. D. Arkansas, W. D. June 26, 1918.)

1. Removal of Causes \$\infty 102-Venue-Remand of Cause.

As the venue in the federal court, on removal from a state court on the ground of diversity of citizenship, is not jurisdictional in the sense that it cannot be waived, the court may not remand the cause of its own motion because neither of the parties is a citizen of the state and district; no objections to the removal having been made.

2. Process = 114-Service-Privilege of Officer.

Where federal industrial mediator went from California, where he was engaged in his duties, to Hot Springs, Ark., to secure treatment for illness incurred in course of duties, and while at Hot Springs completed findings in California matter and there received instructions to go to Texas and act in his official capacity, which he did, he was not privileged from service of process, issuing from the Arkansas court, while at Hot Springs.

3. Process \$\infty\$ 168-Abuse-Institution of Transitory Action.

Where federal industrial mediator, resident of Colorado, voluntarily went from California to Hot Springs, Ark., to secure treatment for illness, and there was served with process from Arkansas court by plaintiffs, guilty of no fraud in inducing him to go to Arkansas, though all witnesses were residents of Colorado, Wyoming, and California, plaintiff was properly sued in Arkansas, action being transitory, and it was not abuse of process.

4. PROCESS \$\infty 168-ABUSE-TRICKERY OR FRAUD.

Party ordinarily has right to institute and maintain transitory action in any court of competent jurisdiction where personal service can be had on defendant whereby court obtains jurisdiction of person; but if, by sham transfers or trickery, to force payment of unjust claim, suit is instituted in court whose jurisdiction could not have been invoked except by fraud, institution constitutes abuse of process.

In Equity. Suit by William F. Fitzhugh and others against Verner Z. Reid. On motion to quash service of process. Motion overruled, and defendant granted time within which to file answer.

Moore, Smith, Moore & Trieber, of Little Rock, Ark., for the plaintiffs.

Tyson S. Dines, of Denver, Colo., and W. H. Martin, of Hot Springs, Ark., for defendant.

TRIEBER, District Judge. [1] The defendant while in Hot Springs, Ark., was served with a summons in the above-entitled cause, issued out of the chancery court of Garland county, state of Arkansas. The action was removed to this court upon the petition of the defendant, upon the ground of diversity of citizenship. Although neither of the parties to the action is a citizen of this state and district, no objections to the removal have been made by the plaintiffs; in fact, the plaintiffs expressly consented to the removal. As the venue is not jurisdictional, in the sense that it cannot be waived, there being a diversity of citizenship, the court may not remand the cause of its own motion. In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; Male v. Atchison, etc., R. R., 240 U. S. 97, 36 Sup. Ct. 351, 60 L. Ed. 544.

The motion to quash the service of process sets up a large number of grounds, but they have been properly summarized by counsel for the defendant in his brief, under two general headings: First. That the defendant was a public officer of the United States, and as such was immune from service of civil process at the time he was served with the summons in this cause, at Hot Springs, in the state of Arkan-Second. That the advantages which the plaintiffs seek to gain in selecting a court in the state of Arkansas, which is an inconvenient geographical place, is unconscionable, and constitutes an abuse of the process of the court. The motion was verified by the defendant, and was heard on the motion and the affidavit of the defendant's secretary; the plaintiffs introducing no evidence.

1. The official position of the defendant, it is alleged in the motion,

is that of a mediator in disputes between employers and employes, appointed under direct authorization of the President of the United States; that at the time he was served with process he was sojourning at Hot Springs, Ark., for a few days, under treatment of physicians, in an attempt to obtain relief from sickness incurred while in the service of the United States, during the course of the arduous duties performed by him, in connection with his office, in the state of California; that on the 15th day of December, 1917, one day after he had been served with process, he was directed by the Secretary of Labor to go to the city of Houston, in the state of Texas, to effect a settlement of a dispute in Texas and Louisiana between the employers and employés in the oil fields of these states, and he left Hot Springs for Houston, Tex., on December 16, 1917; that he would not have been in the state of Arkansas at the time he was served with process but for the duties devolving upon him as such mediator.

From the affidavit of the defendant's secretary it appears that the defendant left Los Angeles, Cal., on December 1st, and arrived in Hot Springs on December 5th, and that while at Hot Springs he was busily engaged in the completion of matters which had been left unfinished in connection with the official work he had been engaged in in California, and that on the 13th day of December he received a telegram from the president of the State Federation of Labor of Texas, requesting him to come to Houston, Tex., and act in his official capacity and effect a settlement of labor disputes in the oil fields of Texas; that he was directed by the Department of Labor to proceed to Houston on the 15th of December; and that he left Hot Springs

for Houston on the 16th of December.

It is conceded that the action, being for an accounting and to recover sums of money alleged to be due to the plaintiffs from the defendant, on account of breaches of contracts and alleged fraudulent acts, is transitory.

[2] It will be assumed, without deciding, that the official position of the defendant, mediator in labor disputes, entitles him to the same privilege of exemption from service in a civil action, while away from his home in the performance of his official duties, as litigants and witnesses in foreign courts, legislators, or judges. It has been so held in actions against judges (Lyell v. Goodwin, 4 McLean, 29 Fed. Cas. No.

8,616; Commonwealth v. Ronald, 4 Call. [Va.] 97), and by implication in Re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. But see Mason v. Connors (C. C.) 129 Fed. 831, where it was held that a superintendent of construction of a federal building, in a state other than that of his residence, was not entitled to exemption from service of process in the foreign state, where he was employed as such superintendent. The court said:

"The employment was merely his voluntary private business, which took him, but did not compel him to go, there."

But all the authorities, whether the privilege is claimed by litigants, witnesses, or attorneys from foreign states, when employed in an action pending in court, members of legislative bodies or constitutional conventions, and judges, hold that this privilege extends only when the parties are in actual attendance on the courts, legislative bodies, or in the performance of their official duties, and for a reasonable period of time for coming and going. This is the most liberal construction that can be found in any of the authorities.

As it is not claimed that the defendant, while in Hot Springs, was engaged in the performance of official duties, unless the preparation of his report of his official acts, while in California, in the performance of such an official duty, entitles him to the privilege claimed, the contention that he was at that time on his way to the state of Texas to perform his duties there cannot be sustained.

À case very much in point is Gratz v. Wilson, 6 N. J. Law, 419. The defendant was a justice of the Supreme Court of the United States, and he and the plaintiff were both citizens of the state of Pennsylvania. While the defendant was in the state of New Jersey, he was arrested under process in a civil action, and held to bail. He had then been appointed to hold the Circuit Court of the United States in the state of Georgia, which was to he held 30 days subsequent to the time of his arrest. The claim of privilege was denied by the court. Chief Justice Kinsey, who delivered the opinion of the court, said:

"Privilege is ever a matter stricti juris, and ought not, particularly when of so odious a character, to be extended by implication."

Justice Kirkpatrick, in a separate concurring opinion, said:

"As to cases of peers, members of Legislature, etc., they stand upon ground altogether different, and it is sufficient to say this is not a case of that kind. Arguments have been laid before us, drawn from general views of [public] policy, public utility and convenience; but these cannot serve as the foundation of an introduction by the judiciary of a new rule. Where but little doubt remains, suggestions of this kind are proper; \* \* \* but they will not authorize us to discharge this defendant unless he has a right to be discharged by law."

In the opinion of the court, this claim is untenable. The defendant left Los Angeles, in the state of California, on December 1st, direct for Hot Springs, Ark. At that time he had no orders to proceed to Texas, or to perform any duties in that state. He received no orders to go there until the day after this suit had been instituted and process served on him. The most that can be claimed for him is that he ex-

pected to be sent there at some time in the future. He was not therefore in Hot Springs for the purpose of performing official duties, nor was he on the way to a place to perform official duties, nor returning

from such a place.

The fact that he required rest and recuperation from the arduous duties which he had performed in the state of California, and to obtain them induced him to go to Hot Springs, a health resort, clearly does not entitle him to claim that privilege, and no authority has been cited to the court, nor has the court been able to find any, which would sustain such a claim. This also applies to the claim that he was preparing his report of what had been done by him in California. The only authority cited to the court, and on which counsel rely, is Miner v. Markham (C. C.) 28 Fed. 387; but the facts in that case are clearly inapplicable to those in the instant case. In that case defendant was a member of Congress from the state of California. At the time of the service of process upon him, he was on his way to the city of Washington for the purpose of attending a session of the House of Representatives, as a member thereof, and was temporarily in the city of Milwaukee. He left Los Angeles, accompanied by his wife and four children, intending to proceed to Washington, and there secure a suitable place of residence for himself and family during the session. and in time to arrange for and settle his family and household affairs there, prior to the date of the commencement of the session; that during his journey several of his children were ill, and by reason thereof he was obliged to stop at several places on his way to Washington; that, by reason of such illness, he was being detained in Milwaukee, at the residence of his brother, and while there was served with the summons. He further stated in his affidavit that he started from his residence in Los Angeles to attend the session of Congress only a reasonable length of time before the commencement of the session, and such as he considered proper and necessary under all the circumstances connected with the discharge of his duties, as a Representative in Congress, and was proceeding on his way to attend the session without any unreasonable and unnecessary delay. The court held that, upon these facts he was exempt from service of process. The court said:

"To entitle the defendant to the privilege here invoked, he must have been in good faith on his way to the seat of government to enter upon the discharge of his public duties; that must have been the primary object of his journey. He must have left his residence in California with the intent of then going to Washington to take his seat in the Congress to which he was elected, and the time taken for the journey must have been reasonable. He had a right, without forfeiture of his privilege, to set out from his residence at such time before the session should open as would enable him conveniently to establish his quarters, and settle his family and household affairs at the Capital, and also, I think, to enable him to inform himself as a new member regarding pending legislation, so that he might enter advisedly upon the discharge of his duties. A slight deviation from the usual route for rest, convenience, or because of family sickness, ought not to cause a loss of his privilege, if such deviation was but an incident to the principal journey. Nor ought the duration of the privilege to be strictly measured by the exact number of days, with the present facilities for travel required for a journey from his residence in California to Washington. At the same time, his privilege could

not and ought not to avail him if the deviation was equivalent to an abandonment of the original journey for purposes of pleasure or family visiting. If, when he left his home in California, his intention was to make a journey, not to Washington but to Milwaukee, there to spend an indefinite time visiting relatives, and then go from Milwaukee to Washington after such prearranged delay at the former place as would still enable him to arrive at the Capital in reasonable time to enter upon his public duties, so that it might be fairly said that the object of his journey at the time he set out upon it was not then to go to the Capital, but elsewhere, it is clear that while in Milwaukee he could not assert the constitutional privilege of exemption from arrest or service of process."

If the judge of this court should proceed to the state of Colorado, by reason of an assignment to preside in the District Court there, he would, no doubt, be exempt from service of process in a civil action, while thus engaged in the state of Colorado, and while going to and returning from there to his home. But could he claim that privilege if he went to Colorado for rest and recuperation from his arduous official labors, even if he expects that, while in that state, he would be assigned to preside in the court of that state, or some other state? Clearly not. Nor would he be in the performance of his official duties, if while recuperating in Colorado he should prepare opinions in causes which had been submitted to him, while presiding in his own court in this state, and by him taken under advisement.

Counsel for defendant, in their brief, say:

"The court will take judicial notice of the fact that one of the common and direct lines of travel from Los Angeles, Cal., to the oil fields of Texas and Louisiana, would take the defendant eastward to Kansas City, and St. Louis, and thence southward through Arkansas to the oil fields in question. Defendant took this route, stopping off at Hot Springs, Ark., intending to recuperate there from his recent arduous duties, and while there complete his findings arising out of the California investigation."

If the court is permitted to take judicial notice of the lines of travel from Los Angeles, Cal., to the oil fields of Texas, which is seriously doubted, it would have to take notice of the fact that the shortest and most direct route is by way of El Paso, Tex. That would also be the most direct route to reach Arkansas. To go to Hot Springs from Los Angeles by the shortest route he would have to traverse the entire state of Texas.

[3, 4] 2. Is the institution of this action, which is conceded to be transitory, such an abuse of the process of the court as requires it to be set aside?

The grounds for this contention, as set out in the motion, are briefly stated as follows:

"That the plaintiffs are citizens and residents of the state of California, within which state the defendant had been for a period of several weeks preceding the said 14th day of December, 1917; that plaintiffs subjected him to espionage, while in the discharge of his public duties in that state, and followed and spied upon and sued him in the Arkansas court, for the purpose of oppressing and annoying him and interfering with the discharge of his official duties, and put him to great expense and inconvenience, although he could have been sued and served with process in the state of Colorado where he resided; that the property rights and interests involved in the litigation are not and have never been situated within the state of Arkansas; that the

contracts out of which the alleged controversy grows were made and executed within the state of Colorado; that all the witnesses for both parties reside in the states of Colorado, California, and Wyoming, and none in the state of Arkansas; that all the books, papers, and records are in the city of Denver, Colo.; that the transactions that are referred to in the complaint run over a long period of years, involving many complicated questions of law, and will compel him to go to great and unnecessary expense in bringing witnesses and attorneys to the state of Arkansas; that the object of bringing the suit in Arkansas is an oppressive, unjust, and fraudulent use of the process of the court, for the purpose of harassing and annoying the defendant and causing him great expense unnecessarily."

It will be noticed that no claim is made that the defendant was induced by any act of the plaintiffs to go to Hot Springs, Ark. There is no pretense that plaintiffs were guilty of any fraud in obtaining the service of process; there was no misrepresentation by the plaintiffs, express or implied, in regard to anything connected with the defendant's going to or staying at Hot Springs; it was his own voluntary act, which took him there. There is therefore no ground for a claim of fraud practiced upon him by the plaintiffs. In Jaster v. Currie, 198 U. S. 144, 147, 25 Sup. Ct. 614, 615 [49 L. Ed. 988], Mr. Justice Holmes, speaking for the court in a case in which a claim that the defendant had been fraudulently induced by the plaintiff to go to a foreign state, for the purpose of having him served with process there, said:

"It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plaintiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word 'fraud' may be discarded as inappropriate."

The action being transitory, a party has, ordinarily, the right to institute and maintain an action against a defendant in any court of competent jurisdiction where personal service can be had on him, whereby the court obtains jurisdiction of his person. The fact that it may be inconvenient for the defendant to make his defense in that tribunal, and that is practically all the allegations in the motion amount to, is no cause for abatement of the action, or quashing the service of the summons. In a number of states there is only one national court, and that may be several hundred miles distant from the place of the residence of the defendant; yet, can it be successfully contended that by reason of this inconvenience caused to the defendant, and by reason of the fact that his witnesses may also reside in the place of his residence, the service of summons should be quashed? At one time there was but one national court in the large state of Texas, and that at a time when there were no railroads in that state. Great as the inconvenience must have been to be sued in such a court. when living several hundred miles from the place where the court was held, he could not object to the jurisdiction of that court, regardless of the inconvenience it may cause him.

The fact that the testimony will have to be taken in the states of Colorado, Wyoming, and California, does not change this rule. The acts of Congress and Equity Rule 47 (198 Fed. xxxi, 115 C. C. A.

xxxi) expressly provide that the testimony of witnesses residing out of the district, and more than 100 miles from the place where the court is held, may be taken by deposition. This does away with the necessity of bringing witnesses, books, and documents to the trial court. Even if the suit were brought in the state of Colorado, it would be necessary, according to the allegations in the motion, to have the testimony of witnesses residing in the states of Wyoming and California.

The principal cases upon which counsel rely are Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207, and Smith v. Weeks, 60 Wis. 94, 18 N. W. 778. But neither of these cases is in point. In the Dishaw Case, which was an action for malicious prosecution by a civil proceeding, the facts were that the defendant, an attorney at law, residing at Potsdam, N. Y., entered into an arrangement with one Woodward, residing at Gouverneur, N. Y., in the same county, by which the defendant was to procure accounts to be assigned to Woodward, for the purpose of having suits instituted by Woodward in the justice's court at Gouverneur. The accounts were for small amounts, and the evidence established that the object of having these suits brought in Gouverneur, which was 60 miles from Potsdam, and to reach which it was necessary to start the day before, was to compel the payment of these small claims, regardless of whether they were just or not, in order to avoid the expense and inconvenience of going to Gouverneur, which would exceed the amounts involved. To add to the oppression of the party sued, the defendant would cause subpænas to be served on him at the same time the summons was issued. It also appeared that the plaintiff, having failed to appear in obedience to the subpœna, was attached, and a fine of \$1 and \$15.20 costs were imposed on him, and execution against his person issued for the fine and costs. Upon these facts, the court held that the action for malicious prosecution would lie. The correctness of this decision cannot be assailed. For a similar action an attorney was held to be properly disbarred in Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.

In Smith v. Weeks, the action was against a sheriff for abuse of process, which consisted of arresting a locomotive engineer just as he was preparing to go out on a run with his locomotive. The evidence showed that the sheriff had the writ in his pocket and kept watch over the defendant for several hours prior to the time he made the arrest, and that he delayed serving it in order to make the arrest as inconvenient as possible for the accused.

No allegations of that nature are found in defendant's motion. There can be no doubt that if by sham transfers, or trickery, for the purpose of forcing the payment or settlement of an unjust claim, a suit is instituted in a court whose jurisdiction could not have been invoked except by trickery or fraud, the law will not sanction such a proceeding. Steiger v. Bonn (C. C.) 4 Fed. 17; Blair v. Turtle (C. C.) 5 Fed. 394.

But nothing of this nature is claimed by the defendant in this case; the plaintiffs did nothing except what the law authorizes them to do, and instituted their action in a court of competent jurisdiction of the subject-matter, and, owing to the presence of the defendant there, of his person. What his motives for not instituting the action in the courts of Colorado are, as long as he does not resort to fraud or trickery, cannot be questioned, no more than when a suit is instituted in a national instead of a state court of the county where the defendant resides, although the latter would be more convenient. Dickerman v. Northern Trust Co., 176 U. S. 181, 190, 20 Sup. Ct. 311, 44 L. Ed. 423; Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758; Hamilton, etc., Co. v. Parish, 67 Ohio St. 181, 189, 65 N. E. 1011, 60 L. R. A. 531; 1 Corpus Juris, 971.

The motion to quash is overruled, and defendant granted 60 days within which to file his answer.

### THE ADDISON E. BULLARD.

# TURNER et al. v. CARGO OF RESAWN PITCH PINE TIMBER AND LUMBER et al.

(District Court, N. D. Florida. June 14, 1918.)

1. Shipping \$\iff 49(2)\$—Charterers—Freight Money—"Lawful Merchandise"

Under a charter to furnish a full cargo of lawful merchandise and to pay \$30 per gross ton delivered to vessel and for not less than 2,250 gross tons, her dead weight capacity, the charterer loading lumber, which was "lawful merchandise," into all the cargo space, was bound to pay for 2,250 gross tons, though the cargo loaded was less.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful Merchandise.]

2. EVIDENCE \$\igcream 448\$—Construction of Charter.

In the construction of a charter, evidence of contemporaneous transactions and correspondence is competent, if aiding in reaching the true intent of the parties, or when explaining the meaning of ambiguous words, but not to alter or modify plain words.

3. Shipping \$\sim 39--Charter-Rights of Parties.

The charter signed must be taken to express the true and final intendment of the parties, and courts may not substitute a different contract, if the agreement may work unexpected hardship.

4. Shipping \$\infty 45\to Discretion of Master-Deck Cargo.

The master, if competent, has discretion in the manner of loading, the quantity to be taken on deck or elsewhere, consistent with the vessel's seaworthiness in view of the voyage, and, if acting in good faith, his judgment is controlling, though he may not modify the owners' contract for a positive undertaking.

- 5. Shipping \$\iffissup 58(2)\$—Refusal of Cargo—Master's Discretion—Evidence. Evidence held not to show an arbitrary abuse of the master's discretion in refusing to take a greater deck load of lumber under a charter whereby the vessel was to take a full and complete deck load consistent with seaworthiness.
- 6. Shipping \$\ightharpoonup 44-Cargo Space-"Provisions."

Where the charter of a schooner specifically reserved space for "provisions," and required the use of the vessel's steam winches, the term "provisions" included coal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provision.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  $252~\mathrm{F.}{-}16$ 

7. Shipping \$\infty\$39—Cargo Space—Provisions—Master's Discretion.

The master's judgment as to the kind and quantity of provisions permitted under the charter is generally controlling.

In Admiralty. Libel in rem by Horace Turner and others, owners of the schooner Addison E. Bullard, against a Cargo of Resawn Pitch Pine Timber and Lumber, and in personam against Allen & Freiderichs. Decree for libelants.

Scott M. Loftin, of Jacksonville, Fla., for libelants.

John C. Hollingsworth, of New Orleans, La., and W. A. Blount,
Jr., of Pensacola, Fla., for respondents.

SHEPPARD, District Judge. This is a case of libel, brought by the owners of the schooner Addison E. Bullard, in rem against the cargo, and in personam against Allen & Freiderichs, charterers of the vessel. The Bullard was chartered to take a cargo from Pensacola, Fla., to Genoa, Italy. The merits of the controversy turn on the construction of that clause of the charter party which reads substantially:

"\* \* Charterers engage to provide and furnish the vessel a full and complete cargo of lawful merchandise, understood no explosives to be shipped. Vessel to furnish the use of her steam winches and steam to drive them. Vessel agrees to take a full and complete deck load consistent with seaworthiness. Charterers to pay the owners or agents for the use of said vessel during the voyage at the rate of \$30 per gross fon of 2,240 pounds, delivered to vessel, but charterers to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity."

The cargo furnished was lumber, and when 1,630 tons had been loaded on the vessel the master refused to take further deck load. Charterers contend that they were entitled to load 2,250 tons, or vessel's dead weight capacity, and, when further cargo was refused, presented bills of lading for 1,630 tons at \$30 per ton, which the master refused to sign, claiming that he was entitled to clean bills of lading for 2,250 tons. The owners thereupon libeled the cargo and the charterers in personam for \$67,500, minimum freight claimed under the charter party.

The respondents answered that under the charter party the owners were entitled to freight only for cargo actually laden, at the rate of \$30 per ton, that the master had refused a full and complete deck load, and that freight space which charterers, were entitled to, the master had arbitrarily withheld for coal. Pending litigation, parties entered into an agreement by which the vessel was allowed to go on the voyage, leaving the question of freight due and payable under the charter to be adjudicated. Except for the question whether the master took a full and complete deck load consistent with the vessel's seaworthiness, the solution of the controversy is to be determined by ascertaining the respective rights of the parties when the cargo loaded consumed the cargo space, but fell short of the minimum freight or vessel's dead weight capacity. There is also the incidental question that the master consumed cargo

space with unnecessary coal but this, like the other question involved,

is determined by the terms of the charter party.

[1] The conspicuous part of the undertaking, as ascertained from the contract, was that the charterers might load a cargo of "lawful merchandise," and the owners recognizing the option of the charterers to choose any class of cargo, so long as it was "lawful merchandise," excluding explosives, it is plain that they undertook by the charter to protect themselves from any loss of freight, should the charterers exercise their option to load a bulky, but light, cargo. Hence this provision in the charter:

"Charterers to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity."

This clause is seemingly definitive of what charterers were to pay freight; that is to say, on not less than 2,250 gross tons. Under the designation "lawful merchandise," obviously, might be included many kinds of cargo, as, for instance, ore or salt, which would consume, of course, less space per ton than a cargo of sponges or excelsior, and, as charterers had the option on the kind of cargo, the owners, with a view for their protection, inserted the stipulation:

"Charterers to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity."

From the evidence it appears that, when the vessel was engaged. charterers contemplated furnishing a cargo of tobacco; but the cargo actually provided was lumber, and when 1,630 tons had been loaded, a portion of it on deck, the master objected to further loading, because, in his opinion, more deck load would not be "consistent with the vessel's seaworthiness." It may be conceded that the 1,630 tons was not the vessel's dead weight capacity; but the language of the charter does not support the contention that the vessel was warranted to take 2,250 gross tons of lumber. Besides, lumber cargoes are not reckoned by tons, but in standards or feet. and this custom the parties will be deemed to have had in contemplation when they made the contract. The charterers exercised their right to load lumber, which was lawful merchandise; but, when they did so under a tonnage contract, with a provision for minimum freight on 2,250 tons, then, under the terms of the charter party. they were bound for the minimum freight, irrespective of the character of cargo.

[2] To induce a different interpretation, charterers offered much testimony of contemporaneous transactions and correspondence between the parties. Such evidence is competent and helpful, when it may assist in arriving at the true intent of the parties, or when it may explain the meaning of ambiguous terms found in the written contract but never to alter or modify the plain words of the agreement.

[3] The correspondence between the parties and the charterers' testimony, explaining their understanding of the negotiations, are strongly persuasive that the contract executed was different from the one originally contemplated by charterers; but the instrument

itself must be taken to express the true and final intendment of the parties. Courts may not substitute a different contract between the parties, if perchance the written agreement works unexpected hardship. Brawley v. United States, 96 U. S. 174, 24 L. Ed. 622.

[4, 5] Coming now to the master's refusal to take more deck load, it is objected by respondents that the master's course was arbitrary, and the evidence was voluminous in an endeavor to show that the vessel did not, in fact, have a full and complete deck load. The stevedore, who loaded the vessel, was of the opinion that more load could have been stored on the flush deck, but admitted that he made no investigation of the condition of the main deck, or the supports of the flush deck, and the evidence discloses his interest in getting as much on board the vessel as possible.

Many others engaged in chartering ships were called as experts as to the vessel's capacity for cargo, to whom were exhibited photographs of the Bullard and other sailing ships of like model and construction, upon which they were asked to express hypothetical opinions as to whether more deck load could have been stored on this ship. With scarcely an exception none knew the Bullard or had any personal knowledge of the construction or the strength of her decks. Not one of them had seen the vessel after the cargo was

The master called a survey at the place of loading, and the report of the surveyors confirmed the judgment of the master, that the vessel had all of the deck load consistent with her seaworthiness. The master may not alter or modify the owners' contract for a positive undertaking; but, if he is competent, the manner of loading, the quantity to be taken on deck or elsewhere, consistent with the vessel's seaworthiness, is left to the discretion of the master, in view of the voyage to be accomplished, and, when he acts in good faith, his judgment is controlling. The weight of the evidence does not show an arbitrary abuse of the master's discretion. Boyd v. Moses, 7 Wall. (74 U. S.) 316, 19 L. Ed. 192; Weston v. Foster, 2 Curt. 119. Fed. Cas. No. 17,452.

[6, 7] Lastly, the objection that 40 tons of coal was an excessive quantity for the voyage, and took up space that should have been left for cargo, may be answered by the suggestion that coal is included in the term "provisions," space for which was specifically reserved by the charter, which also provides for the use of the vessel's steam winches "with steam to drive them." Moreover, there was no testimony to show that 40 tons of coal was excessive for the described voyage, and it is perhaps enough to say on this subject that the master's judgment likewise as to kind and quantity of provisions is generally controlling. Boyd v. Moses, supra; Carver on Carriage by Sea, § 273.

It follows that the libelants are entitled to a decree.

UNITED STATES ex rel. KOTZEN v. LOCAL EXEMPTION BOARD NO. 157 OF CITY OF NEW YORK et al.

(District Court, S. D. New York. June 7, 1918.)

- 1. Habeas Corpus ⇐⇒85(1)—Draft—Exemption—Aliens—Burden of Proof.

  Although under section 79, rule 12, subd. F, Rules and Regulations of the Selective Service Act of May 18, 1917, a nondeclarant alien should be placed in class V-F, which exempts from service, in view of section 100, providing for correction of questionnaires, and section 101, enjoining local boards to satisfy themselves that a registrant claiming exemption as an allen is not a citizen, the burden of proof rests on complainant in habeas corpus to prove his alienage beyond a reasonable doubt.
- 2. Army and Navy \$\infty\$20\to Draft\to Exemption\to Hearing\to Summons as Notice to Produce Full Proof of Claim.

Where a drafted person, claiming exemption from military service on the ground of alienage, is summoned before the exemption board under section 101 of Rules and Regulations of Selective Service, to testify on the exemption claim, the summons is notice to claimant to present all the evidence he has in support of his claim.

3. Army and Navy €==20—Draft—Claim of Exemption—Rehearing—Duty of Draft Board.

Where a drafted person claimed exemption from military service on the ground of alienage, and upon being summoned, under section 100, to prove his claim of exemption, failed to establish it, the duty to reopen the case rested in the sound discretion of the exemption board.

4. Habeas Corpus \$\infty\$16-Draft-Claim of Exemption.

It is not the province of the United States District Court to pass judgment upon what constitutes sufficient evidence to satisfy exemption boards of the alienage of a registrant claiming exemption from military service, unless the board has acted arbitrarily or illegally.

Habeas corpus by the United States, on the relation of Max Kotzen, against the Chairman, Clerk, and Members of Local Exemption Board No. 157 for the City of New York, the Military Authorities of the United States, and any person having custody of the relator. Writ dismissed.

Louis J. Gold, of New York City, for petitioner.

Julian Hartridge, Asst. U. S. Atty., of New York City, for Local Board No. 157 and the United States.

KNOX, District Judge. In this case Max Kotzen, the relator, obtained a writ of habeas corpus for the purpose of being discharged from the military service of the United States, into which he had been inducted by Local Exemption Board 157 of the city of New York. The relator, being within the draft age, claimed upon his questionnaire to have been born in Russia on October 31, 1890, and to have come to this country in 1893 (approximately 25 years ago). At the time of his arrival he was accompanied by his mother. Nothing is said in the questionnaire as to his father, save that he answered "No" to question 8, series 7, namely, "Has either of your parents been naturalized in the United States?" The relator likewise denied that he had ever voted in the United States, or that he had declared his intention to become a citizen of the United States. In answer to other

questions the registrant declared that he did not want to fight for the United States or for his native country.

Manifestly, if the statements of the registrant that he is a nondeclarant alien are true, he should, under subdivision F of rule 12, section 79, of the Rules and Regulations of the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76), have been placed in class V-F. The local exemption board, however, placed the registrant in class I-A, summoned him for service, and duly inducted him into the mili-

tary service of the United States.

[1] The question, therefore, for determination, is whether the registrant was properly classified, and, if he was not, his writ should be sustained. In order to arrive at the answer to the question now before the court, it is necessary to consider other sections of the Rules and Regulations governing the operation of the Selective Service Act, together with what was done subsequent to the filing of the relator's questionnaire. Among other things, section 100 provides:

"If, upon examination, the local board finds that a questionnaire does not contain the information required, or contains substantial or material errors which indicate ignorance or lack of knowledge on the part of the registrant, or in case the local board shall desire further information, the board shall require the registrant to appear at a day to be fixed and complete the questionnaire or correct any substantial or material error which may appear therein, or to furnish such other evidence as the board may require. Failure on the part of the registrant to appear on or before the day set by the local board shall remove the right of the registrant to correct, modify, or add to his questionnaire."

Under section 101 of the Rules and Regulations relating to the process governing the classification by local boards, there appears a note, part of which reads:

"Local boards are especially enjoined to scrutinize carefully any claim for exemption of a registrant on the ground of alienage, and, before classifying an alleged alien in class V, to satisfy themselves beyond reasonable doubt, that the registrant claiming such exemption is not a citizen of the United States and has not declared his intention to become a citizen.

It appears in the case before me that the board was not satisfied with the claim of alienage put forth by the registrant, inasmuch as some time prior to February 6, 1918, the local board directed a paper, in the nature of a subpoena, to be issued to the registrant; the purport of this paper being:

"You are hereby commanded to appear as a witness before the abovenamed board on the 6th day of February 1918, at 3 o'clock p. m., for the purpose of testifying in the matter of the claim for exemption or deferred classification, and not depart without leave of the board."

The registrant received this subpoena, and, in response thereto, went before the board, where he was questioned. A pencil memorandum was taken as to what transpired upon this occasion. That memorandum reads as follows:

"Is here 24 years. Was 3 years old when he arrived. Father here 25 years. Attended public school here. Does not know whether his father is a citizen. Never was with him all the time. Has no personal knowledge."

Thereafter the board decided against the claim of the registrant and placed him, as set forth above, in class I-A. Upon learning of his classification, the relator, upon February 11, 1918, took an appeal to the district board, and the local board sent to the district board a memorandum setting forth substantially the result of Kotzen's examination, with this addition:

"Registrant did not know whether his father was a citizen, and, the members of the board being of the opinion that his proof of alienage was insufficient, the claim was unanimously denied."

The district board likewise unanimously classified the registrant in class I-A, because it found that the alienage of the registrant was not

proved to the satisfaction of the local board.

About March 16th, Kotzen took up with the attorney for the Provost Marshal General the matter of reopening his case, submitting a certificate of the Russian consul general at New York, which is to the effect that Kotzen had submitted to that office certain declarations from which it appears that he is a native and citizen of Russia. He also submitted the affidavit of a man named Sam B. Klitzner, in which Klitzner says from his own knowledge that he knows Kotzen is not a citizen of the United States, that he (Klitzner) had asked him to become a citizen, and that Kotzen had declined to do so. An affidavit was also submitted from another man, named Harris Brodofsky, who says that he knows that Kotzen is of Russian birth and never became a citizen of the United States, and that the affiant has discussed with Kotzen the possibility of making an application to become a citizen. Julius Kotzen, the father of Max Kotzen, also makes an affidavit in which he says he came to this country with the registrant about the year 1895, and that he knows of his own knowledge that Max Kotzen has never declared his intention to become a citizen of the United States, and that he (the father) is not a citizen of the United States.

The attorney for the Provost Marshal General forwarded these documents to the local board, without any recommendation as to the consideration to be given them. Written upon the letter of the attorney, in lead pencil, are the words "Application denied 3—19—18," which notation is followed by the initials "N. G.," which are the initials of

Nathan Gordon, the chairman of the exemption board.

Upon this state of facts I was, upon the argument, inclined to believe that the relator was entitled to have his writ of habeas corpus sustained. I have since changed my mind, and have concluded that his writ must be dismissed. I base this decision upon the ground that the burden of establishing the relator's alienage rested upon him; that in view of his long residence in the United States, the tender age at which he came here, the absence of any proof as to whether or not his father had become a citizen, or, if his father had died, whether or not his mother had remarried a citizen of the United States prior to the majority of the relator, made it perfectly proper for the board to decline to be satisfied with the mere declaration, even though it was a sworn declaration, of the relator, that he was not a citizen of the United States, or was not a declarant.

- [2] It seems to me that the note which follows section 101 of the Rules and Regulations governing the operation of the Selective Service Act establishes the degree of proof that is necessary in order for a registrant to obtain exemption, namely, that the board shall be satisfied of his assertions beyond a reasonable doubt. I am also of the opinion that, when Kotzen was called before the board for the purpose of testifying in the matter of his claim for exemption, that was in effect a notice to him that the issue of his claim of exemption was to be tried, and thereby a notice to him to present all the evidence he possessed as to the facts claimed by him. It would follow that his failure to produce proof which would convince the board beyond a reasonable doubt of his alienage justified the board in declining his request to be classified in class V. I have been of the opinion that perhaps it was the duty of the board to advise him that he was required to furnish further evidence, if it was not satisfied with the testimony of Kotzen. However, I do not now hold to this view.
- [3, 4] As to the duty of the board to reopen the case, I hold it was in the sound discretion of the board whether or not it should be reopened. In the very nature of the operation of the local boards, guided by the provisions of the Selective Service Act, and its rules and regulations, it is necessary that they should have wide range of discretion, unless the work of these boards is to be seriously interfered with. It may be said that the board should have been satisfied with the proof of the relator, but I am of the opinion that it is not the province of this court to pass judgment upon what constituted sufficient evidence to satisfy the board of the alienage of this registrant. In other words, I am not prepared to say that the board here acted in such an arbitrary manner and with so little regard for its duties as to justify me in reaching the conclusion that its whole action is tainted with illegality.

The writ is dismissed.

BROWN v. CRAWFORD et al. (DAVID INV. CO., Intervener).

DAVID INV. CO. v. BROWN et al. (District Court, D. Oregon. June 27, 1918.)

No. 7426.

1. BANKRUPTCY \$\ightarrow\$143(1)\top Title of Trustee.

By Bankruptcy Act, § 7a (Comp. St. 1916, § 9591), trustee in bankruptcy, when appointed, is vested with title to all property of bankrupt as of date of adjudication; property being that which, prior to filing of petition, bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

2. Bankruptcy &=151—Rights and Remedies of Trustee.

By Bankruptcy Act, § 47, subd. 2 (Comp. St. 1916, § 9631), trustee in bankruptcy is deemed to be vested with all rights, remedies, and powers of creditor holding lien by legal or equitable proceedings as to all property coming into custody of court, and as to other property he is deemed to be vested with all rights and remedies of judgment creditor holding execution returned unsatisfied.

3. Mortgages \$\iff 594(5)\$—Right of Redemption—Junior Incumbrancer.

Ordinarily the right of redemption belongs to the mortgagor or his suc-

cessor in interest, in reality to the owner of the equity of redemption; but a junior incumbrancer may redeem a prior mortgage or other lien.

4. Subrogation €==17-Right of Redemptioner.

The right of foreclosure and the right of redemption being correlative, any person not himself liable as a principal debtor, and compelled to redeem for the protection of his own lien on mortgaged premises, is entitled to subrogation to the rights of the senior mortgagee.

5. Mortgages  $\Leftrightarrow$  427(1)—Foreclosure—Owner of Equity of Redemption as Party.

In the strictest sense, the owner of the equity of redemption is not an indispensable party to a foreclosure, though the object of foreclosure is to extinguish the equity of redemption; the procedure being quasi in rem.

A purchaser under foreclosure sale, though the holder of the equity of redemption is not made a party, is subrogated to the rights of the mortgagee, and may require the holder to redeem or be barred of his equity.

7. MORTGAGES \$\iff 427(1)\$—Foreclosure—Holder of Equity of Redemption as Party—Personal Judgment.

If personal judgment is sought as against holder of equity of redemption, he is an indispensable party to a foreclosure, and the mortgagee cannot have relief without his personal presence.

8. Courts &=343—Equity Rules—Lack of Jurisdiction as to Some Defendants—Judicial Code.

By Judicial Code, § 50 (Comp. St. 1916, § 1032), where there are several defendants, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to trial as between the parties properly before it; the decree being without prejudice to those not served nor appearing, the rule particularly applying to parties having an interest in the controversy, but whose interest will not be directly affected by decree in their absence.

9. Courts \$\infty\$ 343—Equity Rules—Lack of Jurisdiction as to Some Defendants—Rule of Court.

Equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix), as to the absence of persons who would be proper parties, applies not only to a defect of parties, due to their being out of reach of process, but also to parties within the reach of process, whose joinder would out the jurisdiction of the court, in which contingency the court may in its discretion proceed without making such persons parties; the rule particularly applying to parties having an interest in the controversy, but whose interest will not be directly affected by decree in their absence.

10. EQUITY \$\sim 90\$—Parties.

In chancery, all persons ought to be made parties who are interested in the controversy.

11. Equity € 94—Parties.

A chancery court cannot proceed at all without the presence of the indispensable parties.

12. Mortgages \$\infty\$=427(1)—Foreclosure—Owner of Equity of Redemption as Party—Statute and Rule of Court.

In a foreclosure suit, if it is apparent that the presence of the owner of the equity of redemption will oust the court of jurisdiction, it may proceed without him, under Judicial Code, § 50 (Comp. St. 1916, § 1032), and rule of equity 39 (198 Fed. xxix, 115 C. C. A. xxix), as to the absence of persons who would be proper parties.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

13. Courts \$\infty 264(1)\$—Federal Courts—Diversity of Citizenship—Ancillary Proceeding.

In a proceeding ancillary to the main suit, as to suit to foreclose a mortgage, it is not requisite to jurisdiction that there be a diversity of citizenship as to parties.

14. BANKRUPTCY \$\infty 253-Right of Trustee to Redeem from Mortgage.

Under Bankruptcy Act, § 7a, and section 47, subd. 2 (Comp. St. 1916, §§ 9591, 9631), where an adjudication in bankruptcy did not take place until more than two years after the purchaser at execution sale of the bankrupt's realty acquired his sheriff's deed, as to such realty the trustee in bankruptcy does not occupy the position of lien creditors, and has no right to redeem from the mortgage in the right of such creditors.

15. BANKRUPTCY \$\infty 207-REDEMPTION BY VOLUNTEER-SUBROGATION.

A trustee in bankruptcy, who, without lien, as a volunteer, redeems the bankrupt's realty from a mortgage, is without the right of subrogation, so as to avail himself of the lien of the mortgage.

16. Mortgages \$\infty 453\to Foreclose\to Prayer for Relief.

Where a bill is of the nature of a bill to foreclose, it has that effect, though it does not pray such relief.

17. Courts \$\infty\$ 264(2)—Federal Courts—Diversity of Citizenship.

The fact that residents of the same state as cross-complainant were made parties to a cross-bill filed in suit for accounting and redemption from mortgage by a trustee in bankruptcy in the federal court on the ground of diversity of citizenship does not out the court of jurisdiction.

18. Mortgages \$\infty\$ 624(3)—Suit to Redeem—Owner of Equity of Redemption

Where the owner of the equity of redemption is not made a party in a subsequent lienholder's suit to redeem, his equity will not be cut off or barred by the foreclosure.

19. Mortgages ६==616—Suit to Redeem—Requirement to Answer of Appear.

Requiring the owner of the equity of redemption, in a subsequent lienholder's suit for redemption, to answer a cross-bill for subrogation to the extent of interest paid by the cross-complainant, does not suffice to require him to answer or appear in the main case.

20. Usury 5-145-Forfeiture of Mortgage to State.

Equity does not look with favor upon forfeitures, and a mortgage will not be forfeited to the state for usury, unless the case is clear and indisputable.

21. Usury \$\sim 2(2)\$—Illinois Contracts.

Where notes and a mortgage were executed in Chicago, Ill., though dated at Portland, Or., the controlling transactions being in Chicago and the notes being made payable there, where the trustee was a resident, the documents were Illinois contracts, controlled by Illinois law as to usury.

22. Usury \$\infty\$31-Mortgage Transaction.

Where mortgagor company received full face value of loan from investment company which negotiated it, investment company being independent entity, though controlling majority stock of lumber company, having sold notes and mortgage to another company, an independent concern, at a large discount, itself becoming the loser by the discount, and not the lumber company, the transactions were not usurious, in the absence of a relationship between all the parties stamping the transactions as a device for evading the law.

23. Mortgages 5 199(3)—Mortgages in Possession-Accounting.

Trustee and purchaser of mortgage notes, who took possession under the mortgage, disposed of personal property, and collected rents and profits, but, as appears from their accounting, expended more than they received, must account to the mortgagor's trustee in bankruptcy for personalty left in their hands, but for no money receipts.

24. Mortgages 200(3)—Expense Incurred by Mortgagees—Recoupment.

In suit for accounting and to redeem by trustee in bankruptcy of mortgagor company, trustee and company which purchased mortgage notes, who, while in possession under mortgage, paid taxes, etc., are entitled to recoupment and a lien therefor; the mortgage so providing.

In Equity. Suit by Russell H. Brown, as trustee in bankruptcy of the Monarch Lumber Company, a bankrupt, against William W. Crawford, trustee, and the Assets Realization Company, a corporation, wherein the David Investment Company intervenes, making parties defendant, in addition to those already parties, Grayson M. P. Murphy and others. Decree in accordance with the opinion.

This is a suit, primarily by Russell H. Brown, trustee in bankruptcy of the Monarch Lumber Company, for an accounting and redemption against William H. Crawford, trustee, under a mortgage executed by the Monarch Lumber Company, the bankrupt, and the Assets Realization Company, which latter company is the present owner and holder of the mortgage. The Monarch Lumber Company was adjudicated a bankrupt January 29, 1917. The only parties defendant are the two-Crawford, trustee, and the Assets Realization Company. These parties defendant answered, admitting the execution of the mortgage, and praying strict foreclosure. Later the David Investment Company was allowed to intervene and file a cross-complaint, whereby it sets up, in effect, that it, before the purchase by the Assets Realization Company of the notes and mortgage executed by the Monarch Lumber Company, guaranteed the payment of such notes, and that, in pursuance of such guaranty, it was compelled to pay, and did pay, certain installments of interest upon said notes, amounting to the sum of \$37,500, and prays that, upon foreclosure of the mortgage, it be subrogated to the rights of the mortgagee, and be allowed that sum upon sale of the premises under the foreclosure.

The David Investment Company, in addition to the complainant and defendants in the main suit, made the following parties defendants: Grayson M. P. Murphy, J. W. Kaste and Jane Doe Kaste, his wife, Brayton & Lawbaugh, Limited, a corporation, John Bjelik, and Rose Springer as administrator of the estate of A. C. Springer deceased. The last-named defendant defaulted. J. D. Moody was later substituted in the stead of John Bjelik. Kaste, Brayton & Lawbaugh, Limited, and Moody, who are all residents and inhabitants of Oregon, answered. Kaste simply states that, by virtue of certain proceedings had in the circuit court of the state of Oregon, one Patton recovered a judgment against the Monarch Lumber Company, whereunder the mortgaged premises were sold at sheriff's sale, and that Kaste is now the owner in fee simple of such premises as successor to Patton; the statutory time for redemption from such sale having expired. In further elucidation, the Patton judgment, through which Kaste deraigns title, was given and rendered, and docketed, September 5, 1913. Execution was issued, and the mortgaged real property was sold November 17, 1913. The sale was confirmed December 24, 1913, and on December 26, 1914, a sheriff's deed to the property was delivered to Patton. Later Patton deeded to Kaste, Brayton & Lawbaugh, Limited, answers, in effect, that it is a judgment creditor, having a lien upon the mortgaged property. The judgment was given and rendered December 8, 1913. This judgment has since been recognized and confirmed by a judgment and decree of the Supreme Court of the state of Oregon, rendered in the case of Brayton & Lawbaugh, Limited, v. Monarch Lumber Co. et al., December 27, 1917. So of the Patton and Bjelik judgments. See 169 Pac. 528. Brayton & Lawbaugh as well controverts the validity of the claim of the David Investment Company, and its right to be subrogated to the rights of the mortgagee. J. D. Moody also controverts the validity of the claim of the David Investment Company and its right to subrogation, and says that the

payment of the alleged accrued interest by such company was unlawful and usurious, and that the claim therefor does not constitute a valid demand against the mortgaged property. The Bjelik judgment, assigned to Moody, was made and entered June 30, 1913.

Ralph A. Coan, of Portland, Or., for complainant.

O. A. Neal, of Portland, Or., for defendants Crawford and Assets Realization Co.

Carey & Kerr and C. A. Sheppard, all of Portland, Or., for intervener.

Martin L. Pipes, of Portland, Or., and Dey, Hampson & Nelson, for John W. Kaste.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for cross-defendant Brayton & Lawbaugh.

Maurice W. Seitz, of Portland, Or., for cross-defendant Moody.

WOLVERTON, District Judge (after stating the facts as above). The first inquiry may be directed to whether the bill of complaint states a cause of suit, because of the absence of J. W. Kaste as a party to the bill. It may be stated at the outset that Kaste is now, and was at the time of the institution of the suit, the owner of the equity of redemption of the real property covered by the Monarch Lumber Company mortgage. This much is settled by the decree of the state circuit and Supreme Courts rendered in the case of Brayton & Lawbaugh, Limited, v. Monarch Lumber Co. et al., 169 Pac. 528. The bill is for an accounting, and, upon this branch of the inquiry, it can scarcely be doubted that it states a good cause. It is only as to another branch of the inquiry that its sufficiency may be questioned, namely, whether a subsequent lienholder may maintain a bill for redemption without making the owner of the equity of redemption a party to the bill.

[1,2] First, let us inquire as to the position of Brown as trustee in bankruptcy of the Monarch Lumber Company, as it respects the title and right to administer the property of the bankrupt for the benefit of the creditors. The trustee, when appointed, is vested with the title to all the property of the bankrupt as of the date of the adjudication in bankruptcy. The property to which the trustee succeeds is that which, prior to the filing of the petition in bankruptcy, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Section 7a, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. 1916, § 9591]). This covers any interest in the property the bankrupt may have had, however minute, that was subject to transfer by him or levy and sale by judicial process. The statute is designed to be so broad and searching as to comprise all property that the bankrupt may have that may be of use or benefit to him, however small. By subdivision 2, section 47, of the act (Comp. St. 1916, § 9631), the trustee is deemed to be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings as to all property coming into the custody of the court, and as to property not in such custody he is deemed to be vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied

The statute deals with the property of the bankrupt, not with that of another, and is designed to vest the trustee with the broadest rights, remedies, and powers commensurate with possessing himself of the property of the bankrupt for the benefit of the creditors. It not only vests the trustee with the rights of the bankrupt, standing in his shoes, but with all the rights of a creditor, whether he or the court is in or out of possession. 2 Remington on Bankruptcy, pp. 943, 944, thus interprets the section:

"As long as other sections of the act give the trustee greater rights than merely those that might be asserted by the bankrupt, the statute must be construed to mean that he takes the bankrupt's title and rights and in addition thereto takes more—takes also the rights of creditors, not only those rights that have been already actually asserted by some creditor but any and all that might have been asserted had the trustee been a judgment creditor who had levied on the property in his custody or who holds an unsatisfied execution as to property not in his custody, as well as the rights of creditors under state law to avoid fraudulent transactions. It is doubtless true that the trustee's title since the amendment of 1910 is the most extensive and complete of any in jurisprudence. It also must be borne in mind that the amendment of 1910, by placing the trustee in the position of an execution creditor with a levy on the property in his custody and with an unsatisfied execution on the property not in his custody, gives him more than the rights, which any creditor might have chanced already to have asserted. It gives him in addition thereto, all rights which would have been obtainable by creditors under state law had the trustee been an officer holding an execution or equitable process in behalf of all creditors."

[3] Ordinarily the right of redemption belongs to the mortgagor, or his successor in interest—in reality, to the owner of the equity of redemption; that is, the owner of the estate redeems it from the incumbrance of the mortgage or other liens that may have attached thereto. But a junior incumbrancer may redeem a prior mortgage or other lien. This is a proposition too well settled, says Judge Woodruff, in Jenkins v. Continental Insurance Company, 12 How. Prac. (N. Y.) 66, to be now open for discussion. The right is recognized by text-writers and the adjudicated cases. McDermutt et al. v. Strong et al., 4 Johns. Ch. (N. Y.) 687; United States v. Sturges, Fed. Cas. No. 16,414; 11 Am. & Eng. Enc. of Law, 219, 222; 27 Cyc. 1809, 1811.

[4] The right of foreclosure and the right of redemption are said to be correlative, and any person, who is not himself liable as a principal debtor, who is compelled to redeem for the protection of his own lien on mortgaged premises, is entitled to subrogation to the rights of

the senior mortgagee.

[5] The question has been presented whether the owner of the equity of redemption is, first, an indispensable party to a mortgage foreclosure; and, second, an indispensable party whose presence is necessary to the entertainment of jurisdiction by a federal court. In the strictest sense the owner of the equity of redemption is not an indispensable party to a foreclosure, although it is said the object of the foreclosure is to extinguish the equity of redemption, for, if such owner be not joined as a party, the decree for that reason will not be void. 27 Cyc. 1570, 1571. The procedure is quasi in rem, and so treated by

the authorities. Mr. Justice Brewer, while on the circuit bench, sitting in the district of Minnesota, in Martin v. Pond, 30 Fed. 15, says:

"A foreclosure in the form in which it is ordinarily prosecuted is really, in its nature, partly an action in rem, for the seizure and sale of the property, and partly in personam, for the ascertainment of the debt of the mortgagor, and a personal judgment against him."

He then cites and quotes from Waples on Proceedings in Rem, § 607:

"It has been held that a mortgage suit to foreclose by barring the right of redemption is personal, but that, so far as it is for the condemnation of property to pay debt, it is in rem. Courts, both state and national, have frequently spoken of the mortgage suit, in which there is the object of obtaining an order of sale, as of the latter description. Though nominally against persons, such suits are to vindicate liens. They proceed upon seizure. They treat property as primarily indebted, and, with the qualification above mentioned, they are substantially property actions. In the civil law, they re styled 'hypothecary actions,' and their sole object is the enforcement of the lien against the res. In the common law, they would be different if chancery did not treat the conditional conveyance as a mere hypothecation, and the creditor's right as an equitable lien; so, in both, the suit is a real action, so far as it is against property, and seeks the judicial recognition of a property debt, and an order for the sale of the res."

[6,7] Again, a purchaser under a foreclosure sale, even though the holder of the equity of redemption is not made a party, is subrogated to the rights of the mortgagee, and may require the holder to redeem or be barred of his equity, so that, as expressed by Cyc., supra, the holder of the equity of redemption is not in the strictest sense an absolutely necessary party to a foreclosure. If, however, a personal judgment is sought as against the holder, he would be an indispensable party, and the mortgagee could not have relief without his personal

presence.

[8, 9] As it relates to the jurisdiction of a federal court, the question is to be resolved by the application of section 50 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1916, § 1032]) and equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix). The Code seems to contemplate that where there are several defendants, and one or more of them are neither inhabitants nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and may proceed to trial as between the parties properly before the court; but the decree will be without prejudice to those not served nor appearing. Equity rule 39 is somewhat broader, in that it applies, not only to a defect of parties due to their being out of reach of process, but also to parties within the reach of process whose joinder would oust the jurisdiction of the court. In the latter contingency the court may, in its discretion, proceed without making such persons parties. Hughes, Fed. Procedure (2d Ed.) 256, 257. As it relates to equity, the statutory enactment and the rule are but declaratory of the principles and practice previously enforced by the courts. Shields v. Barrow, 17 How. 130, 141, 15 L. Ed. 158; Minnesota v. Northern Securities Co., 184 U. S. 199, 236, 22 Sup. Ct. 308, 46 L. Ed. 499; Detweiler v. Holderbaum (C. C.) 42 Fed. 337, 338. [10] As affecting the jurisdiction of the court, there are certain qualifications to the general rule in chancery that all persons ought to be made parties who are interested in the controversy, in order that there may be an end to litigation. These qualifications arise out of public policy and the necessities of particular cases. The classifications are three: First, indispensable parties, that is, such as will be directly affected by the decree; second, parties having an interest in the controversy, but whose interests will not be directly affected by a decree rendered in their absence; and, third, parties not interested in the controversy between the immediate litigants, but who have an interest in the subject-matter, which may be conveniently settled in the suit. Williams v. Bankhead, 19 Wall. 563, 571, 22 L. Ed. 184.

[11, 12] As to parties falling within the first classification, the court cannot proceed at all without their presence. It is as to the second classification that section 50 of the Code and the thirty-ninth rule of equity practice particularly apply. If their joinder would oust the court of jurisdiction, the court may in its discretion proceed without their presence. The owner of the equity of redemption in a foreclosure suit, I am persuaded, falls within this classification, and, if it is apparent that his presence will oust the court of jurisdiction, it may proceed

without him.

[13] The cross-bill filed by the David Investment Company was the inauguration of a proceeding ancillary to the main suit. In such a proceeding, it is not requisite to jurisdiction that there be a diversity of citizenship as to parties. As said by Judge Deady, in First National Bank of Salem v. Salem Capital Flour Mills Co. (C. C.) 31 Fed. 580, 583:

"In suits not original, but ancillary to litigation already pending in a Circuit Court of the United States, the citizenship of the parties is wholly immaterial. \* \* If the citizenship of the parties in the original suit is sufficient to give the court jurisdiction, it has jurisdiction of the cross-bill therein."

This statement of the law has received approval by the Circuit Court of Appeals of this circuit, in Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475. Hawley, District Judge, delivering the opinion of the court in that case, says:

"Consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be."

And in Desty on Federal Procedure, vol. 1, p. 400, is found this statement of the law:

"An original bill and a cross-bill thereto constitute but one cause, and when a Circuit Court has jurisdiction of the former by reason of the citizenship of the parties thereto, it has jurisdiction of the latter without reference to such citizenship."

The subject is exhaustively and ably treated of by Judge Hunt in Ames Realty Co. v. Big Indian Mining Co. (C. C.) 146 Fed. 166. This case is cited as authoritative by the Supreme Court in Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 263, 31 Sup. Ct.

11, 54 L. Ed. 1032; the Supreme Court case approving the principle. See, also, Railroad Co. v. Chamberlain, 6 Wall. 748, 18 L. Ed. 859, Freeman v. Howe et al., 24 How. 450, 16 L. Ed. 749, Osborne & Co. v. Barge (C. C.) 30 Fed. 805, and Continental Trust Co. v. Toledo, St. L. & K. C. B. Co. (C. C.) 82 Fed. 642, same case, on appeal to the

Circuit Court of Appeals, 95 Fed. 497, 36 C. C. A. 155.

[14, 15] These principles having been ascertained, let us proceed to their application here. If the trustee were standing in the right of lien creditors as it pertains to the real property described in the mortgage, his right to redeem from the mortgage would be clear. As to this property, he does not occupy that position. Kaste's predecessor acquired his sheriff's deed to the property December 26, 1914. The Monarch Lumber Company was not adjudged a bankrupt until January 29, 1917, something over two years later than the date of the sheriff's deed, which conveyed all the right of the Monarch Lumber Company away to Patton. The creditors thereafter, unless they had in some way, by creditors' bill or otherwise, impressed a lien, could have no right in the property, for it went to Patton, and they could have no further recourse to it. The trustee as to this property occupies no better position than the creditors, and he could have no lien or other right to property that did not belong to the bankrupt at the date of the filing of the petition in bankruptcy or within four months prior thereto. It is therefore apparent that the trustee, having no lien by reason of the provisions of the bankruptcy act or otherwise, upon the mortgaged property, is not in a position to exercise the right of redemption from the mortgage. Without the lien, if he did redeem from the mortgage, he would occupy the position of a volunteer. and would be without the right of subrogation so as to avail himself of the lien of the mortgagee.

[16] It scarcely can be questioned that Crawford and the Assets Realization Company are entitled to their foreclosure. I am treating the answer of these parties as a bill to foreclose. It is of that nature, although that is not the relief prayed. The effect is the same. Kaste, while a proper party to the bill of complaint, was not an indispensable party, and the jurisdiction of the court is not affected

by reason of his not being made a party to the bill.

[17] The fact that Kaste and others who are residents within the state of Oregon were made parties to the cross-bill does not oust the court of jurisdiction. This and the deduction next previous are not affected by the question of the present possession of the property,

while the fact of possession may have a bearing.

[18,19] Kaste not having been made a party in the main case, his equity of redemption will not be cut off or barred by the foreclosure. While made a party to the cross-bill, he was not called upon to plead or answer to the original bill, nor to the answers thereto of Crawford and the Assets Realization Company. His being required to answer to the cross-bill does not suffice to require him to answer or appear in the main case. While the cross-bill sets up the mortgage, it is only set up with a view on the part of the David Investment Company of procuring subrogation to the extent of intertest paid by it, and which

it was compelled to pay, and it makes no contention as to the amount due on the mortgage proper to the mortgagees. Kaste has a right to be heard as to this, but, not being a party to the main suit, he is without opportunity to propound a controversy upon the inquiry, or at least he is not required to enter upon such inquiry, and in his last amendment of his answer he has not done so. I do not see how he can be barred of his equity of redemption under the issues made by the respective pleadings and the manner in which they are brought upon the record. His position is not affected by the case of Higgs v. McDuffie, 81 Or. 256, 157 Pac. 794, 158 Pac. 953, nor can it be until his equity is foreclosed by a proper bill against him.

As to some of the creditors, Kaste has declared his purpose to subordinate his equities to their demands, and this, I assume, rises to the dignity of a legal obligation. As to these creditors, the trustee stands in their relation, and is in a position to insist that their rights be observed; but the pleadings nowhere set forth the facts essential to an adjudication respecting the relative rights of the parties concerned, and the court cannot attempt to settle the controversy here.

[20] Brayton & Lawbaugh and Moody were also brought in by the cross-bill. They set up their judgment liens, which are subordinate to the mortgage. They assail the validity of the mortgage, in that they assert that it is usurious, and should be forfeited to the state. This contention I will now consider. Equity does not look with favor upon forfeitures, and the case must be clear and indisputable before the court will impose so harsh a measure.

[21] Without going into the testimony at length, I am persuaded that these notes and the mortgage are Illinois contracts. Crawford, the trustee, is a resident and inhabitant of Chicago, Ill., and was at the time these documents were executed. The documents were all executed in Chicago, and, although they purport to be dated at Portland, Or., the controlling transactions were had and negotiated in Chicago, the final execution was there completed and terminated, and the notes are made payable there. This renders the documents Illinois contracts. DeWolf v. Johnson, 10 Wheat. 367, 6 L. Ed. 343; Ringer v. Virgin Timber Co. (D. C.) 213 Fed. 1001. Being Illinois contracts, there is, under the law of that state, no taint of usury.

[22] Further than this, it is by no means clear that the notes and mortgage are tainted with usury, even if they may be considered to be Oregon contracts. The Monarch Lumber Company received, beyond question, the full face value of the loan. The David Investment Company paid it that, or rather the difference between what the Assets Realization Company paid and the face of the notes. The David Investment Company, while it controlled the majority stock of the Monarch Lumber Company, was an independent entity. It sold the notes and mortgage to the Assets Realization Company, an entirely independent concern, at a large discount. It became the loser by the discount, and not the Monarch Lumber Company, the real mortgagor. I am not prepared to say that the transactions thus consummated render them usurious. Notes of the kind are bought and sold every day, and the price is regulated by the value of the securities on the market;

and it does not seem to me that there was such a close and interlocking relationship between all the parties to the transactions as to stamp the transactions as a device for evading the law or to render them usurious under the statute.

[23] Coming, now, to the accounting, there is little to be said. Crawford and the Assets Realization Company went into possession of the property. Attempts were made to form other corporations for readjusting the mortgage and debtor obligations, and to transfer the property to these concerns; but they all came to naught, and the Supreme Court of the state has so declared. Nevertheless the mortgagee, either by itself or through the agency of one or more of these concerns, continued in possession until the trustee in bankruptcy succeeded thereto. These parties assumed possession as mortgagees under the terms of the mortgage. They did what was deemed necessary to preserve the property, disposed of a large amount of personal property, and collected some rents and profits. They incurred obligations in the care of the property, and advanced taxes and funds to take care of the insurance, and have rendered a full accounting respecting the property and funds coming into their hands. It appears that they have expended more than they received, but have left in their hands some odds and ends of personalty of small value, consisting of a stock of moldings and a few groceries in the cookhouse. The trustee is entitled to these on the accounting, but for no money receipts.

It is unnecessary to state the account further than this, as it is entirely manifest from the testimony that neither Crawford nor the Assets Realization Company owes the trustee anything, or is accountable to him for anything except the small amount of personal property above mentioned. The account with the Monarch Lumber Company by Crawford, trustee, and the Assets Realization Company has been rendered. It appears quite clearly from the accountant's statement that the trustee and the Assets Realization Company, while in possession, expended \$64,765.53 over and above the amount received by them. Of this amount \$41,444.13 was for taxes and insurance. I will not stop to make a restatement thereof. Counsel for these parties have set the same forth in their brief quite impartially, and their de-

ductions appear to be warranted by the testimony.

[24] The trustee, Crawford, and the Assets Realization Company, were compelled to enter into the possession of the property to protect it and prevent its disintegration. Of necessity they were required to carry the insurance against fire loss, and to pay the taxes, to prevent the dissipation of the property. To this was added the expense of watchmen and necessary repairs, to prevent threatened injury. The mortgage, by its sections 6, 7, 10, and 12, article 2, provided for the payment of these expenses by the mortgagee in case he was required to enter into possession for breach of the mortgage conditions and for recoupment against the property, for which a lien was reserved. The amount of the recoupment prayed for is \$50,000, and to this I am of the opinion that the mortgagee and the Assets Realization Company are entitled, and the same will be declared a lien upon the property under the mortgage. The amount due upon the mortgage is the prin-

cipal, \$300,000, and interest at the rate of 7 per cent. per annum from

September 1, 1913.

The David Investment Company guaranteed the payment of the mortgage notes, and in course of time was compelled to pay, and did pay, the first two years' interest falling due thereon, or the sum of \$37,500, for which it is entitled to be subrogated to the lien of the mortgage; and the decree will so provide.

## UNITED STATES v. GREENBAUM.

(District Court, E. D. Michigan, S. D. May 16, 1918.)

No. 5855.

1. Indictment and Information € 111(2)—Bankbuptcy—Negativing Exception—Concealing Property.

There being no express exception or reference to exemptions in Bankruptcy Act July 1, 1898, § 29b (Comp. St. 1916, § 9613), an indictment thereunder for concealing property need not allege the property was not exempt from execution under state laws, though section 6 (section 9590) secures to bankrupts allowance of exemptions under such laws.

2. INDICTMENT AND INFORMATION \$\infty\$ 111(3)\top-Statutory OFFENSE\topNegativing Exceptions.

Unless a statute creating an offense so defines it that it cannot be properly described without negativing an exception, an indictment for violation thereof need not negative the exception.

3. INDICTMENT AND INFORMATION \$\sim 86(2)\$—Specifying Time and Place.

An indictment for concealing property while bankrupt, alleging the concealment took place at the city of Detroit, in this district, on July 5, 1916, specifies the place.

4. Indictment and Information \$\sime\$ 87(2)—Specifying Time.

An indictment for concealing property while bankrupt, alleging the concealment took place at the city of Detroit, in this district, on July 5, 1916, specifies the time.

5. BANKRUPTCY \$\infty 494\to Concealing Property-Indictment.

Though Bankruptcy Act July 1, 1898, § 1a (22) (Comp. St. 1916, § 9585), provides that the word "conceal" shall include "secrete, falsify, and mutilate," it is sufficient, in an indictment under section 29b (section 9613), to allege a concealment by using the word "conceal," without stating how or in what manner it was accomplished.

The purposes of an indictment are to inform accused, with reasonable certainty, of the nature of the offense charged, so he may properly prepare his defense, to enable him to use his acquittal, if again accused, and to enable the court to determine whether acts alleged to constitute a crime would warrant a conviction thereof, if proved.

7. Indictment and Information \$\iff 110(4)\$—Following Language of Statute—Exceptions to Rule.

An indictment based on an alleged violation of a statute sufficiently describes the nature of the crime charged, if it follows the language of the statute, unless it is too indefinite to accurately indicate, without addition of other words, the essential elements of the alleged crime.

8. BANKBUPTCY \$\sim 494\$—Concealing Property—Indictment.

An indictment under Bankruptcy Act July 1, 1898, § 29b (Comp. St. 1916, § 9613), charging concealment by a bankrupt of a certain large por-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion of his property, consisting of money and merchandise, setting forth its general nature and alleging a more particular description is unknown, together with a bill of particulars showing that the property referred to was all the property belonging to him on a specified date, except the portion turned over or accounted for, sufficiently describes the property.

9. Bankruptcy \$\infty 494\to Concealing Property-Indictment.

An indictment under Bankruptcy Act July 1, 1898, § 29b (Comp. St. 1916, § 9613), alleging that on a certain date the bankrupt had certain property of a certain value, and that when he became bankrupt, about four months later, the aggregate of all property turned over to his trustee was much less than he owned on the date mentioned, is not defective, as showing that defendant was merely being compelled to make an accounting, and was not charged with a crime.

Criminal Law \$\$\sim 552(1)\$—Evidence of Crime—Necessity of Direct Evidence.

It is not necessary that the commission of a crime should be proved by direct evidence, and it may be proved by circumstantial evidence; that is, by inferences properly drawn from circumstances.

Joseph Greenbaum was indicted for concealing property while a bankrupt, and he demurs to the indictment. Demurrer overruled.

John E. Kinnane, U. S. Dist. Atty., of Detroit, Mich. Selling & Brand, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This matter is before the court on a demurrer to the indictment. The indictment charged the defendant with having knowingly and fraudulently concealed, while a bankrupt, certain property, belonging to the bankrupt's estate, from the trustee in bankruptcy. The gist of the indictment is found in the following allegation therein:

"And the grand jurors aforesaid upon their like oaths further present that on, to wit: the fifth day of July, A. D. 1916, the said Joseph Greenbaum at the city of Detroit in the said division and district and within the jurisdiction of this honorable court, who was then and there a bankrupt as aforesaid, and while he was such bankrupt, did unlawfully, knowingly, and fraudulently and feloniously conceal a certain large portion of his property belonging to the bankrupt estate of the said Joseph Greenbaum from the said Harry C. Moulthrop, trustee as aforesaid of the property belonging to the estate in bankruptcy of the said Joseph Greenbaum, said property then and there consisting of money and merchandise of the value of, to wit, thirty thousand dollars lawful money of the United States, said merchandise comprised in said portion of said property being then and there of the following nature and character, to wit, women's and children's clothing and ready to wear garments, general clothing, dry goods, and merchandise, and being of the general kind and description manufactured and handled at wholesale and retail by said Joseph Greenbaum at his place of business at, to wit, No. 285 Gratiot avenue in said city of Detroit, a more particular description of said merchandise being to these grand jurors unknown, and a more particular description of the denomination, kind, and character of said money being also to these grand jurors at this time unknown-contrary to the form, force, and effect of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Defendant demanded a bill of particulars, specifying and describing the property which he is charged with having concealed, and the place, time, and manner of such concealment. The court having ordered the furnishing of as definite a bill of particulars as was possible, the district attorney filed what he termed "the government's bill of particulars as far as it is now able to furnish such," as follows:

The following is the government's bill of particulars as far as it is now able to furnish such, to wit:

Amount of merchandise and assets on hand per statement of Jan. 1, 1916	
Leaving net assets and property	\$13,325.78 . 3,500.00
Total net worth Jan. 1, 1916	
Total property and assets	\$53,178.21 \$11,000.00
	\$42,178.21

Such bill of particulars also recited that the government was unable to furnish the bill of particulars desired by defendant, because the information demanded by defendant was from the very nature of the case not within the knowledge of the government, but was well known to defendant. It was alleged that the government—

"is unable to state the exact kind, quantity, and value of the merchandise and chattels concealed by defendant, or the portion of such property that was in the form of money, or the kind of money, or denominations thereof, for want of knowledge, such being peculiarly within the knowledge of defendant, upon whom rests the burden of proof to show that he turned over to his trustee all of his assets and to explain the apparent disappearance of property traced to and owned by him."

Defendant thereupon filed a demurrer to the indictment on 16 different grounds, which may be grouped under three heads, as follows: First, that the indictment does not state any crime or misdemeanor punishable under the statutes of the United States; second, that said indictment does not sufficiently decribe the time, place, or manner of the alleged concealment; third, that said indictment does not sufficiently describe the property alleged to have been concealed.

[1] 1. The contention that the indictment does not state any offense punishable under the statutes of the United States is based on the ground that there is no allegation in the indictment that the property alleged to have been concealed was not exempt from execution under the laws of the state of Michigan, wherein the defendant was domiciled for the six months immediately preceding the time of the filing of such indictment, and counsel refers to section 6 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. 1916, § 9590]), which provides that such act—

"shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in

the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The provision of the Bankruptcy Act upon which this indictment is based is found in section 29b (section 9613), which provides, among other things, as follows:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge from his trustee any of the property belonging to his estate in bankruptcy."

The contention of counsel just stated is clearly without merit. If it is the claim of the bankrupt that the property which he is thus charged with having knowingly and fraudulently concealed from his trustee consisted of his exemptions, and that for that reason he could not be guilty of having knowingly and fraudulently concealed such property, that is a matter of defense, to be presented upon his trial.

[2] It will be noted that the section of the Bankruptcy Act on which this indictment is based does not contain any express exception or refer to the exemptions of the bankrupt; and it is well settled that, unless a statute creating an offense so defines such offense that the latter cannot be properly described without negativing an exception, an indictment charging a violation of such statute need not negative the exception. United States v. Cook, 17 Wall. (84 U. S.) 168, 21 L. Ed. 538; Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; United States v. Stone (D. C.) 135 Fed. 392; United States v. Freed (C. C.) 179 Fed. 236. As was pointed out in United States v. Cook, supra:

"Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence."

It is entirely plain that this contention must be overruled.

[3,4] 2. Nor am I able to agree with the contention that this indictment does not specify in detail exactly the time, place, or manner of the alleged concealment, and that it is therefore defective. It will be noted that such concealment is alleged to have taken place at the city of Detroit in this district and on, to wit, July 5, 1916. It therefore certainly cannot be said that the time and place of the alleged offense are not specified in the indictment.

[5] It is urged that the word "conceal" has no such settled technical meaning that its use sufficiently denotes every element necessary to constitute an offense under the statute, and it is insisted that, as section 1a (22) of the Bankruptcy Act of July 1, 1898 (Comp. St. 1916, § 9585), provides that the word "conceal" shall include secrete, falsify, and mutilate," it is not sufficient to allege a concealment by using the word "conceal," without stating how and in what manner the alleged concealment was accomplished.

[6] The purposes of an indictment are to inform the accused, with

reasonable certainty, of the nature of the offense with which he is charged, so that he may make proper preparation for his defense, to enable him to use his acquittal on such charge, if he is subsequently again accused of the same crime, and to enable the court to determine in advance of the trial whether the acts of the accused alleged to constitute a crime would, if proved in court, warrant a conviction for such crime. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. In the language of the Supreme Court in United States v. Cruikshank, supra:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

[7] It is also well settled that an indictment based upon an alleged violation of a statute sufficiently describes the nature of the crime charged against the accused if it follows the language of such statute, unless such language is too indefinite to accurately indicate, without the addition of other words, the essential elements of the alleged crime. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; Evans v. United States, supra; Potter v. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. As was said in Potter v. United States, supra:

"The offense charged is a statutory one, and while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing such an offense (United States v. Carll, 105 U. S. 611 [26 L. Ed. 1135]), yet if such language is, according to the natural import of the words, fully descriptive of the offense, then ordinarily it is sufficient."

Applying this rule to the present case, I think it clear that the word "conceal" is sufficiently descriptive to apprise the defendant of the nature of the crime alleged, without the addition of words to indicate the exact means by which the alleged concealment was accomplished. United States v. Comstock (C. C.) 161 Fed 644; United States v. Rhodes (D. C.) 212 Fed. 513. As was pointed out in United States v. Comstock, supra:

"Under the statute now in question, the mode of concealment is entirely immaterial. \* \* \* By this indictment the defendant is charged with fraudulent concealment of goods, and is given due notice that evidence may be offered against him of various modes of concealment. To require the government to specify a particular mode of concealment would unnecessarily limit it to a particular mode, and deprive it of the right to introduce evidence that all the modes of concealment—the actual hiding of goods, hiding of books, accounts, or documentary evidence, by secreting or mutilating the same, etc.—were used. It is unnecessary to set forth the evidence upon which the government relies, and the defendant, as in ordinary cases, must take notice that any testimony relevant to the question of fraudulent concealment may be introduced against him."

The following language used by the court in Burton v. United States, supra, is applicable here:

"The averments of the indictment were sufficient to enable the defendant to prepare his defense, and, in the event of acquittal or conviction, the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him."

The gist of the offense charged against the defendant is the knowing and fraudulent withholding of property by him, while a bankrupt, from his trustee. If he has so withheld property belonging to the bankrupt estate, as alleged in the indictment, he is guilty of a violation of the section of the Bankruptcy Act in question. Whether such a concealment was accomplished by secreting, falsifying, mutilating, or through other means, is entirely immaterial. The object of this statute is the protection of creditors from unscrupulous debtors, willing to evade the payment of just debts by wrongfully falling to turn over to the bankruptcy court property which in justice and in law no longer belongs to them. Congress has wisely declared such conduct to be a criminal offense, and the courts ought so far as possible to give effect to the obvious meaning of the statute.

If the contention of counsel were adopted, it would place a premium upon the skill with which the concealment of such property was accomplished. The unjust result which would follow can be readily appreciated. If the bankrupt were only clever and skillful enough to succeed in so concealing his property that neither the property nor the means whereby it had been concealed could be discovered, the successful culprit would thereby gain immunity from prosecution and the opportunity to freely enjoy the fruits of his nefarious enterprise. Congress certainly never intended such a result, and the courts should not permit the manifest object of this legislation to be thus thwarted. The contention is overruled.

[8] 3. It is urged that the indictment is defective, because it does not sufficiently describe the property alleged to have been concealed, and it is insisted that the indictment, taken in connection with the bill of particulars, shows that the defendant is not charged with having concealed any specific property properly described, but that this prosecution is merely an attempt by the government to compel an accounting by the defendant through the means of a criminal prosecution.

I do not agree with this contention. It will be noted that the defendant is charged with having knowingly and fraudulently concealed "a certain large portion of his property, \* \* \* consisting of money and merchandise of the value of, to wit, thirty thousand dollars." The general nature of the said property is set forth, and it is alleged that a more particular description thereof is unknown. The bill of particulars shows that the property which the defendant is charged

with having thus concealed is all of the property belonging to him January 1, 1916, except the portion thereof which he subsequently turned over, or accounted for, to his trustee. It seems to me that these allegations so refer to and identify the property alleged to have been concealed as to reasonably inform the defendant as to what particular property is meant, and to protect him, in the event of an acquittal, from a subsequent prosecution on the same charge. From the very nature of this crime, which I have already discussed, it would be exceedingly difficult, if not impossible, for the government in such cases to give a more specific description of the property alleged to have been concealed; and I know of no reason why it should be compelled to do so. In the case of Ripon Knitting Works v. Schreider (D. C.) 101 Fed. 810, the same contention was made, and in overruling it the court used the following language, which seems to me equally applicable to the present case:

"The real point upon which the bankrupt relies is that he was unable to produce evidence, because he was not informed as to what particular property or money was supposed to be abstracted or concealed; in other words, that no particular property or money was described in any pleading on file. This ground of defense is technical, but unavailing. The principles of reason and justice do not exact of those who have incurred losses by extending credit to a dishonest merchant the impossible thing of tracing the proceeds of merchandise which he has handled before compelling him to surrender money in his possession which rightfully should be applied to the payment of their accounts. In this case it is impossible for the trustee or the creditors to identify the pieces of money which have come to the bankrupt's hands, or to identify or describe the particular pairs of shoes which were sold for money which the bankrupt now conceals; and, being impossible, it is unnecessary."

[9] Nor do I agree with the contention that the defendant is merely being compelled to make an accounting, and is not charged with a crime. The government alleges that on the 1st of January, 1916, the bankrupt had in his possession certain property, having a certain value, and that when he became a bankrupt, about four months later, the aggregate of all of the property which he turned over to his trustee was much less than what he had owned on the date first mentioned. Necessarily, therefore, if these allegations are true, either the bankrupt had lost or disposed of the missing property between such date and the date of his bankruptcy, or else at the time that he turned over to the trustee what purported to be all of the property belonging to his estate in bankruptcy he concealed this missing property. There can be no escape from this conclusion. If the defendant can satisfactorily explain this shortage, by accounting for its disappearance before he became a bankrupt, he cannot, of course, be convicted of concealing such property from his trustee. If, however, it is shown that he cannot account for such shortage, the necessary inference would be that he has withheld—that is, concealed—this property from his trustee. Stern v. United States, 193 Fed. 888, 114 C. C. A. 102. As was said in the case just cited:

"It is difficult to imagine circumstances under which the burden of explaining a fact or situation would be more clearly and peremptorily cast upon those charged with a criminal offense than was the burden in this case cast

upon the defendants to account for the disposition of the large sum of money traced as coming into the hands of those defendants."

It is well settled that in bankruptcy proceedings, either on application for a discharge or on summary order to deliver assets to the trustee, when it is shown that shortly before the filing of the petition in bankruptcy the bankrupt owned certain property, and that such property was not subsequently accounted for or turned over to the trustee, these facts justify the inference that such property has been concealed by the bankrupt. In re Meyers (D. C.) 96 Fed. 408; In re Finkelstein (D. C.) 101 Fed. 418; In re Boyden (D. C.) 132 Fed. 991; In re Jacobs & Verstandig (D. C.) 147 Fed. 797; In re Lasky (D. C.) 163 Fed. 99. As was said in Re Meyers, supra:

"When, as in the case of this firm, a large shrinkage or disappearance of assets within a short period preceding failure cannot be explained in any rational or intelligible manner, the inference is justified of a fraudulent withdrawal and concealment of assets."

In the language of In re Lasky, supra:

"The property of a bankrupt estate, traced to the recent control or possession of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. \* \* \* \* A merchant should not be permitted to shut his eyes to the disappearance of his goods, and when called upon by the court to account therefor escape the penalty of the law by simply saying: 'I have not the goods. I have no money.'"

[10] I see no reason why this same rule should not apply to the present case. If the tracing of property into the hands of a bankrupt before his bankruptcy, coupled with proof of his failure to account for such property afterwards, warrants, in a civil proceeding, an inference of fact that the bankrupt has concealed such property, it would seem to logically follow that the same evidence may warrant the same inference in a criminal proceeding, provided, of course, that it satisfies the jury beyond a reasonable doubt of the fact to be proved. It is not necessary that the commission of a crime should be proved by direct evidence. It may be proved by circumstantial evidence; that is, by inference properly drawn from circumstances. This court cannot say that if, on the trial of the defendant here, the government prove circumstances from which an inference of concealment may properly be drawn, the jury would not be justified in finding defendant guilty of the crime charged. As was pointed out by the court in Stern v. United States, supra:

"We may assume, from our knowledge of human affairs and human conduct, that the offenses denounced by the Bankrupt Law and set forth in the indictments are not such as can be readily proved by direct testimony. The very description of the offense indicates that this must be true. 'Concealment' is the very essence of the conduct denounced by the law, and a court and jury, in administering this law, are not dealing with open and flagrant acts of the defendant, but with the fact of concealment itself. The evidence, therefore, in such cases, must accommodate itself to the issue to be tried, and be such as in the practical affairs of life tends to produce belief and conviction in the minds of those to whom such evidence is addressed."

I am satisfied that the allegations of this indictment, taken in connection with the bill of particulars, are sufficient to inform the defend-

ant of the nature of the offense with which he is charged, to enable him to prepare his defense, to protect him against a subsequent prosecution on the same charge, and, if established by proper evidence, to show a violation of the statute in question. As was said by the Supreme Court, speaking through Mr. Justice Brown, in Evans v. United States, supra:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove."

The demurrer is overruled.

#### THE KONGSLI.

(District Court, D. Maine. July 15, 1918.)

# No. 437.

- 1. Admiralty \$\iff 26\to Process of Foreign Court\to Proceeding in Personam.

  A suit in the French Tribunal of Commerce at Oran, Algeria, by the master of a British vessel against the master of a Norwegian vessel, claiming damages for collision, in which that tribunal ordered a "protective seizure," and received a letter of indemnity, and released the vessel from attachment, was a suit in personam, and not a proceeding in rem.
- 2. Admiralty =26-"Action in Rem"-"Action in Personam"-Distinction.

"Actions in rem" are prosecuted to enforce a right to the thing arrested, to perfect a maritime privilege or lien attached to a vessel or cargo, or both, and in which the thing to be made responsible is proceeded against as the real party; and "actions in personam" are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction, and in which the process and proceedings are different from those in an action in rem.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Personam; In Rem.]

3. Admiralty \$\infty\$ 16-Proceeding in Rem-Jurisdiction.

The courts of the United States recognize liens in rem arising out of maritime collisions, and possess the procedure to enforce them, and will do so, even where a collision occurred in the territorial waters of a country whose law does not give such maritime lien against the offending vessel.

ABATEMENT AND REVIVAL ⇐⇒13—Pending Proceeding in Foreign Courts
—Effect.

The pendency of an action in a foreign court is no bar to a suit in the federal court, though it is otherwise if a definitive judgment has been rendered by the foreign court in such suit.

5. Admiralty =28-Lien-Action in Rem.

The owner of a vessel has a lien arising out of a collision, given by the general maritime law of the United States, which may be enforced by an action in rem.

6. Admiralty \$\infty 35\to Action in Rem-Foreign Law.

The laws of the United States are supreme in the United States courts over the French law; and there is no reason, under the principle of re-

ciprocity, for dismissing a libel growing out of a collision in French waters, and leaving the question to the French court, in which a previous action in personam has been brought, which has not proceeded to judgment.

7. Admiralty &=1—Jurisdiction—Maritime Usages of Foreign Countries.

The maritime usages of foreign countries are not obligatory upon the courts of the United States, and will not be respected as authority, except so far as they are consonant with the well-settled opinions of English and American jurisprudence.

8. Admiralty 55-Proceeding in Rem-Effect of Proceedings in Forkign Court-Letter of Indemnity.

A letter of indemnity, taken after a "protective seizure" by the French Tribunal of Commerce in Oran, Algeria, upon which a vessel was released from attachment arising out of a collision, did not have the force of a bond given to discharge a vessel arrested upon a suit in rem, in which latter case the bond discharges the lien, releases the vessel, and takes the place of the vessel itself.

In Admiralty. Libel by the Kincraig Steamship Company, Limited, against the Norwegian steamship Kongsli. Claimant's exceptions to the libel, and its alternative motion to dismiss the libel, overruled.

Kirlin, Woolsey & Hickox, of New York City, and Benjamin Thompson and Nathan Thompson, both of Portland, Me. (John M. Woolsey, of New York City, of counsel), for libelant.

Duncan & Mount, of New York City, and Wm. H. Gulliver, of Portland, Me., specially, for respondent.

HALE, District Judge. On February 6, 1917, the British steamship Kincraig, owned by the Kincraig Steamship Company, Limited, a British corporation, and the Norwegian steamship Kongsli, came in collision in the harbor of Oran, Algeria. A suit was begun in the Tribunal of Commerce at Oran by Capt. Abbott, master of the Kincraig, against Capt. Olsen, master of the Kongsli, claiming damages to the Kincraig, including damages for delay. Another suit was brought by the Oran Coal Company, owner of some coal barges injured in the collision, against both the master of the Kincraig and the master of the Kongsli. On February 15, 1917, Capt. Abbott in his suit petitioned the court for a "protective seizure" of the Kongsli for 225,000 francs, and such seizure was ordered; on February 17, 1917, the "protective seizure" was made and reported by the court officers. The seizure was also made at the same time on behalf of the suit of the Oran Coal Company. On February 23d it appears by a letter of indemnity that a guaranty in the sum of £20,000 was received to cover "the responsibilities and consequences which may be determined, owing to the collision which occurred on the 6th of February." It appears that the Kongsli was on that day released from attachment. On February 7, 1917, the Tribunal of Commerce by decree appointed three experts, former sea captains, to examine and report to the court on the extent of the damage to the coal barges and coal, and also on the extent of the damage to the Kincraig, including loss of time, and the liability therefor. These experts made an examination of certain facts, and afterwards made a report to the court, in which they state their conclusions, as follows:

"That it is difficult to cast on the steamer Kongsli the entire responsibility of all the damages caused by the breaking of its moorings as much to the Kincraig as to the barges, and, admitting that there would be doubt about the efficiency of its mooring, we think in our minds and consciences that its responsibility must be very greatly lessened in reason of the atmospheric conditions, first causes of the accidents, both the violence and unexpectedness of which may constitute an accidental case foreseen by the lawmaker."

The case at Oran has not proceeded to trial and judgment. After being released by the letter of indemnity, the Kongsli proceeded to sea.

On March 22, 1917, this libel, brought by the Kincraig Steamship Company, Limited, the owner of the steamship Kincraig, against the Kongsli, was filed in the District Court for the District of Maine; the steamship having come into this jurisdiction. On the same day the vessel was arrested by the marshal. Bond was given in the sum of \$140,000, and the Kongsli was released, and again proceeded to sea. This bond takes the place of the ship.

The case now comes before the court on the exceptions of the claimant to the libel, on the ground that the libelant already had a suit against the Kongsli for the same cause of action for which the present libel is brought, on which suit there had been an attachment and release of the vessel on the giving of guaranty, that the ship was thereby made free and clear of all liens for the claim of damage to the Kincraig, and from the alleged lien, to enforce which the present suit was brought, and that the present suit and seizure of the ship are vexatious. An alternative motion is also made by the claimant to dismiss the libel. This motion is said to be addressed to the discretion of the court.

The libelant has moved to strike out the exceptions, on the ground that they do not come within the rule as to the scope and purpose of exceptions, but that the question raised by the claimant should be presented by a motion to dismiss with proofs. Without entering into a discussion as to the technical objections to the exceptions, I will consider the question involved to be before the court on the motion.

Does the fact that proceedings are pending in Oran, Algeria, consti-

tute a bar to the proceedings here?

[1-4] Upon an examination of the facts in the case, it does not appear that the proceeding in the French court in Oran, Algeria, was a proceeding in rem. Indeed, there appears to be nothing in the law of procedure in France which corresponds with, or is similar to, a proceeding in rem for collision under American or English law. The suit at Oran was a suit in personam to enforce a claim for negligence. In that suit a "protective seizure" was made; that is, substantially, an attachment of the steamer. So far, then, as appears, the suit was not against the ship itself. It was a proceeding by attachment. So far as anything is shown, any other property might as well have been attached to secure the claim in question. It cannot be said that by the suit in the French court the same matters are brought at issue which are brought at issue in this suit. The difference between the two proceedings has been repeatedly recognized in our courts. Wolf v. Cook (C. C.) 40 Fed. 432, 438; The Sabine, 101 U. S. 384, 391, 25 L. Ed. 982. In the latter case, in speaking for the Supreme Court, Judge Clifford said:

"Actions in rem are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party; but actions in personam are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

While, apparently, the French courts do not possess any procedure designed to enforce a lien in rem arising out of a maritime collision, the courts in our country do recognize such liens; they have the machinery to enforce them, and will enforce them, even where the collision occurred in the territorial waters of a country whose law does not give such maritime lien against the offending vessel. It is the prevailing doctrine of our courts that the pendency of an action in a foreign court is no bar to a suit in the federal court. If a definitive judgment has been rendered in such suit in the foreign court, it is, of course, otherwise. The Eagle, 8 Wall. 15, 26, 19 L. Ed. 365; The Kalorama, 10 Wall. 204, 218, 19 L. Ed. 941; The Isabella, 13 Fed. Cas. No. 7,100; Elder Dempster Shipping Co., Limited, v. Pouppirt, 125 Fed. 732, 740, 60 C. C. A. 500; The Kaiser Wilhelm II (D. C.) 175 Fed. 215, 219; The Kaiser Wilhelm II (D. C.) 230 Fed. 717, 723; The Maggie Hammond, 9 Wall. 435, 461, 19 L. Ed. 772. The Bold Buccleugh, a leading English authority, has been repeatedly relied upon in our courts. That case is found under the name of Harmer v. Bell, 7 Moore (Privy Council) 267, 19 L. T. 235. The bark William was run down in the River Humber by the Bold Buccleugh, and lost. The owners of the William brought suit against the owners of the Bold Buccleugh in the Court of Sessions in Scotland. The steamer was arrested in Leith Harbor; on bail being given to answer the action in that court, she was released. She returned to Hull and was there again arrested by virtue of a warrant under the seal of the High Court of Admiralty; an action in rem was commenced in that court, and instructions sent to Scotland to abandon the suit in the Court of Sessions. The owners of the Bold Buccleugh appeared under protest. Dr. Lushington, the judge of the High Court of Admiralty, overruled the plea of the owners of lis alibi pendens. The Privy Council affirmed the decision. In speaking for the court, Sir John Jervis said:

"The pleadings show that the proceedings in Scotland were commenced by process against the persons of the defendants, and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding in rem differs from one in personam, and it follows that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."

The learned proctors for the claimant have brought to my attention certain recent English authorities which seem to take a different view. They have cited The Christiansborg (in the Court of Appeal, 1885) 10 Probate Div. 141; The Hagen (Court of Appeal, 1908); The Jasep (1896) 12 Times Law Reps. 375, affirmed by Court of Appeal 12 Times Law Reps. 434. These later cases do not overrule The Bold Buccleugh, but treat the question from a different point of view. The

Bold Buccleugh has always been regarded as an authority, and is in the line of our American decisions. The Supreme Court recognizes it as sound law in courts exercising admiralty jurisdiction. The John G. Stevens, 170 U. S. 113, 127, 18 Sup. Ct. 544, 42 L. Ed. 969; The Elfrida, 172 U. S. 186, 206, 19 Sup. Ct. 146, 43 L. Ed. 413. In The Robert W. Parsons, 191 U. S. 17, 37, 24 Sup. Ct. 8, 15 (48 L. Ed. 73) in speaking for the Supreme Court, Mr. Justice Brown said:

"In all these cases the distinction is sharply drawn between a commonlaw action in personam, with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding in rem against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule 2 declaring that in suits in personam the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for'; and rule 9, that in suits and proceedings in rem the process shall be by warrant of arrest of the ship, goods or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts."

Marsden, on Collisions at Sea, at pages 88 and 165, refers to The

Bold Buccleugh as a leading authority.

[5-7] In the case at bar the libelant has a lien given by the general maritime law of the United States. Such lien may be enforced by an action in rem. This right is given by the laws of the United States; and the laws of the United States are supreme in our courts over French law. There appears, indeed, to be no reason in French law, under the principle of reciprocity, for dismissing the libel and leaving the question to the French courts, in a case which has not already proceeded to judgment. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. The maritime usages of foreign countries are not obligatory upon the courts of the United States, and will not be respected as authority, except so far as they are consonant with the well-settled opinions of English and American jurisprudence. This is well settled by the Supreme Court. The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413.

[8] In the case in the French court in Algeria, the letter of indemnity upon which the vessel was released from attachment did not have the force of a bond given to discharge a vessel which has been arrested upon a suit in rem. In the latter case, the bond discharges the lien and releases the vessel, because the bond is a substitute for the vessel. The guaranty of the bond takes the place of the vessel itself. The letter of indemnity given in the case at Oran was not such a bond; for the suit was not a suit in rem. If the suit had been a proceeding in rem, and the vessel had been released upon a bond taking the place of the ship and becoming a substitute for the ship, then there would have been ground for holding that this further suit, brought in the Maine district, might be a vexatious proceeding; but the facts in

the case at bar do not sustain the contention of the claimant.

The libelant by its proctors has formally offered to dismiss the pro-

ceeding in the French court. The claimant has not satisfied me that I have a right to dismiss this suit in the Maine district, and leave the parties to their remedy in the French court. In coming to this conclusion, I do not find it necessary to consider whether the exceptions properly raise the question sought to be raised by them. The motion to dismiss, although directed to my discretion, may be regarded as raising the whole question, and as properly presenting the facts.

The exceptions are overruled; the motion to dismiss is overruled.

## In re ANDERSON.

# Petitions of TODD-MELLOR CO.

(District Court, D. Rhode Island. July 27, 1918.)

No. 1573.

1. Bankruptcy ← 184(2)—Preferential Transfer—Record—"Required."

Under Bankruptcy Act July 1, 1898, §§ 60a, 60b (Comp. St. 1916, § 9644), avoiding preferential transfers by an insolvent recorded within four months before bankruptcy proceedings, "if by law such recording \* \* \* is required," the word "required" does not mean required for any purpose, and, in view of Gen. Laws R. I. 1909, c. 253, § 2, making an unrecorded mortgage as between the parties valid the mere failure to record is insufficient evidence of a tacit agreement between the bankrupt and the mortgagee to withhold it from record for improper purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Require.]

- 2. Mortgages \$\infty\$25(6)—Consideration—Presumption.

  The presumption is that a mortgage is for a present consideration.
- 3. Bankruptcy \$\sim 342\frac{1}{2}\sim Evidence\rightarrow Record.

On petitions to review referee's order disallowing a mortgagee's claims for payment out of proceeds of mortgaged realty sold free and clear of liens, testimony of bankrupt before referee, not properly a part of the record on the petitions, might be disregarded.

- 4. BANKRUPTCY \$\infty 340-Preference-Notice to Creditor-Evidence.
  - On petitions to review referee's order disallowing claims for payment out of the proceeds of mortgaged realty sold free and clear of liens, evidence *hėld* to sustain referee's conclusion that the creditor, immediately receiving the proceeds of the mortgage, had reasonable cause to believe that a preference was intended.
- 5. BANKRUPTCY \$\infty 342\forall\_-Loan to Bankrupt-Intent-Evidence.
  - On petitions to review referee's order disallowing claims for payment out of the proceeds of mortgaged realty, sold free and clear of liens, evidence *held* to support referee's finding that the loan was sought and made to procure funds to prefer a creditor, and to pay its claim in full.
- 6. Bankruptcy \$\sim 342\frac{1}{2}\$—Hearing Before Referee—Weight of Evidence.

  The credit which should be attached to oral testimony of witnesses appearing before the referee, and the weight which he should attach to sweeping denials of actual knowledge of matters concerning which knowledge or inquiry were to be expected, are matters to be finally determined by him.

In Bankruptcy. In the matter of Alma C. Anderson, bankrupt. Two petitions by the Todd-Mellor Company to review orders of the

referee. On petition No. 1, order reversed, and petitioner's claim allowed; and on petition No. 2, order affirmed.

Crane, Munro & Barry, of Providence, R. I., for petitioners.

BROWN, District Judge. These petitions seek to review the orders of the referee disallowing claims for payment out of the proceeds of real estate subject to mortgage; the real estate having been sold free and clear of liens.

The first question is as to the validity of the claim based upon a mortgage to Albert J. Eastwood, dated November 15, 1912, and record-

ed February 10, 1916.

The petition in bankruptcy was filed March 13, 1916, and adjudicated

March 27, 1916.

The transfer of the mortgage by Eastwood to Todd-Mellor Company, the petitioner, is dated March 6, 1916, and was recorded March 11, 1916, two days before the filing of the petition in bankruptcy.

The evidence reported is insufficient to show any ground for impeaching the Eastwood mortgage, except the fact that it was withheld from record. There is a failure of proof to show that it was not given for full consideration, or that the bankrupt was then insolvent.

[1, 2] Under chapter 253, § 2, of the General Laws of Rhode Island, a mortgage as between parties, though unrecorded, is valid. In applying sections 60a and 60b of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1916, § 9644]), the referee seems to have followed those cases which interpret the clause contained in section 60a, "if by law such recording or registering is required," to mean required for any purpose. This is contrary to the decision in Carey v. Donoghue, 240 U. S. 430, 437, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295. The presumption is that the mortgage was for a present consideration, and unless the failure to record it can be regarded as sufficient evidence of a tacit agreement to withhold it from record for improper purposes, thereby making it in effect a fraudulent transaction, there seems to be no ground for holding it invalid, since it was recorded February 10, 1916. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 276, 36 Sup. Ct. 50, 60 L. Ed. 275; Remington on Bankruptcy, § 12703/10.

I am of the opinion that the mere fact of failure to record is insufficient, in the absence of other circumstances, to show fraud, in which the bankrupt and the mortgagee, Eastwood, participated, and that in the hands of Eastwood the mortgage, so far as appears, was valid.

It follows that the Todd-Mellor Company could rightfully purchase it, that the transfer to the Todd-Mellor Company of this mortgage was not prejudicial to creditors, and that under the transfer from Eastwood it is entitled to claim rights as a third mortgagee in the funds remaining after the satisfaction of the prior mortgages.

[3-5] The second question is as to the validity of the \$1,600 mort-

gage to the Todd-Mellor Company.

This mortgage was executed February 15, 1916, and was to secure payment of a note for \$1,600. After deducting interest and a 10 per 252 F.—18

cent. commission, the proceeds received from the \$1,600 mortgage amounted to \$1,392. This money was immediately applied to the payment of notes held by the Italo-American Mutual Trust Company, together with a small additional amount. The effect of this was to prefer that company and to pay it in full.

The question is whether, upon the evidence, the referee was justified in applying Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, which holds that, where an advance is made to enable the debtor to make a preferential payment, the transaction presents an element upon which fraud may be predicated. As was said in that case:

"It is a question of fact in each case what the intent was with which the loan was sought and made."

The evidence seems sufficient to support the referee's finding that the loan was sought for the purpose of procuring funds to pay the Italo-American Company, and the purpose to which it was immediately applied is in itself evidence of the intent with which it was sought. There is some confusion in the record, and the petitioner objects to the consideration by the referee of testimony given by the bankrupt before him. As it does not appear that this is properly a part of the record upon these petitions, this objection seems well taken, and this evidence may be disregarded.

In the record proper appears, however, the testimony of Albert S. Eastwood, a creditor (not the mortgagee under the earlier mortgage), which was given at the hearing at which the petitioner was represented by counsel. From his testimony it appears that in a conversation with Bassett, treasurer of the bank, the witness stated that "he thought the Andersons were in a pretty bad way," and talked with the treasurer as to whether "we could get out some way together." This was but a short time before the Todd-Mellor loan to Anderson and the payment to the bank.

I find no error in the referee's conclusion that the bank had reasonable cause to believe that a preference was intended. That the efforts to secure a loan followed so shortly after this conversation, together with the fact of the immediate application of the proceeds, is in itself sufficient to warrant an inference that pressure was exerted by the bank to secure payment.

Upon the question of the intent with which the loan was made the evidence is circumstantial. The property offered as security for the loan was already heavily incumbered, beyond the ordinary margin of security, and the new loan sought was for an amount which practically covered, if it did not exceed, any possible equity in the real estate. A commission of 10 per cent. was charged, in addition to interest, and Mr. Todd, the president of the Todd-Mellor Company, testified, explaining this commission: "It was a chance, and we were getting well paid for it." In reply to the question: "Q. Greater chance than you usually take?" he said: "In the ordinary course of business, but we do take them from time to time."

Under all the circumstances, and in view of the prior unrecorded mortgage, the referee was entitled to find that the mortgage was not

taken in the ordinary course of business, but for some exceptional reason.

That a mortgage of this character was taken upon such doubtful security, without inquiry as to the personal responsibility of the maker of the note, and as to whether the proceeds of the note were to be applied to the reduction of the borrower's other indebtedness, thus increasing the personal responsibility of the borrower, seems improbable.

Mr. Todd was a director and the secretary of the Italo-American bank, and his attorney, Mr. Ball, who examined the title, was also a director. It is improbable that the mortgagor sought a loan from a director of the bank with any intent of concealing the obligations to the bank; and it seems much more probable that the intent to apply the proceeds of the mortgage to the payment of the bank was stated as an inducement to secure the loan than that it was not stated, or that it was concealed from Mr. Todd. The unusual character of the security offered would naturally have led a business man of sagacity to make full inquiries, and the omission of the natural inquiry is hardly explainable, except upon the theory that the lender preferred not to be informed or to receive any notice which might affect the validity of his security.

What is in fact done by concurrent acts tends in itself to prove what was prearranged. The bank, after notice putting it on guard, secured its preference; the bankrupt borrowed the money applied to making this preference from a director and secretary of the bank, after the

examination of the title by another director of the bank.

[6] The credit which should be attached to oral testimony of witnesses appearing before him, and the weight which he should attach to sweeping denials of actual knowledge of matters concerning which knowledge or inquiry were to be expected, were matters to be finally determined by the referee. Upon a careful reading and examination of the testimony of Mr. Todd, I agree with the referee's finding that there are improbabilities in Mr. Todd's testimony. The referee heard this testimony, and I am unable to say that he erred in refusing to give credit to repeated denials of knowledge usually required in the course of dealings between mortgagor and mortgagee where the security is doubtful.

In the absence of any credible explanation from the lender, the nat-

ural inference may be drawn from the circumstances.

The case in its general aspects is not unusual. In cases of preference, all knowledge of any intent to prefer or to assist in bringing about a preference is usually denied. The chief reliance must be upon circumstantial evidence, interpreted in the light of experience as to the ordinary methods adopted by creditors, who seek a larger share of a bankrupt's assets than can be secured under a system of administration which calls for equality.

Upon a careful consideration of the very thorough briefs of counsel for the petitioner, I am of the opinion that the following orders

should be made:

In petition No. 1, relating to the proceeds of the Eastwood mortgage, the order of the referee is reversed, and the claim of the Todd-

Mellor Company for the amount of principal still due on the Eastwood mortgage, with interest to July 11, 1916, amounting to \$1,126.42, is allowed, subject to correction upon entry of decree of computations, and to deduction for the actual proportional expense of sale, but without deduction of any of the general expenses of the bankruptcy proceedings.

In petition No. 2, as to the mortgage to the Todd-Mellor Company,

the order of the referee is approved and affirmed.

Draft decrees may be presented accordingly.

# AMMON & PERSON v. NARRAGANSETT DAIRY CO., Limited.

(District Court, D. Rhode Island. July 31, 1918.)

### No. 74.

1. Trade-Marks and Trade-Names \$\infty\$=93(3)-Infringement-Evidence.

in suit to restrain defendant from using the word "Queen" as a trademark for oleomargarine, held, under the evidence, that plaintiff was entitled to injunction against infringement of trade-mark "Queen of the West," and against the use of the word "Queen" in connection with sale of oleomargarine.

2. TRADE-MARKS AND TRADE-NAMES 5-61 - INFRINGEMENT - WHAT CONSTI-

TUTES.

The rules applicable to the use of the same name on distinct kinds of goods are inapplicable in cases where the product is the same, and the only difference is in the size or form of the receptacle or package in which the product is sold.

3. Trade-Marks and Trade-Names \$35(5)-Infringement-What Con-STITUTES.

The unnecessary adoption of a part of plaintiff's trade-mark, a part so substantial as to have become a trade-name or nickname for the goods, is generally regarded as an infringement.

4. TRADE-MARKS AND TRADE-NAMES \$\sim 59(5)\$—INFRINGEMENT—WHAT CON-

The use by a defendant of a trade-mark identical with a name which has been derived from plaintiff's trade-mark proper, and has become sufficiently descriptive of plaintiff's goods, is the adoption of a mark which will cause its goods to bear the same name in the market.

5. TRADE-MARKS AND TRADE-NAMES 57-INFRINGEMENT-WHAT CONSTI-TUTES.

Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains, despite the change.

In Equity. Bill by Ammon & Person, a corporation, against the Narrangansett Dairy Company, Limited. Decree for plaintiff.

Edwards & Angell, of Providence, R. I., for plaintiff.

Wilson, Gardner & Churchill, of Providence, R. I., for defendant.

BROWN, District Judge. This is a bill in equity to restrain the defendant from using the word "Queen" as a trade-mark for oleomargarine. The defendant, by counterclaim, seeks a similar remedy against the use of the word "Queen" by the plaintiff.

The plaintiff, Ammon & Person, is a corporation of the state of

New Jersey, having its principal place of business in Jersey City, and the defendant, Narrangansett Dairy Company, Limited, is a corporation of the state of Rhode Island, with its principal business at Prov-

idence, R. I.

It is proved that the plaintiff's predecessors had applied the trademark "Queen of the West" to oleomargarine sold by them before September 30, 1891, and that the plaintiff has continued to use that trademark for many years. The defendant has proved that from 1909 to 1915 the Narragansett Dairy Company, an earlier Rhode Island corporation, used the word "Queen" alone as a trade-mark for oleomargarine. Afterwards, on February 8, 1912, the plaintiff filed its application for registration of the trade-mark "Queen," which was registered April 21, 1914.

Upon its reply brief the plaintiff says:

"The defendant is in no worse position, and the plaintiff is in no better position, by reason of the registration of the word 'Queen,' so far as this proceeding is concerned, than if it had not registered the word."

[1] The primary question is whether the evidence of its long-established use of the words "Queen of the West," applied to oleomargarine, is sufficient ground for an injunction against the subsequent use of the word "Queen" by the defendant, or would have been sufficient against the former Narragansett Dairy Company, which began such use in 1909. For the decision of this question it is unnecessary to determine whether the defendant has succeeded to the rights, if any, of the earlier Narragansett Dairy Company. It is true that a question of estoppel is raised, and the testimony of officers of the former Narragansett Dairy Company and of the vice president of the plaintiff was offered on that issue. This testimony was given orally, and it appeared to me that witnesses on each side were testifying as to matters of which they had a very indistinct recollection. From this testimony I am unable to find that the use of the word "Queen" by the earlier Narragansett Dairy Company was brought to the attention of the plaintiff in 1909 or 1910, or that there was any discussion concerning a slip of paper upon which was written in pencil the word "Queen." The witnesses on both sides were testifying to matters occurring seven or eight years before, their recollection was far from clear, and the testimony does not satisfy me that there was any notice to the plaintiff, or inaction on its part, or knowledge sufficient to support the defense of estoppel even were the defendant entitled to rely upon any estoppel of the plaintiff against the former Narragansett Dairy Company, which it is unnecessary to decide.

The plaintiff has proved, not only the use of the words "Queen of the West" as a trade-mark proper applied to receptacles for oleomargarine, but produces a number of trade circulars in which its product is referred to by the shorter name "Queen," and has also produced testimony to the effect that it was common for customers to describe plaintiff's goods by the shorter name. This testimony is credible, and according to common experience; and this preceded any other use of

the word "Queen" alone in connection with oleomargarine.

While there is some uncertainty in the evidence as to the sale of

goods by the plaintiff with the word "Queen" alone affixed thereto before the date of the application for registration, February 8, 1912, the evidence shows the earlier use of the word "Queen" alone as a trade-name descriptive of plaintiff's goods—a trade-name derived from the plaintiff's technical trade-mark, "Queen of the West."

The plaintiff, having associated its goods with the word "Queen," whether used alone as a trade-name or as a part of the entire trade-mark "Queen of the West," contends that the use of the name "Queen" by defendant as a trade-mark has such obvious tendency to confusion of the goods of the plaintiff with the goods of the defendant as to make such use by the defendant an infringement of its prior right.

[2] There is much testimony in the case as to the different forms of packages to which the words "Queen of the West" and "Queen" were applied; but, as they were all applied to the same product, oleomargarine, I think no substantial distinction can be based upon differences in the packages, or upon the respective dates at which plaintiff and defendant, or the former Narragansett Dairy Company, applied the word "Queen" to cartons or cases rather than to tubs. The rules applicable to the use of the same name on distinct kinds of goods seem inapplicable in this case, where the product is the same and the only difference is in the size or form of the receptacle or package in which the product is sold.

There is much discussion as to whether the word "Queen" is the "dominant" word of the trade-mark; but it is enough to say that it is so substantial a part of the trade-mark that, without the qualifying words "of the West," it has been extensively used as a sufficient description of the product to which is applied the whole trade-mark

"Oueen of the West."

[3-5] The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or nickname for the goods—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, and has become sufficiently descriptive of plaintiff's goods, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes. Hopkins on Trade-Marks, etc. (3d Ed.) § 138, p. 321, and section 113, p. 279; Saxlehner v. Eisner, Mendelson Co., 179 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60; Thomas G. Plant v. May Co., 105 Fed. 375, 44 C. C. A. 534; Gordon's Dry Gin Co., Ltd., v. Eddy & Fisher Co. (D. C.) 246 Fed. 954.

Whether, upon the evidence in this case, the plaintiff is entitled to rely upon infringement of its registered trade-mark "Queen," applied for February 8, 1912, seems doubtful, in view of the uncertainty as to whether the word "Queen" alone had ever been affixed to goods sold by the plaintiff before that date. There is, however, sufficient evidence that before that date it had been used as a trade-name not affixed to goods. The trade-mark up to that time appears to have been the full term "Queen of the West." While it is not impossible

that under special circumstances the two marks, "Queen" and "Queen of the West," might subsist as distinct and equally valid trade-marks, sufficiently differentiated by the circumstances under which they had become known to the trade, I am of the opinion that it is not so in the present case, and that the defendant's counterclaim must be dismissed. The plaintiff's right in the present case seems to rest upon infringement of its unregistered trade-mark "Queen of the West" and of its trade-name, rather than upon any rights which it may have acquired by registration of the word "Queen."

As the case is presented, it seems doubtful whether the plaintiff is entitled to statutory remedies provided in sections 19 and 20 of the Trade-Mark Act of February 20, 1905 (33 Stat. 729, c. 592 [Comp. St. 1916, §§ 9504, 9505]), as amended by Act March 2, 1907, c. 2573, 34 Stat. 1251, and Act Feb. 18, 1911, c. 113, 36 Stat. 918, and Act Jan. 8, 1913, c. 7, 37 Stat. 649 (Comp. St. 1916, §§ 9490, 9491), which re-

late to registered trade-marks.

The bill, however, is between citizens of different states and contains allegations of proper jurisdictional amount, and is sufficient as

a bill for an unregistered trade-mark.

The evidence fails to show that the defendant has adopted the word "Queen" with any intention of deceiving the public, or of appropriating the plaintiff's good will or trade reputation. The word "Queen" was used by the defendant apparently in good faith and in reliance upon its former use by the earlier company, which had used it since 1909. Mr. H. E. Possner, testifying as to the adoption of the word "Queen" at that time, said: "We simply thought of it; that is all."

There is no evidence in the case to show that in fact the goods of the defendant were ever mistaken for those of the plaintiff, or that any person was ever deceived in the purchase of oleomargarine by the use of the defendant's marks, or that the defendant has interfered with the plaintiff's market, or deprived it of any profits, or to show any elements of actual fraud.

I am of the opinion that the plaintiff is entitled to an injunction against infringement of the plaintiff's trade-mark "Queen of the West," and against the use of the word "Queen" in connection with the sale of oleomargarine. Whether it is also entitled to an accounting, and to the destruction of prints, etc., under the provisions of the registration act, or to other relief, seems doubtful. Straus v. Notaseme Co., 240 U. S. 179, 36 Sup. Ct. 288, 60 L. Ed. 590. Upon these questions, however, counsel may be heard upon the settlement of a decree.

A draft decree may be presented accordingly.

### ATKINS v. GARRETT.

(District Court, W. D. Louisiana, July 16, 1917.)

#### No. 1075.

- 1. Sales —101—Rescission—Grounds—Nonpayment of Purchase Price.

  That, plaintiff seller filed suit for judgment on note given by defendant buyer for stock would not be an affirmance, estopping plaintiff, after dismissing such suit, from suing for a rescission for nonpayment of purchase price, in view of Civ. Code La. art. 2564, as to dissolution of sale taking place on nonpayment of purchase price.
- 2. Sales \$\iff 96\to Suit\$ for Rescission\to Interest of Seller.

  That plaintiff, seller, prior to institution of suit for rescission, had disposed of identical certificate covering shares of stock sold to defendant, would not bar suit for lack of interest, where plaintiff owned other stock more than sufficient to cover shares sold to defendant, and defendant in said suit for rescission set up demand for damages for wrongful conversion and sale of certificate.
- 3. Sales \$\iff 103\)—Rescission—Condition Precedent.

  Tender of dividends received by seller on stock sold by him to defendant, and by defendant pledged as security for purchase price, was not a condition precedent to suit to rescind for nonpayment of purchase price.
- 4. Sales 599—Rescission—"Of Right."

  Defendant, buyer, would not, four months after institution of suit by plaintiff, seller, for rescission for nonpayment of purchase price, have right to make payment of note given for purchase price and demand surrender of stock sold, but held by plaintiff as collateral, in view of Civ. Code La. art. 2564, as to dissolution taking place "of right"; that is, as a matter of course.
- 5. Sales \$\iff 99\to Pledges\to Right of Private Sale.
  Civ. Code La. art. 3165, as to pledgee having no right to sell at private sale, where right so to do is not given, does not affect the right of pledgee, where stock was pledged to secure payment of purchase price, from exercising his right to demand a resolution of the sale for nonpayment of price.

In Equity. Suit by J. W. Atkins against L. C. Garrett. Judgment for plaintiff.

This is a suit at law for the rescission of a contract of sale of 50 shares of stock of the Lenzburg-Crichton Oil & Gas Company for nonpayment of the purchase price, represented by the note of the purchaser for \$5,000, the payment of which was secured by the 50 shares of stock as collateral. A trial by jury was waived and the case submitted to the court.

It appears from the admissions and the evidence adduced that on June 25, 1915, defendant, Garrett, who then lived at Mobile, Ala., by letter, purchased the stock in question from the plaintiff, Atkins, to whom he inclosed his 60-day note for the price. On receipt of defendant's note, plaintiff wrote him that he had indorsed the certificate in blank and had written on the note, "This note secured by 50 shares of stock in the Lenzburg-Crichton Oil & Gas Company, certificate No. 136, for 50 shares," and that he had attached the note to the stock certificate and held the same subject to defendant's order. The note was not paid at maturity, and finally, on September 8, 1915, plaintiff, Atkins, brought suit to recover judgment for the amount of the note, with interest, with recognition of his pledge of the stock, and ordering same seized and sold to satisfy the judgment. Three days later this particular certificate No. 136 was disposed of by plaintiff, and he thereafter dismissed the pending suit for a moneyed judgment on defend-

ant's note, and on October 30, 1915, filed the present suit for rescission of the

sale for nonpayment of the purchase price.

On February 1, 1916, defendant tendered plaintiff the amount of the note sued on, with interest and costs, which the plaintiff declined. Some further negotiations between the parties followed, and the plaintiff was told to leave the stock at the Commercial National Bank, and he accordingly left at the bank a certificate for 50 shares of stock, to be delivered to defendant on payment of the amount due; but the defendant declined to take the stock and pay the money to the bank, because the note sued on was not placed with the stock in the bank. The Lenzburg-Crichton Oil & Gas Company struck oil and prospered. Just after the purchase of the stock by defendant an 8 per cent. dividend was declared, yielding \$400 on his 50 shares, which was paid to plaintiff, as were all subsequent dividends. These dividends aggregated 107½ per cent., more than sufficient, if credited on defendant's note, to pay the debt, with interest.

The defendant, alleging in his answer a conversion and disposition of the stock by plaintiff to other parties, claims that he has been damaged in the sum of \$12,400, the value of the stock, plus \$400 dividends collected by plaintiff, prior to such conversion, with interest, less the amount of defendant's \$5,000 note, with interest, for which amount he asks judgment, and, in the alternative, for judgment for 50 shares of the Lenzburg-Crichton Oil & Gas Company's stock, or its present value, plus the dividends paid on same, less

the amount of his note, with interest.

S. M. Cook and Alexander & Wilkinson, all of Shreveport, La., for plaintiff.

Hardy, Grogan & Percy, of Shreveport, La., for defendant.

JACK, District Judge (after stating the facts as above). The right of the plaintiff to demand the rescission of the sale of stock for nonpayment of the note given for the purchase price is based on article 2564 of the Civil Code of Louisiana, which provides that the dissolution of the sale of movable effects shall take place of right, if demanded, on

nonpayment of the purchase price.

[1] I. It is contended by defendant that the plaintiff, having elected to file suit for judgment on the note, could not thereafter dismiss such suit and sue for rescission of the sale. Counsel argues that this suit on the note was an affirmance of the contract, and plaintiff was thereby estopped from an action to annul. The authorities cited are from the common law, whereas the remedy invoked in this suit is peculiar to the civil law. "By the law of England," says Benjamin on Sales (book V, part 1, p. 622, of 2d London edition), "differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved." Hence these common-law cases, in which the annulment of sales were sought on the ground of fraud or error, have no analogy to the case at bar, in which a sale originally in every respect valid and binding is sought to be rescinded, not because of any fraud in its inception and execution, but because of the purchaser's default thereafter in failing to pay the purchase price.

The plaintiff had the right to sue, either to enforce payment of the note, or for the rescission of the sale; but there is no reason why, having first resorted to the former remedy, he should be cut off from the latter, and in fact the Louisiana Supreme Court has so specifically

held. Canal Bank v. Copeland, 15 La. 79.

[2] II. The fact that the plaintiff, prior to the institution of the present suit, had disposed of the identical certificate No. 136, covering the 50 shares of stock sold defendant, is no bar to the prosecution of this suit, because of lack of interest. Plaintiff, at the time he disposed of this certificate, and continuously for over a year after filing the suit, owned other stock more than sufficient to cover the 50 shares sold the defendant. It was not sacramental that he should have kept attached to defendant's note as collateral that particular certificate. A certificate is not the stock itself, but merely the evidence of it. As is said by Cook in his work on Corporations (4th Edition, section 469):

"One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges, and property. Accordingly it is held that a pledgee need not retain in his possession the identical shares of stock which were pledged to him, but the rights of the pledger are fully preserved, if similar stock is retained by the pledgee until the termination of the pledge."

Counsel for defendant cites Barron v. Jacobs, 38 La. Ann. 370, and Castle v. Floyd, 38 La. Ann. 583, in which case it was held that plaintiffs were without interest to sue for the rescission of sales of real estate where, after such sales, they had sold their interest in the property to third parties. See, also, George v. Knox, 23 La. Ann. 354; Templeman v. Pegues, 24 La. Ann. 537. So, in the case at bar, were it not for the reconventional demand of defendants for damages for the wrongful conversion and sale of such stock, it might be that this plaintiff would be without interest to demand the resolution of the sale. But, in view of this reconventional demand, he certainly has a vital interest in sustaining his claim for rescission, and, while plaintiff's suit was, of course, filed prior to the reconventional demand of defendant, plaintiff's claim for rescission is, in effect, in defense to defendant's claim for damages.

[3] III. The plaintiff was under no obligation, as a condition precedent to his suit, to tender payment to defendant of the dividends received by him on the pledged stock. In McKenzie v. Bacon, 41 La. Ann. 6, 5 South. 640, it was held that the vendee of real estate, against whom a judgment of resolution of the sale has been obtained, owes to the vendor rents and revenues. If plaintiff is entitled to a rescission of the sale, he would be entitled to keep these dividends. The resolution of the contract would place the parties in the same position they were at the time it was entered into. The plaintiff would be entitled to a return of his stock, with its dividends, and the defendant would be entitled to the return of his note, without the payment of

interest. (No interest has been paid on the note.)

[4] IV. I now come to the main issue in the case. Did the defendant, at the time of his tender, February 1, 1916, over four months after the institution of the present suit for the resolution of the sale, have the right to make payment of the note, demand the surrender of his stock held as collateral, and put an end to the litigation?

Ordinarily payment is the end of the law, and, as was said in the recent case of Watson v. Feibel, 139 La. 375, 71 South. 585, on which

defendant relies:

"The resolution of the sale is allowed 'only after the vendor has exhausted every remedy for obtaining payment' [the court quoting from the French commentator, Toullier]. Can a vendor, to whom payment in principal, interest, and costs is tendered, and who refuses to accept, be said to have exhausted every remedy for obtaining payment?"

Again, in Perkins v. Frazer, 107 La. 393, 31 South. 774, the court said

"The spirit of the law is against the enforcement of the resolutory condition, and in favor of the contract being carried out, if possible."

In the case of Watson v. Feibel, plaintiff, after making formal demand on defendant for the payment of the purchase price, the next day brought suit to rescind the sale. Defendant failed to answer within the time prescribed by law, and plaintiff caused a judgment by default to be entered against him. Thereafter, and before the judgment was confirmed, defendant made to plaintiff a tender of payment, which was refused for the reason assigned, that an offer of performance came too late after being put in default. The court, after a very thorough review of the jurisprudence and of the French commentators, reversed the decision of the lower court, rescinding the sale, and held that payment might be made at any time before final judgment.

In the Watson-Feibel Case, however, the sale was not of personal property, as in the case at bar, but of real estate, and, as the articles of the Code covering the two are not the same, the case is not decisive of the issue now before this court. Article 2561 covers the sale of both real and movable property:

"If the buyer does not pay the price, the seller may sue for the dissolution of the sale."

Article 2562 covers the case of the sale of immovables:

"The dissolution of the sale of immovables is summarily awarded, when there is danger that the seller may lose the price and the thing itself.

"If that danger does not exist, the judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months.

"This term being expired without the buyer's yet having paid, the judge shall cancel the sale."

Article 2563 relates to the sale of immovables when the deed itself expressly contains the resolutory condition:

"If, at the time of the sale of immovables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been placed in a state of defult, by a judicial demand, but after that demand, the judge can grant him no delay."

Article 2564 relates to the sale of movable effects:

"In matters of sale of movable effects, the dissolution of the sale shall take place of right, if demanded, without its being in the power of the judge to grant any delay, except that fixed by law."

Referring to article 2564, it will be noted that the dissolution of the sale of movable effects shall take place "of right," if demanded. The

term "of right," it seems, has never been specifically defined. It occurs in the Constitution of the state and frequently in the articles of the Civil Code. Under the Constitution it is declared that:

"All government, of right, originates with the people, is founded on their will alone, and is instituted solely for the good of the whole." Article 1.

In article 248 of the Civil Code it is declared that:

"Tutorship by nature takes place of right."

And in article 2161 of the Civil Code it is provided that subrogation takes place "of right" in certain cases. In article 2399 of the Civil Code it is provided that:

"Every marriage contracted in this state superinduces of right partnership or community of acquêts on gains."

In article 2456 of the Civil Code it is provided:

"The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

It would seem that by the phrase "of right" is meant inherently, by reason of the law, as a matter of course, without the need of any specific agreement. The only condition included in article 2564, providing that the dissolution of the sale of movables shall take place "of right," is "if demanded." The following phrase, "without its being in the power of the judge to grant any delay except that fixed by law," must be construed in connection with article 2562, relative to the sale of immovables, by which it is provided that, where there is no danger of loss to the seller, the judge may grant to the purchaser further time to make payment, not to exceed six months. Article 2564 denies the judge such right in case of the sale of movables. It is not perfectly clear just what is meant by the final phrase "except that fixed by law." The defendant has all the delay fixed by law, without any action of the judge granting such delay. What is probably meant is that the purchaser has only such time to make payment as is allowed by law, and that the court can grant no further extension of time.

Referring to article 2563, relative to the sale of immovables, it will be noted that if, in the contract of sale of immovables, it has been specifically "stipulated that, for want of payment of the price within the terms agreed on, the sale should be of right dissolved," then that notwithstanding such stipulation the purchaser might nevertheless make payment after the expiration of the term up to the time that suit is filed, after which, the judge can grant no further delay.

If such a stipulation be written into a contract for the sale of immovables, then such sale of immovables is placed exactly on the same basis as is the sale of movables, for in the latter case the law writes into the contract the stipulation, in the words of article 2564 of the Code, that for nonpayment of the price "the dissolution of the sale shall take place of right, if demanded, without its being in the power of the judge to grant any delay, except that fixed by law."

Therefore it logically follows, and I conclude, that if, with this stipulation written into the contract for the sale of immovables by the parties themselves, the purchaser may not make payment after suit is filed for the resolution of the contract, neither can the purchaser of movable effects, where the law writes such provision into the contract, make payment after the filing of such suit. In other words, the sale of movables under article 2564 is by reason of the law governed by the same rule as the sale of immovables under article

2563 by reason of the stipulation of the parties.

This construction of the law is in line with the expression of the Louisiana Supreme Court in the case of Moreau v. Chauvin, 8 Rob. (La.) 161, which, however, may have been obiter as stated in the Watson-Feibel Case; but the case has several times since been referred to with approval, though in none of the cases was there presented the exact issue here involved. See Morrison v. Wimberly, 14 La. Ann. 713; Pratt v. Craft, 19 La. Ann. 130; City v. Rigney, 24 La. Ann. 235; Enders v. Gingras, 38 La. Ann. 773; Clover v. Gottlieb, 50 La. Ann. 568, 23 South. 459; Woodstock v. Pulley Mfg. Co., 115 La. 829, 40 South. 236; Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722—all of which are reviewed in the Watson-Feibel Case, 139 La. 394, 71 South. 585.

[5] Counsel contends that as, under article 3165 of the Civil Code, it is specifically provided that, where the right to sell is not given the pledgee of stock, the pledgee, on the pledgor's failure to pay the debt, may not sell the stock at private sale, but must obtain judgment ordering its sale to pay and satisfy the obligation; that such is his sole remedy. I do not think this article was intended to affect the right of the pledgee in that particular class of cases, where the stock was pledged to secure payment of the purchase price, from exercising his right to demand a resolution of the sale. This right, as we have before seen, covers all property, both real and personal, and this latter article of the Code is not meant to form an exception, but merely to prohibit, without express agreement to that effect, the pledgee from taking the law into his own hands and selling the pledged stock to pay the debt.

If the stock had originally been delivered to the defendant, and not held in pledge for the payment of the latter's note, there is no doubt that the plaintiff could have sued for a resolution of the sale for nonpayment of the price, and his right certainly cannot be lessened

by the fact that he holds the stock in pledge as security.

After repeated demands on defendant to pay, plaintiff finally sued him on the note. It was nearly two months thereafter before the suit for rescission of the sale was filed. Defendant was then in default; he had been given more than a reasonable time after demand in which to pay. The sale was then subject to rescission "if demanded," and the tender of payment after suit for rescission was filed came too late.

For these reasons, judgment will be signed and entered, rescinding the sale, and rejecting defendant's demands in reconvention.

## PALMER v. PULLMAN CO. et al.

(District Court, N. D. New York. August 12, 1918.)

1. Life Estates \$\iff 15(2)\$—What Constitutes "Income"—Stock Dividends.

Where residuary estate was devised for life to complainant, with remainder to others, and consisted principally of stock, and the corporation, after the decree of distribution, by resolution increased its capital stock, "in order to represent the capitalization of the company," the life tenant was not entitled to the shares to which the possession of the before issued shares entitled their owner, since such new shares were not "income."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

Where by such distribution of additional stock the value of each original share was lessened, complainant was not entitled to receive the additional shares.

3. LIFE ESTATES \$=15(2)—RIGHT TO INCOME—WHAT CONSTITUTES INCOME—STOCK DIVIDENDS.

Where only one-third of the amount of the additional stock was taken from the surplus earnings after the decree which fixed the values of the respective estates, plaintiff, as life tenant, was not entitled even to the proportional amount of one-third of the stock.

In Equity. Suit by Walter B. Palmer against the Pullman Company, wherein, on removal to the District Court, Gertrude E. Wagoner and another were made defendants. Decree dismissing the bill on the merits.

This is a suit by Walter B. Palmer for a decree requiring the defendant the Pullman Company to issue and deliver to him individually 20 shares of its stock for each 421.6 shares of the stock of said defendant. The estate of one Esther G. Palmer owns 411 shares of the stock of said Pullman Company and a stock dividend has been declared. The plaintiff claims this stock dividend should issue to him as life tenant of said 411 shares, while the remaindermen claim it should issue to the estate. The claim of plaintiff grows out of and is founded on certain facts which appear in the opinion. The complaint also demands \$15,000 damages for the withholding of such shares, but no proof of damages has been given. The suit was commenced in the Supreme Court of the state of New York against the Pullman Company as sole defendant, whence it was removed to the United States District Court for the Northern District of New York, and then the other defendants were brought in and made parties defendant.

C. J. Palmer, of Little Falls, N. Y., for plaintiff.

Alexander & Green, of New York City (Allan McCulloh, of New York City, of counsel), for defendant Pullman Co.

Arnold, Bender & Hinman, of Albany, N. Y., for defendant Wagoner.

Chas. A. Talcott, of Utica, N. Y., for defendant Whiffen.

RAY, District Judge (after stating the facts as above). Esther G. Palmer, of Utica, Oneida county, N. Y., died, leaving a last will and testament, January 5, 1908, and her will was duly probated in that county February 10, 1908. By said will said testatrix gave all the

Em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

rest, residue, and remainder of her estate to her husband, Walter B. Palmer, the plaintiff herein, for and during the period of his natural life, to use and enjoy the income and interest thereof, and on his death such rest, residue, and remainder, real and personal, is given by said will of the testatrix to her niece, Gertrude E. Mills, now Gertrude E. Wagoner, and her cousin, Caroline R. Whiffen, share and share alike. The said rest, residue, and remainder of said estate consisted and consists of 411 shares of the capital stock of the defendant the Pullman Company, and same is in the possession of Walter B. Palmer, the executor of said will, pursuant to the decree of the Surrogate's Court of Oneida county, N. Y., but on deposit with a designated depository, where by the terms of such decree it is to remain during the life of said Palmer.

March 21, 1910, at a meeting of the stockholders of said the Pullman Company, the following resolutions were duly adopted:

"Whereas, the value of the assets of this company exceeds the par value of the capital stock by more than twenty million dollars (\$20,000,000):

"Resolved, that for the purpose of representing the capitalization of this company existing surplus assets to the extent of twenty million dollars (\$20,-000,000), the capital stock of the company is hereby increased to one hundred and twenty million dollars (\$120,000,000), and the proper officers of the company are hereby directed to issue additional stock to the amount of twenty million dollars (\$20,000,000); and

"Resolved, that the directors be authorized to distribute said twenty million dollars (\$20,000,000) capital stock pro rata, to stockholders of the company, in the ratio of twenty (20) shares to each one hundred (100) shares held by stockholders of record at the close of business on the 30th day of

April, 1910."

On the same day, at a meeting of the board of directors of said company, the following resolution was duly adopted, viz.:

"Resolved, that said increase of twenty million dollars (\$20,000,000) capital stock be distributed pro rata to the stockholders of the company in the ratio of twenty (20) shares to each one hundred (100) shares held by the stockholders of record at the close of business on the 30th day of April, 1910, and the proper officers of the company are hereby directed to carry this resolution into effect."

Walter B. Palmer, the life tenant, claims this stock dividend, and the remaindermen claim it as a part of the estate to be ultimately divided between them in equal shares. The question is: Who is entitled thereto?

July 12, 1909, on the judicial settlement of the accounts of Walter B. Palmer, as executor of the last will and testament of said Esther G. Palmer, the balance of the estate was established as consisting of cash \$493.97, and 411 shares of said Pullman stock, of the then cash value of \$60,417; total, \$60,910.97—subject to commissions, \$1,042.94, and \$28 costs, and the executor was directed to convert certain of such stock into cash to pay such commissions and costs, which he did, leaving certain shares undisposed of and constituting the residuary estate. The decree as to such residue contains the following:

"That the said executor, Walter B. Palmer, continue to hold said estate; that he pay over to himself, the said Walter B. Palmer, from time to time, during his life, all dividends, interest, and income arising out of said estate

and said Pullman Palace Car stock, and after his death the said estate be divided, share and share alike, between Gertrude E. Mills and Carrie R. Whiffen."

[1] The decree also provides that the said executor is to hold such stock, but keep same on deposit in a certain bank named, subject to the inspection of the remaindermen, and is not to be removed or sold without their consent. Nothing is said in this decree as to "stock dividends," and I think "the dividends" referred to in the decree are the ordinary cash dividends declared and made by the Pullman Company in the usual manner. The question arises whether the ownership of this stock dividend, consisting of additional capital stock of the Pullman Company, is to be determined under and according to the rule declared by the Supreme Court of the United States in Gibbons v. Mahon, 136 U. S. 549, 558, 10 Sup. Ct. 1057, 34 L. Ed. 525, and Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, or under and according to the rule declared by the Court of Appeals of the state of New York in Matter of Osborne, 209 N. Y. 450, 477, 485, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, and Matter of Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19.

If the surplus earnings and profits of the Pullman Company had been accumulated from time to time, and put in bank or specially invested for the purpose of paying a special or extraordinary dividend in cash to stockholders at a subsequent time, I think the dividend subsequently declared from earnings and profits arising during the life of this trust, and thus accumulated, would belong to the life tenant. But this was not done. Such earnings and profits were not taken out of the general property of the Pullman Company, and put in a special or separate fund, and devoted to any such purpose to be subsequently executed. At the end of each year there was a cash surplus, and also rolling stock, equipment, fixtures, and investments in securities belonging to the Pullman Company. The surplus, after payment of ordinary running expenses and repairs, was used so far as necessary for improvements of its properties and additions from time to time as the board of directors should determine, and what was not actually used or kept on hand was invested, not for the purpose of a subsequent dividend in cash, but for such general purposes, it might be dividends, as the board of directors should subsequently determine. It was always within the power and discretion of this board of directors to use up all the surplus earnings, including the investments, for repairs, additions, and extensions. This surplus, not paid out in making the ordinary and regular dividends, became a part of the capital of the company, temporarily at least.

In March, 1910, the stockholders and board of directors passed the resolutions quoted, and determined *not* to declare and to pay an additional and extraordinary cash dividend to stockholders, but to increase the capital stock of the company "for the purpose of representing the capitalization of the company," and to divide and issue it to its stockholders according or in proportion to their respective holdings. These surplus earnings were thus devoted to an increase of the capital of the company, and it was duly apportioned to show the respective in-

terests of the stockholders. The estate of Esther G. Palmer was the owner of 411 shares, and this addition to the capital stock was apportioned by the resolution to the estate, title in the executor as such, not in the life tenant, and when that capital, thus increased, is divided, it will go, under the rule of the Supreme Court of the United States and of the Massachusetts, Connecticut, Maine, Rhode Island, and English courts, to the remaindermen, not to the life tenant. The life tenant will get his interest therein, which will be and is the cash dividends, if any, hereafter declared on all capital stock, including such additional stock. In Towne v. Eisner, Collector, etc., 245 U. S. 418, 426, 38 Sup. Ct. 158, 62 L. Ed. 372, the Supreme Court of the United States, reversing Towne v. Eisner (D. C.) 242 Fed. 703, has very recently (January 7, 1918) reiterated the rule declared in Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, and the court said in the case of a stock dividend:

"Notwithstanding the thoughtful discussion that the case received below, we cannot doubt that the dividend [stock dividend] was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman."

In this case I think I am bound to follow these decisions of the Supreme Court of the United States. The New York cases do not give construction to any statute of that state bearing on this question, and there has been no construction of this will by any court requiring a contrary holding. The New York rule would seem the more equitable, inasmuch as, should it be followed in this case, there would be an ascertainment and apportionment of the surplus earnings of the Pullman Company accruing since the death of Esther G. Palmer or the decree of the surrogate, and which actually went or will go into this stock dividend apportioned to the stockholders held by the executor of her estate.

Some of the earlier New York cases—Williams v. W. U. Tel. Co., 93 N. Y. 162, and Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449—seem to be somewhat at war with Matter of Osborne, 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298; but the latter case must be deemed to state the modern New York rule. But this Osborne Case in no way shakes the case of Gibbons v. Mahon, supra, as it is expressly approved and followed in Towne v. Eisner, supra. The Williams Case, supra, did not involve the rights of life tenant and remaindermen in stock dividends. In Gibbons v. Mahon, supra, 136 U. S. at page 559, 10 Sup. Ct. at page 1059, 34 L. Ed. 525, the court says:

"Therefore when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, a manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of each share."

In the instant case there is nothing in the language of the resolution of either the stockholders or board of directors indicating a purpose to make a division of profits and income. On the other hand, the language of the resolution forbids this construction. The resolution of the stockholders says:

"Whereas, the value of the assets of this company exceeds the par value of the capital stock: \* \* \* Resolved, that for the purpose of representing the capitalization of this company existing surplus assets to the extent of \$20,000,000, the capital stock of the company is hereby increased to \$120,000,000, and the proper officers of the company are hereby directed to issue additional stock to the amount of \$20,000,000." (Italics mine.)

That is, \$20,000,000 additional stock is to be issued "for the purpose of representing the capitalization of the company," not for the purpose of making a division of profits and income. This must be controlling as to the purpose of this stock dividend, if regard is had to the decision of the Supreme Court.

[2] But, aside from this, I see no theory on which the plaintiff is entitled to all the shares of "stock dividend" stock. The testatrix died January 4, 1908, the will was proved February 10, 1908, and the decree on settlement, by which the shares of the Pullman Company stock was set apart and directed held as residuary estate, was made and entered July 12, 1909. The gift to this plaintiff, Walter B. Palmer, is by the eighth clause of the will, viz.:

"All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to my husband Walter B. Palmer, for and during the period of his natural life to use and enjoy the income and interest thereof and upon his death I give, devise and bequeath the said rest, residue and remainder of my estate, real and personal, to my niece Gertrude E. Mills of Albany, N. Y., and my cousin Carrie R. Whiffen of Utica, N. Y., in equal portions, share and share alike."

There is no specific gift of this Pullman Company stock. It was a part of the general estate, and did not take on the character of "rest, residue and remainder" held for Walter B. Palmer until the estate was settled and the decree of July 12, 1909, was entered. The decree shows that shares of this Pullman stock had been sold, and it is presumed that all dividends on same paid between the death of Esther G. Palmer and the accounting were accounted for. The amount of the residuary estate, and of what it consisted, was determined on the entry of that decree. This is the rest, residue, and remainder of which Walter B. Palmer is given the use and interest and income. It was set apart by the decree of the surrogate in the form of 411 shares of Pullman stock, of the then value of \$60,417, subject to commissions, \$1,042.94, and expenses \$28, less the cash in hand, \$493.97, and such executor was authorized by the decree to sell enough of this stock to pay the balance of such commissions.

The decree, to which Walter B. Palmer assented, directed this stock to be held in specie. This decree fixed the then cash value of this stock at \$147 per share. This value at that time (July 12, 1909) was determined by the value of all the property of the Pullman Company then owned by it. As between Walter B. Palmer and the remaindermen, he was entitled to have this kept good, if the property of the Pullman Company would do it, and this was the right of the re-

maindermen as well; and Mr. Palmer was entitled to the interest and income—that is, dividends in cash declared and paid on this stock from the date of that decree and nothing more. If the property of the Pullman Company became more valuable, and the stock set apart by the decree became more valuable, this increase added to the value of the "rest, residue and remainder," but did not necessarily add to the dividends or income of the life tenant. If by reason of the making of this stock dividend April 30, 1910 (the increase of capital stock), the value of the 411 shares was lessened or impaired, the life tenant as well as the remaindermen was entitled to have it made good by this additional stock, and, in any event, as this stock dividend in great part came out of the value of the rest, residue, and remainder the life tenant is entitled to all dividends thereon, but not to the stock itself (new or additional stock), as that is neither interest nor income nor cash dividends, unless it be that some part of this new or additional stock actually represents and comes from income or interest or cash dividends on this "rest, residue and remainder."

The statements and figures in evidence show that the value of the "rest, residue and remainder" has not been impaired or lessened by the mere declaration and making of this "stock dividend," but that it would be by turning over to the plaintiff individually as his own this new or additional stock. The value of each of the 411 shares of stock, constituting the rest, residue and remainder, was \$147. After the making of the stock dividend, and the consequent increase of stock, the value of each share is only \$109.13. True, the number of shares belonging to the estate and to the rest, residue, and remainder is increased; but the value of each share is decreased from \$147 per share to \$109.13 per share. These are the figures presented, and as to which there is no dispute.

[3] The statement in evidence, Exhibit A, shows the "composition of \$20,000,000," the stock dividend in question, and, from it, it appears that of earnings, etc., after July 12, 1909, there went into this new stock from the "insurance reserve fund" \$206,064.18, and from "amount added to surplus" from August 1, 1909, to February 28, 1910, the sum of \$5,972,741.79. All the balance of this \$20,000,000 was from "insurance reserve fund" from July 31, 1893, to July 31, 1909, extension of plant in 1907, "reserve for doubtful accounts" in 1908, prior to July 31, and amounts added to surplus in 1906, 1907, 1908, and 1909, prior to or on July 31 of that year. The "insurance reserve fund" is a sum set apart to make good losses not covered by insurance. Assuming that the \$5,972,741.71 was taken from the surplus earnings of the company from August 1, 1909, to February 28, 1910, a proportional part of this, as represented in the new stock, is all this plaintiff would be entitled to under the New York rule of apportionment. Clearly earnings and accumulations earned and made prior to the setting aside of these shares of stock in July, 1909, as the rest, residue, and remainder are not interest or income or dividends accruing to this plaintiff on such a well-defined and specified "rest, residue and remainder" ascertained and determined by the decree of the Surrogate's Court of July 12, 1909.

Assuming that this plaintiff was entitled to the earnings and income of the rest, residue, and remainder of the estate, as it was, prior to the decree of July 12, 1909, and that such earnings and income went into the general estate and was used in payment of debts, etc., the decree of the Surrogate's Court settled all that and fixed the "rest, residue and remainder," both in value at that time and of what specific property it consisted. It was represented by these 411 shares of this stock. That value of the stock was fixed and determined by the value of all the property of every name and nature owned by the Pullman Company at the date of that decree. If by subsequent action of the stockholders and board of directors some of that property has been taken, or set apart, and is now represented by additional shares of stock, this stock dividend, the share and interest of the estate held for the use of the plaintiff for his life, remainder to the ultimate beneficiaries named, is not changed, except in form. This, of course, is not considering the fact that in this new stock we have represented \$5,972,741.79 of earnings for 1909, 1910, after August 1, 1909, and up to February 28, 1910.

Is this plaintiff entitled to have a proportional part of that new stock set apart and issued to him, such part as represents his interests in that \$5,972,741.79, considering and treating it as interest and income derived from the 411 shares of stock and to which he was entitled under the will and the decree of the Surrogate's Court? The stockholders by vote have said that this \$5,972,741.79, instead of being divided amongst the stockholders in accordance with their stock holdings in a cash dividend, shall be held as a part of the capital of the company and represented by new or additional capital stock issued to the stockholders, and the board of directors, being thus authorized by the stockholders, by resolution directed that this increase of capital stock "be distributed pro rata to the stockholders of the company in the ratio of 20 shares to each 100 shares held by the stockholders of record as of the 30th day of April, 1910," etc. In Gibbons v. Mahon, supra, 136 U. S. 559, 10 Sup. Ct. 1059, 34 L. Ed. 525, the court says:

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest; the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

The court (136 U. S. at page 561, 10 Sup. Ct. at page 1059, 34 L. Ed. 525) further says:

"In Great Britain, it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital [and that is what was done in the instant case], the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to the tenant for life."

In Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 22 L. Ed. 840, it is stated that:

"As a general rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the company" and "such a dividend, if earned and declared, necessarily increases the value of the old stock, if new stock is not issued, and in that mode reaches substantially the same result."

In Williams v. Western Union Tel. Co., 93 N. Y. 162, the Court of Appeals of the state of New York said:

"When a corporation has a surplus, whether a dividend shall be made, and, if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts."

In the instant case, to make a decree that any part of this additional stock be issued and delivered to this plaintiff as his individual property, instead of to him as a stockholder and as executor, would be for this court to reverse and change the action of the stockholders and board of directors of the Pullman Company, and to proceed contrary to the English rule, the rule of the Supreme Court of the United States, which I think controlling on this court, and the rule in Massachusetts, Rhode Island, and Maine. See cases cited in Gibbons v. Mahon, 136 U. S. pp. 564, 565, 10 Sup. Ct. 1057, 34 L. Ed. 525.

I think this action cannot be maintained on the facts proved and that there must be a decree dismissing the bill on the merits, but, in view of all the facts and the not harmonious decisions of the courts,

without costs.

# UNIVERSAL TRANSP. CO., Inc., v. NATIONAL SURETY CO.

(District Court, S. D. New York. June, 1918.)

1. Courts \$\infty 334\\_Federal Court\\_Scire Facias.

Under Judicial Code, § 262 (Comp. St. 1916, § 1239), empowering District Courts to issue writs of scire facias, they may do so in a state which has abolished the writ.

- 2. APPEAL AND ERROR \$\infty 1239\text{-Scire Facias-Nature of Writ.}
  - The writ of scire facias, to enforce liability of the surety on an appeal bond, is original only in the sense that, being obtained, the subsequent procedure is as in an action at law, entitling the defendant to answer and to jury trial.
- 3. APPEAL AND ERROR \$\infty\$=1239—APPEAL BOND—Scire Facias.

  It is not ground of objection to issuance of scire facias against the surety on an appeal bond, to enforce its liability thereon, that it was not a party to the original action.
- 4. Courts ⇐=334—Federal Court—Common-Law Writ—Procedure.

  In absence of rule of federal court, a common-law writ will proceed in accordance with the settled practice at common law.

At Law. Application by the Universal Transportation Company for writ of scire facias against the National Surety Company. Plea to jurisdiction overruled.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

J. Parker Kirlin, John M. Woolsey, and L. de Grove Potter, all of New York City, for the motion.

T. Langland Thompson and James S. Darcy, both of New York

City, opposed.

MAYER, District Judge. This is an application for a writ of scire

facias by plaintiff against the surety company.

Plaintiff heretofore recovered in this court a money judgment at law against a steamship company known as Rederiaktiebolaget Amie. The Amie and the surety company executed a bond or undertaking, and the Amie sued out a writ of error. The judgment was thereafter modified and affirmed, and the plaintiff, having failed to collect the judgment against defendant, has moved for a writ of scire facias to issue against the surety on the bond requiring it to show cause why it "ought not to have execution against it, the said National Surety Company, for the amount due to the plaintiff for its damages and costs under the judgment aforesaid." The surety company, by plea or answer, alleges, inter alia, as matter of law, that the court is without jurisdiction to proceed against it in this summary manner.

The question now under consideration is solely that of jurisdiction. The grounds on which the jurisdiction of the court is challenged are: (1) That the writ is obsolete in New York; (2) that such a proceeding is the commencement of a new action, which must fail because of lack of diversity of citizenship; and (3) that the present action is, in any event, merely the continuation of the original action at law, and hence (a) because the surety company was not a party to the original action it cannot be proceeded against, and (b) there is no rule of court which permits or recognizes the writ, and therefore the cause must proceed in accordance with the law and practice of New York.

[1] 1. While the writ has disappeared from the New York practice, it is specially preserved by the Judicial Code, which, in section

262, provides:

"The Supreme Court and the District Courts shall have power to issue writs of scire facies \* \* \* and the District Court shall have power to issue all writs not specifically provided for by statute, and which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Act March 3, 1911, c. 231, 36 Stat. 1162 (Comp. St. 1916, § 1239).

The foregoing provision plainly means that the writ may be availed of in any jurisdiction, even though the state in which the federal forum is situated has abolished the writ. The reason doubtless is that Congress regarded it as necessary to revive judgments or to recover upon recognizance or bonds that the litigant should not be compelled to resort to the state courts, but could find and pursue his remedy in the court where the judgment was had. The writ is in the nature of an ancillary arm.

[2] 2. Writs of scire facias are of two kinds:

(1) The continuation of a previous action such as a scire facias to revive a judgment and to have execution on it. Collin Co. National Bank v. Hughes, 155 Fed. 389, 83 C. C. A. 661; Grantland v.

Memphis (C. C.) 12 Fed. 287; Wonderly v. Lafayette Co. (C. C.) 77 Fed. 665; King v. Davis (C. C.) 137 Fed. 198; Davis v. Davis, 174 Fed. 786, 98 C. C. A. 494; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Brown v. Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284; Browne v. Chavez, 189 U. S. 68, 21 Sup. Ct. 514, 45 L. Ed. 752.

(2) A scire facias which is in the nature of a new suit, such as a writ to review that which has happened, to recover upon recognizance or bail bond, etc. Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; Hollister v. United States, 145 Fed. 773, 76 C. C. A. 337; United States v. Ambrose (C. C.) 7 Fed. 554; Kirk v. United States (C. C.) 131 Fed. 331; Id., 137 Fed. 753, 70 C. C. A. 187; Id., 204 Fed. 688; United States v. Taylor (D. C.) 157 Fed. 718; 35 Cyc. 1145; Foster's Federal Practice, 1248; Hughes' Federal Procedure, 297.

In the case of Washburn v. Pullman Palace Car Co. (C. C.) 66 Fed. 790, 76 Fed. 1005, 21 C. C. A. 598, it was held that a writ of scire facias would lie to enforce the liability for costs on a judgment of the federal court against the indorser of a writ, who, under Massachusetts practice, occupies the position of surety on a cost bond. In Bozman v. Armistead, 4 N. C. 616, it was held that a scire facias would lie upon an injunction bond, it being made part of the record by statute. In Egan v. Chicago & Great Western Railway (C. C.) 163 Fed. 344, where a motion was made by the plaintiff for judgment against the surety upon a supersedeas bond under a state statute, Reed, District Judge, said at page 350:

"This proceeding is analogous to that of scire facias, a judicial writ at common law to revive judgments or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered. 3 Black. Com., 416–422; Owens v. Henry, 161 U. S. 642–645, 16 Sup. Ct. 693, 40 L. Ed. 837; Pullman's Palace Car Co. v. Washburn (C. C.) 66 Fed. 790; McGee v. Barber, 14 Pick. (Mass.) 212."

It has also been held in the following cases that a scire facias is a proper process to obtain execution for costs against the indorser of an original writ. Reid v. Blaney, 2 Greenl. (2 Me.) 128; McGee v. Barber, 14 Pick. (31 Mass.) 212; Ruggles v. Ives, 6 Mass. 494; Miller v. Washburn, 11 Mass. 411; Merrill v. Walker, 24 Me. 237; Newson's Administrator v. Ran, 18 Ohio, 240.

A scire facias is a judicial writ used to enforce execution of some matter of record on which it is usually founded; but, though a judicial writ or writ of execution, it is so far original that the defendant may plead to it. As it disclosed the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration and the plea is properly to the writ. Winder v. Caldwell, 14 How. 434, 14 L. Ed. 487; Dickson v. Wilkinson, 3 How. 57, 11 L. Ed. 491; Hunt v. United States, 61 Fed. 795, 10 C. C. A. 74; 35 Cyc. 1149; Hughes' Federal Procedure, 298, 299.

A suit on a recognizance or bond is an original proceeding. Davis v. Packard, 7 Pet. 276, 8 L. Ed. 864; Winder v. Caldwell, supra; United States v. Payne, 147 U. S. 687, 13 Sup. Ct. 442, 37 L. Ed. 332.

From the foregoing it appears that the writ is original only in the sense that once obtained the resultant procedure is the same as any action at law entitling a defendant to answer and to a jury trial. The extent or limitations of the subject-matter which may be litigated at the trial need not now be considered.

[3, 4] 3. (a) The fact that the surety was not a party to the original action is immaterial. The very nature and purpose of the writ are inter alia to reach the surety who obviously is not a party to the original suit

original suit.

(b) Common law rule VI of this court provides:

"In all cases not provided for by the rules of this court causes at common law shall proceed as nearly as may be in accordance with the law for the time being of the state of New York and the practice thereunder of the Supreme Court of said state."

This rule was enacted in accordance with the Conformity Act, to point out procedure in such cases as were otherwise not provided for by special rules wherein procedure peculiar to the United States courts have been adopted or followed, as, for instance, rule 3, which provides for the service of process in the first instance by the marshal.

Clearly, in the absence of a rule, a common-law writ will proceed in accordance with the settled practice at common law. That procedure is interestingly described in a memorandum of the clerk in Kinney v. Plymouth Rock Squab Co. (District of Massachusetts, No. 107, Law), a copy of which will be filed with this memorandum for the information of those who may have occasion hereafter to resort to the writ.

The rare use of the writ in this jurisdiction has been due probably to the few instances where the surety has resisted payment of his undertaking and probably partly to the unfamiliarity of New York practitioners with its use and efficacy. It is but fair to the surety company to state that it refuses to pay because of notice of certain defenses urged by its indemnitors in protection of their rights, as they understand them.

The conclusion is that the court has jurisdiction to issue the writ

and the matter may proceed in due and orderly course.

#### NOTE.

The memorandum of James S. Allen, clerk, in Robert D. Kinney v. Plymouth Rock Squab Company, referred to above, is as follows:

Authorities Submitted on the Question of the Issuance of a Writ of Scire Facias.

The question is whether the clerk has authority to issue a writ of scire facias to revive a judgment, as of course and as of right, without special order of the court.

Judicial Code, § 262: "The Supreme Court and the District Courts shall have power to issue writs of scire facias \* \* \* and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Judicial Code, § 9: "Any District Judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules,

and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." Comp. St. 1916, § 976.

### I. Court Rule or Order.

We have not been able to find any rule or order of this court authorizing the clerk to issue the writ of scire facias as of right, or as of course. It should be observed, however, that we find no rule or order authorizing the clerk to issue ordinary writs of summons and attachment, yet it is the immemorial custom for the clerk to sell them in blank to any applicant, as of right, wifhout the order of the court, although we still cling to the phrase that "the plaintiff sues out a writ."

The clerk is provided with a printed blank form for a writ of scire facias, which form was printed nearly a century ago. This is not conclusive evidence, however, that the clerk has power to sell the writ in blank to any applicant, for we are similarly provided with writs of execution in blank, and yet issue one only when the clerk is satisfied that the record warrants it,

and after its blanks have been filled in by the clerk.

### II. Precedents in This Court.

We have appended (marked Appendix B) a statement of the previous instances of writs of scire facias of the Circuit and District Courts for this district. It appears that, when the writ was issued upon the decease of a party pending litigation, it has always issued only upon motion allowed by the court; on the other hand, in the very rare instances where the writ has issued to revive a judgment, the record does not indicate whether it was issued by order of the court or not.

## III. Form of Writ.

It should be noted that the form of writ which has been in use in this court for more than a century (see copy annexed marked Appendix C) sets forth that the plaintiff has recovered against the defendant a certain sum of money and costs, "whereof the said defendant is convict, as to us appears of record," and contains the words, "Whereas the said plaintiff has made application to us to provide remedy for him in that behalf." The inference is that the writ is to issue only upon application to the court, and only when the court sees that there is a judgment of record in the court.

## IV. Authorities Regarding Writ in General.

We have appended (marked Appendix A) a list of some of the leading cases upon scire facias in this country. It appears from these authorities that these writs are of two kinds: (1) A scire facias which is a continuation of a previous action, such as a scire facias to revive a judgment and to have execution upon it. (2) A scire facias which is a new suit, such as a writ to repeal letters patent, to recover upon a recognizance, etc. To each kind of writ, however, the defendant may plead, and the case proceeds much like a new action.

A scire facias to revive a judgment, being based upon a record of judgment, can be granted only if there is such a record, and it can issue only from the court having possession of the record upon which it is founded; jurisdiction does not depend upon the residence of the party, or upon the amount in controversy. The writ cannot be sued out after action upon the judgment has become barred by the statute of limitations; but, if sued out before that time, it starts the statute of limitations to run anew. It is well settled that the District Court may issue, and direct the manner of service of, a writ of scire facias upon its own judgment, so as to warrant it in entering a judgment of revivor thereon. The requirements for actual service upon a defendant are not as strict as in the case of a writ of summons, because it is merely the continuation of another action in which the defendant has already been duly served. Thus it is well settled that a judgment of revivor may be rendered in the court where the original judgment is recorded, upon the issuance of a writ of scire facias and its service in such manner as the court may direct, or upon two successive returns of nihil, whether the defendant then resides within or without that jurisdiction. Such judgment of revivor is

valid within the jurisdiction. The better opinion is that it is also valid in any other jurisdiction where the defendant then lives, unless the statute of limitations upon the original judgment had already run in the jurisdiction where defendant then lives, when the judgment of revivor was entered.

Upon a writ of scire facias the defendant cannot put in issue the validity of the original judgment, but he can deny the existence of such a record, or set up any defenses arising since the original judgment, such as payment, release, statute of limitations, etc. The purpose of the writ is really to warn the defendant to plead any defense he may have in bar of a new execution upon the old judgment. The writ thus assumes the existence of the record judgment upon which it is based, and must recite such judgment. It need not, however, recite all the proceedings upon which the judgment was given. The writ thus serves as a declaration as well as a writ.

It is stated in Foster on Scire Facias that in England at common law the writ would issue of course upon a præcipe, without rule or motion, if the judgment was less than 7 years old; if over 7 and less than 10 years old, a treasury rule was necessary; if more than 10 and less than 15 years old, it was granted only upon motion during term, or by judge's order in vacation; if the judgment was more than 15 years old, it was issued only upon a rule to show cause. It is said, also, that as a general rule it would issue only upon an affidavit by the judgment creditor, or his attorney, that the judgment was still unsatisfied.

## V. Authorities Regarding Authority to Issue Writ.

There is authority for the view that a writ of scire facias to revive a judgment issues only upon order of the court:

Frierson v. Harris, 5 Cold. (45 Tjenn.) 146, 94 Am. Dec. 220: "The clerk had no power, or authority, to issue the writ; its issuance is a judicial act based upon a suggestion entered of record, and it must be awarded by the court." See, also, Hillman Brothers v. Hickerson, 3 Head. (Tenn.) 575; Bank of West Tenn. v. Marr. 13 Lea. 108: Sherwood v. Pearl. 1 Tyler (Vt.) 319, 327.

Tenn. v. Marr, 13 Lea, 108; Sherwood v. Pearl, 1 Tyler (Vt.) 319, 327.

Walsh v. Haswell, 11 Vt. 85: "Is a judicial writ, founded upon the records of the court, and should be granted only by those who have official access to, or are keepers of the record."

Contra: Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886: "The rules of the court in England recognized the right to have the writ issue as of course without the order of the court, when applied for within certain periods, but required such an order after such periods." The court held that a writ in a proper case may issue as of course out of the clerk's office without the order of the court first being had. See, also, cases cited in Appendix A.

Lewis v. Commonwealth, 106 Va. 20, 54 S. E. 999, in the Supreme Court of Appeals, Virginia, 1906: A scire facias to revive a judgment may be sued out of the clerk's office without the intervention of the court; but a scire facias praying an award of execution upon a bail bond must issue in accordance with the mandate of the court, for a condition precedent to its issuance is that the recognizance shall be declared to have been forfeited.

## VI. Massachusetts Law.

Perkins v. Bangs, 206 Mass. 408, 413, 92 N. E. 623: The remedy of a scire facias when first provided by Stat. Mass. 1785, c. 6, was discretionally granted only on application to the court from which the execution issued; but since R. S. Mass. c. 73, § 21, the writ is purchased at the clerk's office and issues as of right. The necessary recitals and alterations which constitute the declaration are filled in, not by the clerk, but by counsel.

R. S. Mass. c. 73, § 21 (1836), provides, in substance, that if, after the execution is returned, or recorded, it appears to the creditor that the estate levied upon was not the property of the debtor or not liable to be seized, or that it cannot be held, "the creditor may sue out of the clerk's office of the court from which the execution issued a writ of scire facias to the debtor, requiring him to appear and show cause why an alias execution should not be issued on the same judgment."

The authority given by this statute to sue out the writ from the clerk's

office, as of right, seems to have been applicable to only a limited class of cases in which a scire facias might issue; nevertheless, because of it, the custom appears to have grown up in the Massachusetts state courts for the clerk to sell blank writs of scire facias as of right to any applicant. The question is whether under the federal Conformity Statutes (R. S. §§ 914, 915, 916 [Comp. St. 1916, §§ 1537, 1539, 1540]) and our district court rule 11, this custom should be followed in the federal court. In Collin County National Bank v. Hughes, 155 Fed. 389, 394, 83 C. C. A. 661, the Circuit Court of Appears says that the power of the Circuit Court to issue and serve its writ of scire facias is derived from the Constitution and act of Congress, and cannot be restrained, limited, or made less efficacious by the statutes of the state and that the Act of Conformity does not require the Circuit Court to follow the method of service of its writ prescribed by a state statute.

## VII. Conclusion.

It seems fairly deducible from these authorities that a writ of scire facias to revive a judgment should not issue, unless either the court or the clerk is satisfied that the records of the court contain what purports to be a judgment. Other reasons for this deduction are: (1) The fact that the sole foundation and jurisdiction of the writ is the existence of a record judgment in the same court. (2) The nature of the writ itself; it is a writ to enforce a judgment; it is in many ways analogous to a writ of execution, which issues only if the clerk is satisfied that there is a record judgment. It should be noted that one of its essential allegations is identical with that contained in a writ of execution, namely, the allegation that the plaintiff has recovered judgment against the defendant in a certain sum, and costs in a certain sum, "as to us appears of record"; also the allegation that "execution remains to be made." It differs radically from a writ of summons and attachment, which is not based upon any matter of record, and as to which it would be manifestly improper for the clerk or the court, before issuing the writ, to pass upon any of the facts alleged by the plaintiff, since such facts are the very matters subsequently to be put in issue at the trial. (3) There is a certain impropriety, to say the least, in the court, by the hand of the clerk, signing a writ which states that a certain thing appears to him of record, unless the court, or the clerk, has the right before signing to satisfy himself that such a record exists. (4) The ease of getting judgment upon a return of nihil, without actual notice to the defendant, and without, therefore, the defendants having an opportunity to raise the issue of the existence of a record, makes it important that the writ should not originally issue unless the court or the clerk is satisfied of the prima facie existence of a record of judgment.

### Appendix A.

Collin County National Bank v. Hughes, 152 Fed. 414, 81 C. C. A. 556; Id., 155 Fed. 389, 83 C. C. A. 661; Pullman Palace Car Co. v. Washburn (C. C.) 66 Fed. 790; Id., 76 Fed. 1005, 21 C. C. A. 598; Wonderly v. Lafayette County (C. C.) 77 Fed. 665; Id., 92 Fed. 313, 34 C. C. A. 360; King v. Davis (C. C.) 137 Fed. 198; Id., 157 Fed. 676, 85 C. C. A. 348; Davis v. Davis (C. C.) 164 Fed. 281; Id., 174 Fed. 786, 98 C. C. A. 494; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Brown v. Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284; Browne v. Chavez, 181 U. S. 68, 21 Sup. Ct. 514, 45 L. Ed. 752; Hollister v. United States, 145 Fed. 773, 779, 76 C. C. A. 337; Winder v. Caldwell, 14 How. 434, 443, 14 L. Ed. 487; United States v. Payne, 147 U. S. 687, 690, 13 Sup. Ct. 442, 37 L. Ed. 332; Kirk v. United States (C. C.) 124 Fed. 324, 339; Id. (C. C.) 131 Fed. 331, 336; Id., 137 Fed. 753, 70 C. C. A. 187; Sherwood v. Pearl, 1 Tyler (Vt.) 319, 327; Treasurer v. Moore, 1 Tyler (Vt.) 329; Walsh v. Haswell, 11 Vt. 85, 88; 19 Encyclopedia Pleading and Practice, 266; Foster on Scire Facias (London 1851). See also, Weaver v. Boggs, 38 Md. 255; Brown, Adm'r, v. Chesapeake & Ohio Canal Co. (C. C.) 4 Fed. 770; Grantland v. Memphis (C. C.) 12 Fed. 287; Stewart v. Justices of County Court, 47 Fed. 482; United States v. Houston (D. C.) 48 Fed. 207; Wrightman v. Boone County (C. C.) 82 Fed. 412; Id., 88 Fed. 435, 31 C. C. A. 570; Egan v. Chicago Great Western Railway Co. (C. C.) 163 Fed. 344;

Hunt v. United States, 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063; Dickson v. Wilkinson, 3 How. 57, 61, 11 L. Ed. 491; State v. Lighton, 4 G. Greene (Iowa) 278; Pears v. Bache, 1 N. J. Law, 206; Warwick v. ———, 20 N. J. Law, 116; Hopkins v. Howard, 12 Tex. 7; Commonwealth v. Downey, 9 Mass. 520; Osgood v. Thurston, 23 Pick. (Mass.) 110; Universal Optical Corporation v. Globe Optical Co., 228 Mass. 85, 116 N. E. 491; Habib v. Evans, 222 Mass. 480, 483, 111 N. E. 362.

### Appendix B.

In the records of the United States District and Circuit Courts for the District of Massachusetts, the only instances which we have been able to find since the foundation of the courts in 1789 of the issuance of the writ of scire facias upon an unsatisfied judgment are:

Circuit Court. Broome v. Ashman, Records, vol. 1, p. 172, August 13, 1794. Clarke v. Murietta and Trustee, Records, vol. 18, p. 383, Docket No. 58, October, 1826.

Gaff v. Dailey, Records of 1876, p. 464, Docket No. 828, May, 1876.

District Court. United States v. Moses, Records, vol. 78, p. 389, Docket No. 370, June, 1884.

United States v. Babson, Records, vol. 84, p. 121, No. 758, April, 1888.

In none of these cases is there anything either among the papers or in the records to indicate whether or not application was made to the court for the issuance of the writ.

Several times the writ of scire facias has been issued in the case of the death of a party to a pending suit, in order to summon in the executor or administrator of the deceased. The writ is always based upon a suggestion of the death of the party and an application to the court for the issuance of the writ. Fletcher v. Randall, C. C. Law No. 253, 1997; Carter-Corey Company v. Brigham, C. C. 520, D. C. 68, 1913; Pullman Palace Car Company v. Butler, C. C. Records, vol. 101, p. 109, 1894; United States Construction Company v. Webb D. C. Law 15, 1913.

### Appendix C.

United States of America, Massachusetts District.

To the Marshal of Our District of Massachusetts, or Either of his Deputies—Greeting:

Whereas, — - before our --- of our --- court, holden at Boston, within and for our said district of Massachusetts, on the ---- day of -in the year of our Lord one thousand eight hundred and ---- by the consideration of our said ——, recovered against —— the sum of \$---and also \$--- for costs and charges by --- about --- suit in that behalf expended; whereof the said ——— is convict, as to us appears of record. And although judgment be thereof rendered, yet the execution of the said debt or damage and costs doth yet remain to be made-- whereof the said ---- ha-- made application to us to provide remedy for ---- in that behalf: Now to the end that justice be done, we command you, that you make known unto the said — that -he be before our - of our said court, to be holden at Boston within and for our said district of Mas-- for ---- debt or damage, and costs aforesaid; and further to do and receive that which our said court shall then consider; and there and then have you this writ, with your doings therein. Herein fail not. Witness -, Esq., at Boston, the ---- day of ---- in the year of our Lord one thousand eight hundred and ----

In re NORTH STAR ICE & COAL CO.
Petition of GRIFFIN ICE & COAL CO.

(District Court, E. D. Tennessee, N. D. May 13, 1918.)

No. 1949.

1. BANKRUPTCY =123-SECURED CLAIMS-PROOF.

Where a secured creditor made a purely formal proof of claim, and did not allege any insufficiency in the security, or take any of the steps provided for by Bankruptcy Act July 1, 1898, § 57e (Comp. St. 1916, § 9641), it was not entitled to have its secured claim allowed in any amount, in order that it might participate in the creditors' meetings.

2. Bankruptcy \$\infty 327(2)\$—Trustee-Rights.

Under Bankruptcy Act July 1, 1898, §§ 67, 70 (Comp. St. 1916, §§ 9651, 9654), the trustee takes only the bankrupt's equity in the property, subject to valid liens, and the lienholder, unless restrained, may enforce the lien without regard to the bankruptcy court.

3. BANKRUPTCY \$\infty 214\to Courts\to Rights.

A bankruptcy court may, in the interest of general creditors, regulate the method of enforcing liens, in order to realize as much as possible from the bankrupt's equity.

4. BANKRUPTCY \$\infty\$258-Courts-Authority.

Where property comes into the possession of the bankruptcy court, it may sell the same free from liens, and award the lienholder a preferential payment, representing the proceeds of his lien; but such practice is of doubtful propriety, where the right to a lien is disputed.

5. Bankruptcy \$\sim 258\$—Proceedings—Authority of Court.

The bankruptcy court may in its discretion sell merely the bankrupt's equity in the property, and leave the lienholder to enforce his lien by appropriate proceedings.

6. BANKRUPTCY €=327(2)—CREDITORS—SECURED CREDITORS.

A secured creditor is not even required to file a formal proof of claim, though, where the trustee has taken possession of the property and sold it, he may file a petition to obtain the proceeds of the lien in the hands of the trustee.

7. BANKRUPTCY \$\sim 345\to Debts\text{-Priority.}

Bankruptcy Act July 1, 1898, § 64b (5) (Comp. St. 1916, § 9648), directing payment of debts having priority, does not relate to claims secured by specific liens on property protected by section 67 (section 9651).

8. BANKRUPTCY \$\insigma 150\top Taking Possession of Incumbered Property.

Bankruptcy court is not required to administer property burdened with liens, and should do so only when it is for the interest of the general estate.

9. BANKRUPTCY \$\simes 258\$\to Claims\$\to Opposition to Sale.

A secured creditor, who filed a formal proof of claim, showing that it had mortgages on certain property, *held* not entitled to object to the referee's order directing the trustee to sell the same subject to liens, notwithstanding such creditor later filed an unsecured claim for a small amount, and the trustee questioned the validity of the mortgage.

In Bankruptcy. In the matter of the North Star Ice & Coal Company, bankrupt. On petition of the Griffin Ice & Coal Company to review an order of the referee directing the sale of the bankrupt's property subject to an incumbrance. Petition denied.

Webb, Baker & McDermott, of Knoxville, Tenn., for Griffin Ice & Coal Co.

L. C. Ely, of Knoxville, Tenn., for trustee in bankruptcy. Johnson & Cox, of Knoxville, Tenn., for S. L. Lewis, petitioner for review of referee's order.

SANFORD, District Judge. [1] After the appointment of the trustee in this cause, he intervened in a proceeding pending in the Chancery Court of Knox County, in which the affairs of the bankrupt were being wound up, and by order of that court obtained possession of all the bankrupt's property except certain property, known as the North Side plant, which he elected not to take over. He subsequently filed a petition in this cause asking authority to sell another plant, known as the North Star plant, which had been taken into possession by him, subject to valid incumbrances or in such other manner as the court might direct. At the creditors' meeting at which this petition of the trustee came up for consideration, the petitioner, the Griffin Ice & Coal Company, filed a proof of claim, substantially in accordance with Official Form No. 32 for the proof of a secured debt. This proof of claim was based on notes of the bankrupt for \$36,000 alleged to have been given as part of the purchase price for the North Side plant, which had been sold by the petitioner to the bankrupt and was still in possession of the Chancery Court, and secured both by a vendor's lien on the North Side plant and by a mortgage on the North Star plant, given in further security of \$20,000 of this same purchase money debt. This proof of claim was entirely formal and contained no prayer for the enforcement of the petitioner's security by the bankruptcy court, either as to the mortgage or otherwise; nor was any separate pleading filed by it asking for enforcement of its mortgage security. The petitioner furthermore did not allege any insufficiency in its security, or take any steps as provided by section 57e of the Bankruptcy Act of July 1, 1898. c. 541, 30 Stat. 560 (Comp. St. 1916, § 9641), to have the value of its security determined in order that its claim might be allowed for any excess of its claim over the value of its securities. It was therefore, in this situation, not entitled, under the provisions of this clause, to have its secured claim allowed in any amount in order that it might participate in the creditors' meetings. Re Eagles (D. C.) 99 Fed. 695, 697. At this meeting the attorney for the petitioner, stating that he also represented certain unsecured creditors who had not filed proofs of claim, opposed the petition of the trustee for a sale of the property covered by the petitioner's mortgage, and insisted that it should not be disposed of until the status of the petitioner's secured claim had been ascertained and determined by the court, and opposed the sale of the property subject to incumbrances until this was done. He also asked an opportunity to show by evidence that the allegation of the trustee's petition concerning the necessity and expediency of the proposed sale, were incorrect; which application was denied. Thereupon, with the consent of all unsecured creditors whose claims had been filed and allowed in the cause, the referee entered the order which the petitioner now seeks to review, adjudging that the petitioner being an alleged secured creditor, so far as the record showed, was not interested in the manner or method of the sale of the property if the sale was to be made subject to all valid liens or incumbrances, that only the unsecured creditors had the right to be heard on the trustee's petition, and that they requested that the sale should be made as recommended; and thereupon ordered the trustee to advertise the property and sell the same to the highest bidder subject to all valid and subsisting liens and incumbrances of every kind and character which might exist in favor of the petitioner or other parties, and subject to confirmation by the court. Some days after the entry of this order, the petitioner also filed

its proof of an unsecured claim for \$60.53.

[2-5] Under section 70 of the Bankruptcy Act (Comp. St. 1916, § 9654), the trustee is vested only with the bankrupt's title to property. Hence where the bankrupt's property is subject to a mortgage or other incumbrances, the trustee takes only the bankrupt's equity therein, subject to such incumbrances; and since, under section 67 of the Act (section 9651), the validity of the pre-existing liens is not affected, the lien holder, unless restrained by the order of the bankruptcy court, may enforce the same dehors the court. Ward v. Bank of Ironton (6th Circ.) 202 Fed. 609, 612, 120 C. C. A. 655; Re Goldsmith (D. C.) 118 Fed. 763, 767; Coll. Bank'cy (11th Ed.) 1050, 1051. Nevertheless the bankruptcy court may in the interest of general creditors regulate the method of enforcing such lien in order to realize as much as possible from the bankrupt's equity. Re Jersey Island Packing Co. (9th Circ.) 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560; Cohen v. Nixon (D. C.) 236 Fed. 407, 411. If the property comes into the possession of the bankruptcy court it may sell the property free from the lien and award the lien holder a preferential payment representing the proceeds of his lien. Re Oconee Milling Co. (5th Circ.) 109 Fed. 866, 48 C. C. A. 703; Re Loveland (1st Circ.) 155 Fed. 838, 839, 84 C. C. A. 72; Re Keet (D. C.) 128 Fed. 651; Re Cutler (D. C.) 228 Fed. 771, 773. This practice is, however, of doubtful propriety where the right to a lien is disputed and its determination would involve a controversy productive of delay in the bankruptcy proceedings. Re Muhlhauser (6th Circ.) 121 Fed. 669, 673, 57 C. C. A. 423. Or the bankruptcy court may, in its discretion, sell merely the bankrupt's equity in the property, that is, sell the property subject to the incumbrance and leave the lienor to enforce his lien upon the property by appropriate proceedings. Re Gerry (D. C.) 112 Fed. 958; Re Cutler (D. C.) 228 Fed. at page 773: Lovel. Bank'cy (2d Ed.) 1093. In thus selling the property subject to lien "the trustee acts only in the interest of general creditors." 2 Lovel. Bank'cy, supra, at page 1094.

[6-9] There is no provision in the Bankruptcy Act, however, which gives the lien claimant the right to enforce his lien in the bankruptcy cause itself. He is not even required to file a formal proof of claim; though where the trustee has taken possession of the property and sold it, he may file a petition to obtain the proceeds of the lien in the hands of the trustee. Ward v. Bank of Ironton (6th Circ.) 202 Fed. supra, page 612, 120 C. C. A. 655. Section 64b (5) of the Act (Comp. St. 1916, § 9648) directing the payment of debts having priority does not re-

late to claims secured by specific liens on the property protected by section 67 of the Act. Re Cramond (D. C.) 145 Fed. 966, 978; Re Yoke Brick Co. (D. C.) 180 Fed. 235, 242; 2 Rem. Bank'cy (2d Ed.) § 2188, p. 2079; Coll. Bank'cy (11th Ed.) 1013. The bankruptcy court is not required to administer property burdened with liens, and should only do so when this is for the interest of the general estate. Re Zehner (D. C.) 193 Fed. 787, 789. A court of bankruptcy is not a court for the administration of assets in which the bankrupt's estate is not interested, and should not administer property charged with liens except in the interest of general creditors. Re Harralson (8th Circ.) 179 Fed. 490, 492, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737; Re Cutler (D. C.) 228 Fed. supra, at page 794. The interest of general creditors should control as to the mode of sale. Re Keet (D. C.) 128 Fed. at page 652. The court, and not the lienors, is to decide as to the mode of sale. Re Howard (D. C.) 207 Fed. 402, 417.

On the whole, I conclude that as the petitioner had merely filed a proof of a secured debt, without alleging any insufficiency of security or taken any step necessary to the allowance of its claim for the purpose of participating in the creditors' meetings, and as it had furthermore filed no ancillary bill or other pleading asking the enforcement of its mortgage through the bankruptcy court (even if this were permissible, a matter not decided) it had no standing in the bankruptcy court for the purpose of resisting the sale of the property subject to its mortgage, and cannot be deemed to have been prejudiced in any

way thereby.

It is true that at the meeting at which this sale was ordered the attorney for the trustee gave notice that he would object to the allowance of the petitioner's claim at all, either as a secured or unsecured creditor. No formal objections to the claim were filed, however. now suggested in the petitioner's brief that there may be a serious question as to the validity of its mortgage, and that if the property is sold subject to this mortgage, not knowing what the final result may be in litigation with the purchaser as to the validity of the mortgage or whether there will be any deficiency in its security, it will not be in a position to protect itself at the bidding as an unsecured creditor for any deficiency in its security. There is, however, no pleading raising any such issue. Furthermore it occupied in the court the position of asserting by its proof of claim that it had a valid mortgage on this property, given as additional security to the vendor's lien retained upon other property, with no suggestion upon its part at that time that its security might be invalid or finally found to be insufficient. I am of opinion that under this proof of claim as a secured creditor, asserting the validity of the mortgage and not asserting the insufficiency of the security, it had, as stated, no status for the purpose of resisting a sale subject to the mortgage, the validity of which it itself asserted; and that if it desired to participate in the proceedings and to be heard upon the question of the validity or the sufficiency of its security, it should have taken the proper steps provided by the Act to have the value of its security ascertained in order that it might be heard as an unsecured creditor to the extent of any probable deficiency. It did, however, none of these things, but relied at the time solely upon its position as a secured creditor, asserting a valid lien upon the property. Presumably it is in possession of all facts enabling it to determine the validity or invalidity of its mortgage and also in full possession of the facts as to the value of the security, and should be in a position to bid with more definite knowledge than is possessed by general creditors on the equity of the property which was ordered to be sold. Clearly the small unsecured claim for which it filed proof of claim, after the making of the order in question, gives it no greater rights than it had at the time the order was made.

Furthermore while there appears to be no direct authority upon the specific question involved, the opinion in Re Burr Mfg. Co. (2d Circ.) 217 Fed. 16, 19, 133 C. C. A. 126, is strongly persuasive, if not controlling, of this question. There mortgagees claiming mortgage liens upon the bankrupt's property, sought to revise an order of the District Court confirming a sale of the bankrupt's property, which had been made subject to the liens upon the property. The court said that the fact that mortgagees had not received notice of the sale was not important, as they were not in a position to attack the sale; that only such persons could apply to have a judicial sale vacated as were interested and injuriously affected by the sale; and that the mortgagees were "without interest, because the order confirming the sale was upon the condition that the purchaser \* \* \* should 'accept title to such, if any, liens as may be on the property.'" And later in Re Vanoscope Co. (2d Circ.) 244 Fed. 445, 157 C. C. A. 71, it was held that an adverse claimant of property claimed by the trustee in bankruptcy had no standing to object to an order directing the trustee to sell the bankrupt's "right, title and interest" in the property. The court said, in language having a direct bearing upon the present question:

"The proceedings were in all respects regular, and on the situation as it was developed before the referee he decided that it was to the interest of the estate to order the sale asked for. The trustee did not purport to sell anything but his right, title and interest. No rights were affected or impaired. It was the lookout of the purchaser as to what he was buying, and he has not complained."

So in the instant case the referee found, as stated in his certificate, that it was advantageous to the unsecured creditors to sell the plant and property of the bankrupt as a whole as soon as possible, subject to all valid incumbrances, secured creditors being left to their remedies against the property. The trustee was not directed to sell anything except the bankrupt's interest. No rights of the mortgagee were affected or impaired, and as it stood solely in the position of a secured creditor asserting a valid lien upon the property, the sufficiency of which it did not question, I am of opinion that it has no standing to revise the order of the referee, which will accordingly be confirmed.

252 F.—20

## STATE OF ALABAMA v. PEAK.

(District Court, S. D. Alabama. September 18, 1918.)

No. 4563.

REMOVAL OF CAUSES 5-87—CRIMINAL PROCEEDINGS—SUFFICIENCY OF PETITION.

The petition of a United States revenue officer for removal of a prosecution for grand larceny instituted against him in state court *held* sufficient under Judicial Code, § 33 (Comp. St. 1916, § 1015), as it alleged that petitioner was a revenue officer, and that the prosecution arose out of a transaction in which he was discharging his official duties, though the petitioner denied he was guilty of any larceny, etc.

Joe Peak was indicted in the Alabama circuit court for grand larceny, and the cause was removed to the federal court on petition, under Judicial Code, § 33. On motion to remand. Motion denied.

N. R. Clarke, State Sol., of Mobile, Ala., for movant.

H. T. Pegues, Asst. Dist. Atty., of Mobile, Ala., for respondent.

ERVIN, District Judge. This matter comes on to be heard on the motion by the state of Alabama to remand the case of Joe Peak to the state court for trial, in which it is claimed: First, that the petition of the defendant to remove the above-entitled cause from the circuit court of the Thirteenth judicial circuit, at Mobile, to this court, denies that he committed the larceny complained of in the indictment; second, that the petition does not state facts entitling petitioner to a removal of the above-entitled cause from said circuit court to this honorable court. It will be seen at once that the question for decision is one of pleading, and arises on the sufficiency of the petition in this case, which reads as follows:

"Your petitioner, Joe Peak, respectfully shows unto your honor that heretofore, on, to wit, the 27th day of February, 1918, at a preliminary hearing held before the Honorable Henry Chamberlain, judge of the inferior criminal court for Mobile county, Alabama, he was tried upon a charge of grand larceny alleged to have been committed by him in Mobile county, Alabama, and was on said date bound over by said judge to await the action of the grand jury for said county, and that he gave bond in the sum of \$250 for his appearance: that on, to wit, the 14th day of March, 1918, the grand jury aforesaid returned an indictment against him into the circuit court of Mobile county, Alabama, at Mobile, charging that he feloniously took and carried away one hundred and seventy-five dollars in lawful currency of the United States of America, the personal property of James W. Lenford, said crime alleged to have been committed in Mobile county, Alabama, within the Southern district of Alabama.

"Your petitioner further shows that no grand larceny was committed by him; that he did not feloniously take and carry away the said sum of money, or any other sum, the personal property of James W. Lenford, but that at the time of the alleged act for which he was indicted he was an officer duly appointed under, and acting by authority of, a revenue law of the United States, that is to say, he was a narcotic inspector, duly appointed and acting under an act of Congress approved December 17, 1914, commonly known as the Harrison Narcotic Act, which is an internal revenue law; that he had been assigned for work as such inspector under Hon. Daniel L. Porter, reve-

nue agent in charge of the states of Tennessee and Alabama, with headquarters at Nashville, Tenn.; that he was in Mobile, Alabama, and surrounding territory, under the directions and by instructions from Hon. Daniel L. Porter, revenue agent aforesaid, for the purpose of investigation into violations of the said act, as well as of all other internal revenue laws, including the laws in reference to vinous, spirituous, or malt liquors; that in the course and scope of his said duties as such inspector he had proceeded to the roadhouse of one Ed. Murray, situated some seven or eight miles from the city of Mobile, Ala., to investigate alleged violations of the internal revenue laws, and that he had secured valuable evidence and was on his way back to Mobile to report the same to his superior officer, when the alleged act for which he was indicted occurred; that is to say, on his return journey to Mobile he encountered one James W. Lenford, who was in an automobile with his chauffeur, petitioner likewise being in an automobile with a chauffeur, there also being other persons in Lenford's automobile, all of whom had been to Murray's roadhouse and were returning to Mobile; that said Lenford afterwards claimed that he had been robbed of some money while on said return journey, and when he reached Mobile had warrants issued for petitioner and the two chauffeurs; but petitioner emphatically denies that he was on said occasion, or any other occasion, guilty of any act of grand larceny of the felonious taking of Lenford's or any one else's money; but that the whole course of his conduct and acts on said occasion was in the performance of his official duties as aforesaid.

"In view of these facts, your petitioner prays that the said cause be removed from the circuit court of Mobile county, Alabama, to the District Court of the United States for the Southern District of Alabama, and that the appropriate writ issue. And as in duty bound, he will ever pray.

"[Signed] Joe Peak, Petitioner."

The act under which the petition was filed reads as follows:

Section 33, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1097 [Comp. St. 1916, § 1015]): "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under such law, \* \* \* the said \* \* \* prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the District Court next to be holden in the district where the same is pending, upon the petition of such defendant to said District Court, and in the following manner."

The motion is undoubtedly based upon the case of State of Illinois v. Fletcher (C. C.) 22 Fed. 776, and that case was pressed upon me in the argument. It is urged that, because the petitioner alleges that he "did not feloniously take and carry away said sum of money, or any other sum," and further denies that he was "guilty of any act of grand larceny, or the felonious taking of Lenford's or any one else's money," under the ruling in 22 Fed. 776, this case must be remanded.

In the first place, it occurs to me that the state's attorney overlooked the distinction between the denial of an act and a denial of the criminality of such act; in other words, that where petitioner denies that he was guilty of grand larceny, or the felonious taking of money, this is merely a denial that the act as done was a criminal one, and distinctly constituted a denial that the taking was a felonious one, in that there was no felonious intent in the taking. If petitioner was required to specifically admit the facts as charged in the indictment, and the intent

also charged, this would amount to a plea of guilty, and there would be nothing to try in the federal court; all that would be required would be to enter a judgment.

The argument is based upon the following language, as used in the

case in 22 Fed. 778:

"It is charged in the indictment that the petitioner shot and murdered William Curnan on the 4th day of November, 1884, in the county of Cook, state of Illinois, and the petition distinctly asserts that 'neither of them fired any shot nor did any act by reason of which the said Curnan came to his death, as set forth in the indictment." If they neither did the shooting, nor in any way contributed to Curnan's death, it follows that they have not been indicted for an act or acts done by them as deputy marshals of the United States, and this court has no right to interfere with the jurisdiction of the state court. It is true the petition contains an averment that the indictment was found against the petitioners for acts done by them, if done at all, as deputy marshals of the United States, while in the performance of their duties as such. They did the killing, or contributed to it, or they did not; and nothing short of a positive averment that they did the act for which they stand indicted, and did it in the line of their duty as deputy marshals of the United States, or under color of their authority as such officers, will entitle them to a removal of the case from the state court to this court for trial."

It will be observed in this case that the petition undertakes to set out the facts which it is averred constitute the acts for which they were indicted, and it is held in this sort of case, just as it is in others, that, where the facts are set out, they should be sufficient to establish the right of removal claimed by petitioner. Volume 2, 5th Edition, Foster's Fed. Practice, where it is said:

"It has been held that a petition by a revenue officer is sufficient if it avers in general language that the suit or prosecution in the state court which it describes was brought against him for or on account of an act done by him under a revenue law of the United States, without specifying the facts. Where, however, the petitioner, in addition to the general averment in the statutory language, sets forth the specific facts of the case, and it appears that they do not fall within the statute, the case will be remanded."

This same rule is laid down in the case relied on by the state's attorney, because in the paragraph which precedes the one just quoted is found in the following language:

"If the petition simply averred that the defendants stood indicted in the state court for an act done by them as deputy marshals, or under color of their office, or the law authorizing their appointment, and defining their powers and duties, without describing the act or circumstances under which it was committed, it would, perhaps, be the right and duty of this court to assert jurisdiction of the case; at least, until it should appear that the claim was unfounded. Tennessee v. Davis, 100 U. S. 257 [25 L. Ed. 648]."

It will be observed that the petition in the instant case does not undertake to set out the facts which transpired on the return journey to Mobile, when he met Lenford, and is accused in the indictment of feloniously taking Lenford's money. The petition contents itself merely by stating that:

"Lenford afterwards claimed that he had been robbed of some money while on said return journey, and when he reached Mobile had warrants issued for petitioner and the two chauffeurs; but petitioner emphatically denies that he was on said occasion, or any other occasion, guilty of any act of grand larceny or the felonious taking of Lenford's or any one else's money; but that the whole course of his conduct and acts on said occasion was in the performance of his official duty as aforesaid."

Certainly the conduct and acts on said occasion referred to the occasion of the meeting of the two automobiles, one occupied by Lenford and the other by petitioner, when it is alleged the felonious taking took place, and this petition sets up in general terms that the whole course of petitioner's conduct and acts on said occasion was in the performance of his official duties as aforesaid, meaning, as I take it, in

the performance of his duties as a revenue officer.

It seems to me, therefore, that the petition is sufficient under the terms of the decision relied on by the state of Alabama; but I cannot pass the question without stating that I am not at all satisfied with the correctness of the position taken by the court in State of Illinois v. Fletcher, that nothing short of a positive averment that petitioners did the act for which they stand indicted, and did it in the line of their duty as deputy marshals of the United States, or under color of their authority as such officers, will entitle them to the removal of the case from the state court to this court for trial.

It is true that the terms of the act as written give the right of removal when a suit or criminal prosecution is commenced against a revenue officer on account of any act done under color of his office. I do not, however, concede that the accused must necessarily admit the doing of the specified act in the terms as charged in the state indictment. I think that he has just as much right, if whatever act he did was under color of his office, to have the benefit of a trial of the facts in the federal court, as well as to try the question of the intent with which these acts were done.

The accused might well deny that he is guilty of the specified acts with which he is charged, and yet concede that he did do certain acts at that time, but deny that he did the acts he is specifically charged with. The facts may be so charged in the indictment as to involve a confession, if conceded as charged. The officer may admit doing an act, but claim that the statement of facts in the indictment are incorrectly stated.

The terms of the Removal Act provide that, when a criminal prosecution is commenced in a state court against any officer "on account of any act done under color of his office or of any such law," it may be removed. Certainly the officer must admit the doing of some act under color of his office or of the law for which he is indicted, but he is not required to admit the doing of the acts as charged in the indictment.

A careful reading of the case of Illinois v. Fletcher does not to me preclude the construction I give of the act; but, as it is so construed by the state's attorney, I feel impelled to enter my protest against the construction given by the state's attorney. I think, if the other essentials are present, he should have the right to try in the federal court the act charged, under the terms in which it is charged, as well as the intent with which the acts were done.

The petition in the instant case seems to have been written and conformed to the petition shown in Tennessee v. Davis, 100 U. S. 25, 25

L. Ed. 648. In that case the accused was indicted for murder, and in the petition, after stating that he was indicted for murder, he—

"alleges and further shows that no murder was committed, but, on the other hand, the killing was committed in his own necessary self-defense, to save his life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defense, while engaged in the discharge of the duties of his office as collector of internal revenue, and was acting by and under the authority of the internal revenue laws of the United States, and was done under and by right of his office, to wit, as deputy collector of internal revenue."

Two things will be noticed here. In the first place, the petition does not admit specifically the doing of the acts with which he is specifically charged, for it states, "at the time the alleged act for which he was indicted was committed"; and, in the second place, there is no statement of the facts as to how the man whom petitioner is accused of murdering was killed, but there is a general statement that at the time of the doing of these acts for which he is indicted, the petitioner was engaged in the discharge of his duties as a deputy collector of revenue. The Supreme Court opinion (100 U. S. on page 263, 25 L. Ed. 648) says:

"If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection," etc.

Again (100 U. S. on page 271, 25 L. Ed. 648) the court says:

"It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offenses against state laws from state courts to the Circuit Courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case."

In each of these quotations the court refers to the alleged offense, but nowhere requires that there must be an admission by the petitioner that he did the specified act, in the terms in which it is charged in the indictment as being a criminal offense.

In the petition in Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574, another case where the petitioner was indicted for murder, the facts are set out by the petitioner; but when he comes to the actual killing, while he says that the killing was done by a gun in his hands, he charges that the gun was accidentally discharged, and yet the Supreme Court held in that case that because, at the time the gun is alleged to have been accidentally discharged, petitioner was acting as a member of a posse to arrest the man, he was entitled to have his case removed to the federal court for trial.

It seems to me the rule as to the relationship of the officer and the act committed by him is laid down in People's United States Bank v. Goodwin (C. C.) 162 Fed. 945, where the court says:

"In my opinion, to permit the removal of a cause under this section of the law, the acts which constitute the cause of action must have some rational connection with official duties under a 'revenue law,' and in some way affect

the revenue of the government. It could hardly be claimed that even a revenue collector, if sued for some act claimed to have been committed in the performance of his official duties, would have the right to remove the cause, under section 643, if neither the declaration nor petition for certiorari showed that the act for which he was sued was in fact in the performance of an official duty imposed on him by law, having some relation to the collection of revenue for the government. These facts must appear on the face of the complaint in the action, or in the petition for the writ of certiorari; otherwise, a national court is without jurisdiction.

It is urged that there can be no right of removal where one is charged with a larceny, because there could be no possible connection between the official capacity of a revenue officer and the felonious taking of money or property. This proposition is so manifestly unsound that I think it needs but one statement to refute it. Suppose a revenue officer, finding money or property in the possession of a man he was pursuing or seeking to make a case against, and he abstracts this money or property to be used as evidence in a prosecution against the person in whose possession it was found. Unexplained, the taking and carrying away by the officer of the money would constitute larceny; but, when it was shown that it was taken and carried away for the purpose of being preserved and used in the prosecution of such person, there would be no criminality in the act.

In my opinion, the petition, stating as it does, in general terms, that the act or acts done by petitioner on said occasion were in performance of his official duties as a revenue officer, makes a case for removal, and the motion to remand will therefore be denied.

## RAZUKAS v. NEW YORK TRAP ROCK CO.

(District Court, D. New Jersey. August 2, 1918.)

1. SEAMEN \$\infty\$19\to DISCHARGE\to Notice\to Wages.

In the absence of proof of usage or custom of the port, a captain employed on a scow at a certain rate of wages per month for an indefinite term may be discharged at any time, either during or at the end of the month, without previous notice, and may recover wages only for the time actually served.

- 2. SEAMEN 29(1)—DISCHARGE—USE OF FORCE.
  - Where a captain of a scow has been lawfully discharged by his employer, the employer may use reasonable force to overcome the employé's physical resistance in being removed from the scow.
- 3. Seamen \$\isim\$31-Action for Loss of Goods-Employer's Liability.

In an action by the captain of a scow for loss of household goods and clothing when the scow capsized in a storm, the employer could not be held liable for negligence in loading or navigating the scow, when at the time of the accident neither the tug towing the scow nor the owner were acting on defendant's behalf, but on behalf of the charterer.

4. SEAMEN \$\iiii 31 \text{-Actions for Loss of Goods-Liability of Employer-Evidence.}

In an action by the captain of a scow to recover for household goods and clothing lost when the scow capsized during a storm, evidence held

not to show that the scow was unseaworthy, in that its decks were rotten and full of holes.

5. SEAMEN \$\iiists 31\$—Action for Loss of Goods—Burden of Proof—Evidence.

In an action by a captain of a scow against his employer to recover for household goods and clothing lost when the scow capsized during a storm, evidence \$held\$ not to sustain libelant's burden of proof that the employer failed in his duty to libelant, and that such failure was the proximate cause of the loss.

In Admiralty. Libel by August Razukas against the New York Trap Rock Company. Decree entered for libelant.

Runyon & Autenreith, of Jersey City, N. J. (Edmund S. Johnson, of Jersey City, N. J., on the brief), for libelant.

Frederick W. Park, of New York City, for respondent.

RELLSTAB, District Judge. The libel is in personam and contains three claims: For wages; for personal injuries on being ejected from a scow of which libelant was in charge; and for the loss of goods and chattels. Libelant was in the employ of respondent. He was made captain of the scow Ruth, and subsequently of the scow Wandell.

[1] 1. As to the claim for wages: The respondent admits liability "for three days' pay at the rate of \$50 per month, less a credit of \$1 on account of the same." Libelant was hired on September 14, 1915, at the rate of \$50 per month. He worked on the scow Ruth until the middle of November that year, when he was transferred to the scow Wandell. He continued on the latter until December 4th following, when he and his family were forcibly ejected therefrom. On the day previous he was notified that he was discharged, and told to remove from the boat. This he refused to do. There is a dispute as to the exact words of hiring and the reasons for his discharge, but it is agreed that the service was for an indefinite period.

There is no satisfactory evidence from which the court can find that there is any settled custom in the waters of New York Harbor, or those adjacent thereto, as to what is necessary for either party to terminate such a hiring. In The Rescue (D. C.) 116 Fed. 380, Judge McPherson, of this circuit, following The Pacific (D. C.) 18 Fed. 703, held:

"In the absence of proof of any settled usage or custom of the port, an engineer employed for a vessel at a certain rate of wages per month, without any specified term of service, may be discharged at any time, either during or at the end of a month, without previous notice, and can recover wages only for the time actually served."

These cases are cited and adopted by The Pokanoket (C. C. A. 4) 156 Fed. 241, 84 C. C. A. 49. Their reasoning is satisfactory and will be followed on the matter of wages in the instant case, with the result that no more than is admittedly due will be allowed.

[2] 2. As to the claim for personal injuries: On December 3, 1915, libelant had been notified of his discharge and given opportunity to remove his family and belongings from the boat. Like notice and opportunity were given him on the following day, when he was ejected. He

persisted in remaining on the boat, and forcibly resisted being put off. Considerable force was used in ejecting him, but the evidence warrants the conclusion that no more force was used than was reasonably necessary to effect his removal. His discharge being lawful, reasonable force to overcome his physical resistance to being removed from the scow was also lawful.

[3] 3. As to the claim for loss of goods: This claim is for household goods, clothing, etc., of libelant and his family, which were in the cabin of the scow Ruth when it capsized in a storm on Long Island Sound on the evening of November 15, 1915. The libelant claims that the capsizing of the scow was due to its being unseaworthy, overloaded, and improperly navigated. At that time, it was chartered to the Haverstraw Crushed Stone Company; and the tug Blakeslee, which had charge of the tow of which the Ruth was the hawser boat, was owned and operated by the New Haven Trap Rock Company. At that time neither tug nor owner was acting for or on behalf of respondent, and the latter cannot be held responsible for any negligence (if there was any) in the loading or navigating of the scow.

[4] As to the scow's alleged unseaworthiness: This is said to exist in the absence of lifeboats and life preservers, and in that its decks were rotten and full of holes. The lack of life-saving apparatus manifestly in no way contributed to the capsizing of the scow and the consequent loss of libelant's goods. The libelant's contention that the decks were rotten and filled with holes is testified to by him and his wife. Mr. Martin, who constructed the Ruth and repaired her, both before and after she capsized, denied that the decks were in such condition, and affirmed that they were in good condition, and that the scow was

fit for the service engaged in at the time she capsized.

The respondent's assigned cause of the scow's capsizing is that it was due to injuries received during her continuous bumping with scow No. 38, the one next to the Ruth in the tow, and not to any unseaworthiness existing before that time. This tow, loaded with stone, encountered a severe storm on Long Island Sound, on its way from Orchard Beach, Conn., to New York. It had passed Norwalk, when the tug, in response to a signal of distress from the Ruth, came alongside of her and, at the libelant's request, took off his wife and two small children, who had become frightened. The tug thereupon straightened up its tow and proceeded for about half an hour, when she was again given a distress signal. Before the tug was signaled the sea had washed over the decks of the Ruth, carrying some of the smaller stones (screenings) away. Up to that time the water entering the hold of the scow was well taken care of by the pumps. However, between the time of the slackening of the hawser in response to the first signal of distress and the straightening of the tow preparatory to resuming the journey, the Ruth and scow No. 38, no longer kept apart by the taut hawser, came violently into contact with and repeatedly bumped against each other through the action of the storm, wind, and waves. This undoubtedly injured both scows, for shortly thereafter the water entered into their holds more rapidly, and in greater volume

than their pumping facilities could control, and they began to sink. This necessitated the casting adrift of these two scows. Subsequently they capsized, and the goods of libelant on board the Ruth were lost.

[5] To make the respondent liable for the loss of libelant's goods. it must be shown that it failed in its duty to the libelant, and that such failure was the proximate cause of the loss. This burden was on the libelant, and he has not met it. While the evidence as to the controlling cause of the capsizing of the Ruth is not as satisfactory as it could have been, it supports the respondent's assigned causes, rather than those of the libelant. The Ruth carried her cargo on her decks; therefore they could not have been very rotten. The entrance of the water into the Ruth was no doubt due to a number of causes. The heavy load it was carrying, with the resultant low freeboard, its position as the hawser boat in the tow, and the strong wind that was encountered, all contributed to produce a situation favorable to the sea's washing over its decks. Much of this water undoubtedly found its way into the Ruth's hold, but by the libelant's admission it was sufficiently disposed of by the scow's pumps until after the first distress signal was given. After the Ruth and scow No. 38 came into the violent contact referred to, a different condition was found to exist. The pumps no longer were able to care for the water that entered the scow's hold. Some additional cause must have been responsible for this radically changed situation. None other than that advanced by the respondent is suggested, and that is not merely plausible, but has sufficient probative force to warrant its acceptance as the controlling cause.

The libelant is entitled only to the conceded three days' pay at the rate of \$50 per month, less \$1 paid on account, for which a decree

may be entered.

# UNITED STATES ex rel. SCHWARTZ v. COMMANDING OFFICER OF 78TH DIVISION, U. S. A.

(District Court, D. New Jersey. June 3, 1918.)

1. Army and Navy €==20—Selective Draft—Deferred Classification—Pardon—Effect.

One subject to the Selective Draft Act, who had been fully pardoned after being convicted of a felony, should not be placed in a deferred classification pursuant to section 21 of the original regulations or section 79 of those of November 8, 1917.

2. PARDON \$\sim 9\to FULL PARDON-EFFECT.

A full pardon restores one to all his civil rights, and blots out the existence of guilt.

3. Army and Navy \( \sime 20 \)—Selective Draft—Deferred Classification—Conditional Pardon.

Where relator complied with a condition expressed in his pardon it had the same effect as though originally unconditional; hence the conviction was no ground for relator's deferred classification under the Selective Draft Act.

4. ARMY AND NAVY \$\ightarrow\$20-Selective Draft Act-Decision of Local and District Boards.

A decision of the local and district boards provided for by the Selective Draft Act, denying a deferred classification to relator, who had been convicted of felony, but pardoned, will not be disturbed by the court on petition for habeas corpus, upon the ground that the pardon was conditional, where there was no showing before the boards that the pardon was other than unconditional; for the pardon having been treated as unconditional, there was evidence upon which the boards' conclusion could be supported.

Habeas Corpus. Petition by the United States, on the relation of Meier Schwartz, for a writ of habeas corpus against the Commanding Officer of the 78th Division, U. S. A., located at Camp Dix, N. J. On petition for the writ, and return of an order to show cause. Order to show cause discharged.

Warren Dixon, of Jersey City, N. J., for relator. Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J., for respondent.

HAIGHT, District Judge. [1,2] From the petition, the answering affidavits of the respondent, and certain documents submitted, the following material facts appear, viz.: The relator was inducted into military service on February 24, 1918, pursuant to Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76. Within the prescribed time after being certified as physically fit for military duty, he filed with the proper local board a claim for discharge upon the ground that he had been convicted of a felony, namely, murder, in the state of Mississippi on April 4, 1912, which conviction had not been set aside or reversed. During the course of the board's investigation, it was ascertained, apparently on the relator's admission, that he had been granted a "full pardon by the Governor of the state in which he was convicted, and that since his release he had exercised the right of suffrage as a citizen." The local board disallowed the claim. relator thereupon prosecuted an appeal to the proper district board. which affirmed the action of the local board. In the questionnaire, which he was subsequently required to file, he again stated that he had been convicted of murder and claimed the right to be classified, in accordance with the regulations, in class 5H. The local board, however, placed him in class 1, and the district board, on appeal, affirmed such classification. Thereafter he was required to report for military duty, and did so. Since February 25, 1918, he has been in the military service.

I have had before me a certified copy of the pardon granted to the relator by the Governor of Mississippi, and a memorandum which was submitted by counsel on behalf of the relator to the district board in support of his original claim for discharge. It is the relator's primary contention that, upon his showing that he had been convicted of felony and sentenced, he should have been discharged under sec-

tion 21 of the original regulations promulgated by the President pursuant to the Selective Draft Act, and that pursuant to section 79 of the regulations promulgated on November 8, 1917, he should have been placed in class 5H, and hence, as since the later regulations were issued only men in class 1 have as yet been drafted in the military service, his detention by the military authorities is unlawful.

It was the relator's contention before the local and district boards on both occasions that, as he had been convicted of murder, he was entitled to a discharge or the deferred classification above mentioned, irrespective of the pardon which had been granted to him. This same contention is made here. I cannot accept that view. It has long been settled that a full pardon removes, not only the crime, but all the legal disabilities flowing therefrom, and, as said by Mr. Justice Field, in Ex parte Garland, 4 Wall. 333, at 380 (18 L. Ed. 366):

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

Although the language used in the parts of the regulations above referred to, if literally construed, would undoubtedly support relator's contention, yet, under the settled rules of construction, I think that they must be construed in the light of the law as it then existed, and consequently be held inapplicable to a person who has been convicted of a felony and has subsequently received a pardon, which carries with it the legal consequences above referred to. Any other construction would, I think, be unreasonable, out of harmony with the manifest purposes of the regulations, and contrary to the well-settled rules of construction. As a full pardon restores one to all his civil rights and blots out the existence of guilt, it is inconceivable that it was intended by the regulations that a person who had received a full pardon should be deprived of one of a citizen's greatest privileges, to bear arms in the defense of his country.

[3] However, the pardon which was granted to the relator in this case was upon condition that he should leave the state of Mississippi within three days from the date of the pardon, and should not return thereto. It is next contended that a conditional pardon, such as that, does not have the same effect as a full pardon would. As far as the evidence which is before me shows, the condition has been complied with. Although the rule in some jurisdictions is as the relator contends, it has been decided by the Supreme Court of the United States (which, of course, in a case such as this I am bound to follow) that a pardon granted upon condition blots out the offense, if proof is made of compliance with the condition. Armstrong v. United States, 13 Wall. 154, 155, 20 L. Ed. 614; United States v. Klein, 13 Wall. 128, 142, 147, 20 L. Ed. 519; United States v. Padelford, 9 Wall.

531, 542, 19 L. Ed. 788. In all those cases the pardon was upon condition, and required, on the part of the person pardoned, the continued fulfillment of an oath. I have no doubt, therefore, that, as the relator has complied with the condition upon which the pardon was granted, it has the same effect as if it had been unconditional in the first instance.

[4] Moreover, there was nothing before either the local board or the district board to show that the pardon in this case was any other than a full and unconditional one. In fact, the written argument made before the district board on behalf of the relator made no distinction between conditional and unconditional pardons, but proceeded on the broad ground that the relator's mere conviction entitled him to a discharge or deferred classification, irrespective of the pardon. Hence, whatever may be the legal effect of the particular pardon granted in this case, as there was evidence upon which the boards' conclusions can be supported, namely, proof of a full pardon, this court is not permitted to disturb their judgment. United States v. Kinkead (D. C. N. J.) 248 Fed. 141, affirmed by the Circuit Court of Appeals, 3d Circuit, 250 Fed. 692, — C. C. A. —. No question is raised in this case that the relator did not have a fair hearing, in the sense that every opportunity was afforded him to present evidence in support of his claim.

It follows, therefore, that a writ of habeas corpus should not issue, and that the rule to show cause, heretofore granted, should be dis-

charged.

## TATE v. BAUGH, Sheriff.

(District Court, W. D. Tennessee. July 6, 1918.) No. 1786.

1. Courts \$\sim 344\to Jurisdiction\to Parties.

A suit against "J. O. B., sheriff of Coahoma county, Miss.," was an action against the individual, and not against the office, so that service obtained while he was out of his own state, where he was not acting as sheriff, would not affect the validity of the service.

 COURTS \$\infty\$ 272—Federal Courts—Diversity of Citizenship—District in Which Brought.

Where federal jurisdiction is invoked, founded only on the fact that the action is between citizens of different states, and the suit is brought in the district of the plaintiff's residence, objection thereto on the ground that the suit should have been brought in the district of the defendant's residence presents a question of venue, rather than of jurisdiction; and if in such case the requisite diversity of citizenship appears the objection is not well taken. Judicial Code, §§ 24, 51 (Comp. St. 1916, §§ 991(1), 1033).

Action by Gladys W. Tate against J. O. Baugh, Sheriff of Coahoma County, Miss. Defendant files plea to the jurisdiction. Disallowed.

G. T. Fitzhugh, of Memphis, Tenn., and Gerald Fitzgerald, of Morrill, Tex., for plaintiff.

Cutrer & Johnston, of Clarksdale, Miss., and Wright, Miles, Waring & Walker, of Memphis, Tenn., for defendant.

McCALL, District Judge. This is a plea (as stated on its face) to the jurisdiction of this court. For the causes set out in the plea, it is averred that defendant is not amenable to the process served upon him, and prays that said process be quashed and this suit be dismissed. The substance of the plea, in so far as deemed now material, is that defendant is sued in his official capacity as the sheriff of Coahoma county, Miss., for a tort committed in that state by one of his deputies, and that while the defendant was on a visit in Shelby county, Tenn., this action was brought and process was served on him. It is stated in the plea that when process was served the defendant was not acting as sheriff, nor was he in Tennessee as sheriff. It is argued that this must be true, since his jurisdiction as sheriff does not extend beyond the territorial limits of the state of Mississippi, and, when he crossed the line between the two states, he as it were shucked off his official robe and once again became a plain citizen. Hence he insists that service of process on him as sheriff of Coahoma county, Miss., is void, and gave this court no jurisdiction of him as such sheriff, nor of the cause

As has been seen, defendant assumes that he is sued in his official capacity as sheriff. He refers in his plea to the declaration as authority for the assumption. An examination of the declaration discloses that the plaintiff "sues J. O. Baugh, sheriff of Coahoma county, Mississippi." The writ (directed to the marshal) reads: "You are hereby commanded to summon J. O. Baugh (sheriff of Coahoma county, Mississippi)." The return of the marshal, as indorsed on the writ, reads: "I duly executed the same as therein commanded by making the contents known to the within named defendant, J. O. Baugh." At the hearing plaintiff's counsel insisted that the suit was against Baugh as an individual, and in no sense against him as sheriff. So the first question for decision is whether the suit is against the defendant as an individual or in his official capacity as sheriff.

17 Encyc. Pleading & Practice, page 180, states the rule to be that:

"For the purpose of showing that the action is brought against public officers as such, and not against them individually, there should be, in addition to their individual names, a description of their office, preceded by the word 'as,' the omission of which word will require the addition of the descriptive titles to the individual names to be regarded merely as descriptio personæ."

This rule is supported by the decided cases, notably Bennett v. Whitney, 94 N. Y. 303. But if there was any question as to the rule, and the matter were in doubt, certainly when counsel for plaintiff asserts, as he did, that he is suing J. O. Baugh as an individual, and not in his official capacity as sheriff, that should remove any doubt on that question, in the light of the language used in the writ and declaration.

Jurisdiction of this court is further challenged on the ground, as urged, that it is not founded only on the fact that the action is between citizens of different states, and therefore the suit must be brought in the district whereof defendant is an inhabitant. Section 51 of the United States Judicial Code (Act March 3, 1911, c. 231, 36 Stat.

1101 [Comp. St. 1916, § 1033]) is relied on to support this contention. That section provides that:

"No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 24 of the United States Judicial Code (Comp. St. 1916, § 991 [1]) provides that District Courts have original jurisdiction—
"of all suits of a civil nature, at common law or in equity, \* \* \* where the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars, and \* \* \* is between citizens of different states," etc.

As the court understood counsel for defendant, his position is that, since there were questions arising in the case other than the one of diversity of citizenship, therefore plaintiff was not relying, and could not properly rely, only on the fact of diversity of citizenship in invoking the jurisdiction of this court. Questions other than the citizenship of the parties may, and no doubt will, arise in the progress of the case. Indeed, the question of citizenship itself may become an acute one. But at this stage of the pleadings we may look alone to the declaration to determine if the requisite diversity of citizenship appears.

When section 51 is considered and construed together with section 24, the question raised seems to be one of venue rather than federal jurisdiction. It clearly appears that some federal court can entertain jurisdiction of this case. Indeed, defendant's counsel conceded as much at the hearing, but insisted that that court was the federal court of the Northern district of Mississippi, whereof defendant is an inhabitant. The action being between citizens of different states, it would seem to follow that the only ground for invoking the jurisdiction of

this court is that the plaintiff is a resident of this district.

[1, 2] My conclusions are that this is a suit against Baugh as an individual, and the service of the writ is valid; that this court has jurisdiction of the defendant and the subject-matter of the suit and the suit is properly brought in the district whereof plaintiff is a resident. The defendant appears only for the purpose of pleading to the jurisdiction of the court, and hence I express no opinion upon other questions discussed at the hearing relating to Baugh's liability in his individual capacity for a wrong committed by one of his deputies, while acting as such.

An order will be entered, disallowing the plea to the jurisdiction of this court.

UNION TIMBER PRODUCTS CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, W. D. Washington, N. D. July 19, 1918.)

No. 4102.

REMOVAL OF CAUSES = 19(8)—REMAND—"ACTION ARISING UNDER THE CONSTITUTION OR LAWS."

An action by a shipbuilding company against the Emergency Fleet Corporation organized under Act March 3, 1901, pursuant to the United States Shipbuilding Act (Comp. St. 1916, §§ 8146a-8146r), upon an alleged contract for the building of ships, which it was not allowed to build, is an action arising under the Constitution and laws of the United States, and is not subject to remand from the federal District Court to the state court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arising.]

At Law. Action by the Union Timber Products Company against the United States Shipping Board Emergency Fleet Corporation. On plaintiff's motion to remand the cause to the state court. Motion denied.

Wm. E. Humphrey, Kerr & McCord, Hadley & Hadley, and Wm. D. Totten, all of Seattle, Wash., for plaintiff.

Howard G. Cosgrove, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. The plaintiff sues the defendant, the United States Shipping Board Emergency Fleet Corporation, upon an alleged contract for the building of ships, which, it is alleged, it was not allowed to build. Plaintiff now moves the remanding of the cause to the state court.

The defendant was incorporated under the laws of Congress enacted for the District of Columbia (Act March 3, 1901, c. 854, 31 Stat. 1189, c. 18, subc. 4, § 605 et seq., pp. 1284, 1285), the incorporation thereunder being pursuant to the law commonly called the United States Shipbuilding Act, which act, after creating a board of five commissioners, provides, among other things:

"The board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: Provided, that no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board

shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under

such terms and conditions as may be prescribed by the board.

"The board shall give public notice of the fact that vessels are offered and the terms and conditions upon which a contract will be made, and shall invite competitive offerings. In the event the board shall, after full compliance with the terms of this proviso, determine that it is unable to enter into a contract with such private parties for the purchase, lease, or charter of such vessel, it shall make a full report to the President, who shall examine such report, and if he shall approve the same he shall make an order declaring that the conditions have been found to exist which justify the operation of such vessel by a corporation formed under the provisions of this section.

"At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section seven and shall dispose of the property other than vessels on the best available terms and, after payment of all debts and obligations, deposit the proceeds thereof in the Treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten."

Act Sept. 7, 1916, c. 451, § 11, 39 Stat. 731 (Comp. St. 1916, § 8146f).

The question for determination is whether the present action is a suit arising under the Constitution and laws of the United States. It is clear that it is such a suit, and the motion to remand is denied. Cohen v. Virginia, 6 Wheat. (19 U. S.) 264, at 421–428, 5 L. Ed. 257; Osborn v. United States Bank, 9 Wheat. 738, at 820–825, 6 L. Ed. 204; Pacific R. R. Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Ore. Short Line v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; K. of P. v. Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; K. of P. v. Kalinski, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163; P. K. Supreme Lodge v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Creswill v. K. of P., 225 U. S. 248–258, 32 Sup. Ct. 822, 56 L. Ed. 1074; Lyons v. Bank of Discount (C. C.) 154 Fed. 391; Supreme Lodge of K. P. W. v. Wilson, 66 Fed. 785, 14 C. C. A. 264; Boyd v. G. W. C. & C. Co. (C. C.) 189 Fed. 115; Supreme Lodge, K. of P., v. England, 94 Fed. 369, 36 C. C. A. 298.

252 F.—21

#### In re SCRUGGS BROS.

## (District Court, S. D. Alabama. December, 1917.)

 MORTGAGES \$\instructer=171(5)\$—MISTAKE IN DESCRIPTION—NOTICE TO TRUSTEE IN BANKRUPTCY.

The repetition in the description of the property as the "N. W. ¼ of N. E. ¼" and "N. ½ of N. E. ¼," in the same township and range, carried no notice to a trustee in bankruptcy of the mortgagor that the N. ½ of the N. W. ¼ was intended to be conveyed.

2. NOTICE &=6—CONSTRUCTIVE NOTICE—KNOWLEDGE OF FACTS.

The rule of notice is that knowledge of facts which, if followed up, would disclose the true state of facts, is efficacious.

3. Bankruptcy ← 151—Property Vesting in Trustee—Real Property.

Real property of a bankrupt, which was intended to be covered by a mortgage, but which was not sufficiently described therein to give the trustee notice thereof, passes to the trustee, under Bankruptcy Act July 1, 1898, § 47, as amended by Act June 25, 1910, § 8 (Comp. St. 1916, § 9631), vesting the trustee with all the rights, remedies, and powers of a judgment creditor holding a lien by legal or equitable proceedings thereon.

In Bankruptcy. In the matter of Scruggs Bros., bankrupts. On petition of W. R. Belsher to review ruling of the referee on a petition to order the trustee to convey certain property to the petitioner. Petition denied, and ruling of the referee affirmed.

Brooks & McMillan, of Mobile, Ala., for petitioner.

ERVIN, District Judge. This matter comes on to be heard on the petition of W. R. Belsher to review the ruling of the referee rendered on the following state of facts:

Belsher filed a petition before the referee, setting up that W. S. Scruggs, one of the bankrupts, had executed a mortgage to the said W. R. Belsher to secure \$1,500, which mortgage had become past due, and had been foreclosed by the said Belsher, and at said sale the property has been bought in by said Belsher on such foreclosure. The petition set up the fact that there had been a mistake made in the mortgage as executed by Scruggs, in that the said mortgage conveyed with other property to the "N. W. ¼ of N. E ¼, section 31, township 11, range 1 west; N. ½ of N. E. ¼, section 31, township 11, range 1 west." The petition recites that it was the intention of the grantor to convey the N. ½ of the N. W. ¼ of section 31, instead of the N. ½ of the N. E. ¼ of said section 31.

It is manifest that there is a repetition in the mortgage as written, because the N. ½ of the N. E. ¼ includes the N. W. ¼ of the N. E. ¼. It appears that this same mistake was carried through into the foreclosure conveyances. The petition prays that the referee will order the trustee to convey to petitioner the N. ½ of the N. W. ¼ of section 31, the title to which stood in the bankrupt. The referee denied this petition because of the language of section 47 of the Bank-

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ruptcy Act July 1, 1898, c. 541, 30 Stat. 557, as amended by Act June

25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631).

[1] It is contended by petitioner that the repetition in the mortgage gives notice of the fact that the N. ½ of the N. W. ¼ was intended to be conveyed instead of the N. ½ of the N. E. ¼ as described in the mortgage, and that the bankruptcy schedules, which state that this piece of property was covered by the mortgage, brought the property into court subject to the notice of this mistake. I cannot see that this mistake carried any notice to the trustee that the N. ½ of the N. W. ¼ was intended to be conveyed.

[2] The rule of notice is that "knowledge of facts, which, if followed up, would disclose the true state of facts, is efficacious," but here notice could not have given more information than an examination of the mortgage would have showed, and that would have shown that one piece of property was twice described. It is common knowledge that people do frequently twice describe property in making conveyances, and hence the trustee had no notice of anything more than what an examination of the mortgage itself would have disclosed.

of section 31, so that, when the bankrupt filed his schedules, as I construe the act, that brought this property into the custody of the bankruptcy court, and therefore the trustee, under the language of the amendment above referred to, is "deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." Where property is not covered by any mortgage, and where there is nothing to show that it was intended to include it in the mortgage, I take it that, if a lien by legal or equitable proceedings is fastened on this property, the lienholder has a prior equity in the property to one who merely claims that it was the intention of the owner of the property to include it in a mortgage made by him.

It is therefore ordered that the petition be and the same is hereby

denied, and the ruling of the referee is affirmed.

# KARASIK et al. v. PEOPLE'S TRUST CO.

#### In re FRANKLIN BREWING CO.

(District Court, E. D. New York. December 28, 1917.) No. 360.

1. Corporations \$\infty\$477(2)\topMortgages\topValidity.

In a suit by the trustees of a bankrupt corporation to set aside a mortgage, on the ground that it was never formally authorized by the board of directors as required by General Corporation Law N. Y. § 34, held, the directors, as stockholders, having assented to the mortgage, and it being part of a reorganization scheme, etc., the mortgage was not invalid on that ground.

- 2. Corporations \$\sim 477(6)\$—Mortgages—Consent of Stockholders. Where it abundantly appeared that all of the stockholders of a corporation assented to a mortgage the mortgage is not invalid because no certificate of consent of stockholders was taken and filed in accordance with Stock Corporation Law N. Y. § 6; the consent of the stockholders being the essential and all-important thing.
- 3. Corporations \$\sim 477(6)\to Mortgages\to Failure to File Consent. Where consent of stockholders to a corporate mortgage was not filed as required by Stock Corporation Law N. Y. § 6, the fact that the mortgage was recorded did not validate the same; section 7, validating such mortgages when recorded, etc., having no application, because the corporation did not receive value for bonds issued under the mortgage.
- 4. Corporations \$\sim 477(1)\$—Chattel Mortgage—Filing—Necessity. Under Lien Law N. Y. § 231, declaring that mortgages creating a lien upon real and personal property executed by corporations need not be filed as chattel mortgages, such a mortgage issued by a corporation is not invalid as to personal property because it was not filed and recorded within a reasonable time after execution, as required by sections 230, 232.
- 5. Subrogation \$\infty 23(1)-Voluntary Payment. To entitle a person to invoke the equitable right of subrogation, he must either occupy the position of a surety or have made a payment under an agreement that he should hold and receive an assignment of the debt as security; and hence a stockholder, who advanced money to a corporation to enable it to discharge a mortgage, is not entitled to subrogation to the rights of the mortgagee.
- 6. Mortgages 

  298(4)—Payment—Revivor.

A mortgage executed to secure a specific debt ceases to have any force after the payment of that debt, and cannot be revived to secure a new obligation without a new grant.

7. Mortgages \$\infty 25(6)\$—Action to Set Aside—Consideration.

In a suit by the trustees of a bankrupt corporation to set aside a mortgage securing bonds held by stockholders, evidence held to show that the only consideration for the mortgage was antecedent debts.

8. Corporations \$\sim 542(2)\top"Transfer"\top What Constitutes. Within Stock Corporation Law N. Y. \\$ 66, declaring that no corporation which shall have refused to pay any of its notes, etc., shall transfer any of its property to any of its officers for the payment of any debt, etc., a mortgage is a "transfer."

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series. Transfer.1

9. Corporations 542(2)--Transfers-Statute-Construction.

Stock Corporation Law N. Y. § 66, declaring that no corporation, which shall have refused to pay any of its notes or other obligations, shall transfer any of its property, etc., having supplanted an earlier provision, which referred to notes or other evidences of debt, it must be assumed that no change in meaning was intended by the substitution of the word "obligations."

10. Corporations €==542(2)—Transfers—Validity—"Obligation."

Under Corporation Law N. Y. § 66, declaring that no corporation, which shall have refused to pay any of its notes or other obligations when due, shall transfer any of its property to any of its officers or stockholders for the payment of any debt, the word "obligation," while not including open accounts, includes a contract complete on its face, and, where the corporation failed to make payments according to such a contract a mortgage to its stockholders to secure an antecedent debt was invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obligation.]

- 11. Corporations \$\iffsizes 542(1)\$—Fraudulent Conveyances—Preferences.

  A conveyance is invalid, as preferential, under Stock Corporation Law N. Y. \\$ 66, declaring that no conveyance, assignment, or transfer by any corporation when insolvent with intent of giving a preference to any particular creditor, shall be valid, whenever the corporation or the officer making the conveyance, etc., must have known or expected that it would have the effect of working a preference.
- 12. Corporations ⇐ 542(1)—Suit—Preference.

  In a suit to set aside a mortgage given by a corporation to secure bonds issued to stockholders to whom the corporation was indebted, held, that the mortgage was invalid, under Stock Corporation Law N. Y. § 66, because working a preference.

In Equity. Suit by Louis Karasik and others, as trustees in bankruptcy of the Franklin Brewing Company, bankrupt, against the People's Trust Company, individually and as trustee under a certain alleged mortgage. Decree for complainants. Affirmed 252 Fed. 337,—C. C. A.—.

This is an action by the trustees in bankruptcy of the Franklin Brewing Company to set aside an alleged mortgage for \$450,000 made by the Franklin Brewing Company to the People's Trust Company, as trustee, to secure the issue of certain bonds in like amount. The grounds on which the validity of the mortgage is attacked are that no certificate of consent of the stockholders of the corporation was subscribed, acknowledged, filed and recorded, as required by section 6 of the Stock Corporation Law of this state (Consol. Laws, c. 59); that the mortgage was never authorized by the board of directors, as required by section 34 of the General Corporation Law of this state (Consol. Laws, c. 23); that the mortgage is void, under section 66 of the Stock Corporation Law of this state, both as a transfer of its property to officers, directors, and stockholders, without the payment of cash therefor, after it had refused to pay its notes or other obligations and as a conveyance and security given when the corporation was insolvent or its insolvency was imminent, with the intent of giving a preference to a particular creditor over other creditors; that the bonds issued without the payment of any money to, labor for, or property received by the corporation, contrary to the prohibition of section 55 of the Stock Corporation Law; that the mortgage is void as to all the personal property intended to be secured thereby, because it was not filed and recorded within a reasonable time, as required by sections 230 and 232 of the Lien Law of this state (Consol. Laws, c. 33); that the making of the mortgage for the purpose of issuing and securing payment of bonds to the officers, directors, and stockholders of the corporation is contrary to equity

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and good conscience, and constituted a scheme to hinder, delay, and defraud the creditors of the corporation.

The Franklin Brewing Company was organized as a domestic corporation July 30, 1903, with a capital stock of \$500,000, consisting of 5,000 shares, of the par value of \$100 each. The corporation was organized by Claus Doscher, who had acquired in 1903 the plant and property of the Malcolm Brewing Company, at a public sale in insolvency, subject to an existing mortgage of \$200,000, made by the Malcolm Brewing Company to the Nassau Trust Company, of the city of Brooklyn, February 24, 1891. Thereafter Claus Doscher transferred this property to the Franklin Brewing Company subject to the aforesaid mortgage of \$200,000, which that corporation assumed, and the Franklin Brewing Company subsequently acquired other property. Doscher, in transferring his property to the Franklin Brewing Company agreed to accept for the same 3,000 shares of the capital stock of that corporation, and he further agreed to purchase from time to time the remaining 2,000 shares of that stock, as and when the corporation should require the money for working capital. On July 30, 1903, Claus Doscher received 3,500 shares of the stock of the Franklin Brewing Company, and on the same day he gave 10 shares each to his attorney, Henry F. Cochrane, to his brother, Hermann Doscher, and to his three sons, Henry, Charles, and John Doscher making 50 shares, and he retained 3,450 shares of this stock up to the time of his death on July 6, 1910. He left a will, which was duly probated on July 12, 1910, by the surrogate of Kings county whereof he appointed his three sons Henry, Charles, and John Doscher, the executors and whereby he bequeathed and devised all of his estate (including the aforesaid 3,450 shares of Franklin Brewing Company stock) to his six children, Henry, Charles, and John Doscher, and Gesine Engel, Mathilda C. Behre and Caroline Candidus, in equal shares. Claus Doscher was the president, a director, and a stockholder of the Franklin Brewing Company from 1904 to 1910. During the same period Henry Doscher was the vice president, a director, and a stockholder; Hermann Doscher was the treasurer, a director, and a stockholder: Charles Doscher was the secretary, a director, and a stockholder; John Doscher was a director and stockholder; and Henry F. Cochrane was a stockholder. Upon the death of Claus Doscher, his son Henry Doscher was made president, John Doscher was made vice president, Hermann Doscher continued as treasurer, Charles Doscher continued as secretary, and Henry F. Cochrane was made a director; and the officers, directors, and stockholders continued as above to August 10, 1915, except that Charles Doscher was made both secretary and treasurer.

The company never paid a dividend upon its capital stock. It lost money every year of its existence from 1903, save the years 1905 and 1906, when a small profit was made. Prior to the year 1915 an unavailing effort was made to sell the property. The annual report of the Franklin Brewing Company for the year ending December 31, 1914, showled a loss of \$30,013.49 during that year, and that the liabilities exceeded the assets in the sum of At a stockholders' meeting held January 21, 1915, it was resolved that "in view of the state of the business of the company disclosed by the annual report, a committee of three, consisting of Henry Doscher, John Doscher, and Charles Doscher, be appointed to take the necessary and appropriate steps to wind up the business of the company," and at meetings of the board of directors on March 16 and May 3, 1915, the efforts being made to effect a winding up of the business were discussed. At length in July, 1915, the Doschers found in David M. Neuberger the relief they sought. It was finally agreed that Neuberger should assume the management and control of the Franklin Brewing Company; that the 3,450 shares of stock of that corporation owned and held by the estate of Claus Doscher, deceased, should be distributed, by giving 2,500 shares thereof to Neuberger and the remaining 950 shares thereof to the six children and legatees under the will of the said deceased; that the executors of that estate should, prior to October 1, 1915, loan the necessary money to obtain liquor tax certificates for the saloon keepers who were then customers of the Franklin Brewing Company; that the then officers of that corporation should resign, and Neuberger and his associates should be made officers in their places; and that a mortgage for \$450,000 should be given by the Franklin Brewing Company upon all of its real and personal property to secure the issue of bonds of a like amount in payment of the indebtedness claimed by the Doschers to be owing from the Franklin Brewing Company to the decedent Doscher's estate. An agreement in writing was then executed, about August 4, 1915, between Henry, John, and Charles Doscher, as executors of Claus Doscher, deceased, and David M. Neuberger, embodying substantially the above provisions. The preliminaries for the making of the mortgage having been thus arranged, the attorney for the Doscher estate prepared the mortgage which is the subject of this suit. Henry Doscher had directed John J. Welsh, the bookkeeper of the company,

to copy from the corporate books certain figures, which Welsh did, and handed a slip of paper containing these figures to Doscher, which he subsequently made use of at a meeting of the stockholders of the corporation on August 10, 1915. A meeting of the company was held, at its office, on August 10, 1915, at which all of the stockholders were present, and a resolution was presented setting forth: (1) That the Franklin Brewing Company was indebted to the estate of Claus Doscher in a sum exceeding \$450,000, for money loaned and upon open account; (2) that the financial condition of the Franklin Brewing Company rendered it impossible for it to pay said indebtedness in whole or in part, and unless a reorganization of the company was effected, and an adjustment of this indebtedness was arranged, the company would have to discontinue business and dispose of its property at great sacrifice and loss, both to the Franklin Brewing Company and the estate of Claus Doscher; (3) that the executors of the estate of Claus Doscher, with the consent of all the legatees of that estate, were willing to accept a mortgage of \$450,000 secured upon all of the real and personal property of the company, to be made to a trustee, to secure the issue to the legatees of said estate of 450 bonds, of \$1,000 each, payable in 25 years, with interest at 4 per centum per annum; (4) that the stockholders recommended the execution and delivery of such mortgage to the People's Trust Company, as trustee, for the purposes aforesaid.

This resolution was discussed and voted upon and adopted by all of the stockholders at that meeting, as follows: Henry, Charles, and John Doscher, as executors of the estate of Claus Doscher, voted the 3,450 shares of stock owned by that estate; Henry, John, and Charles Doscher each voted the 10 shares of stock owned by them personally; Henry Doscher, by proxy, voted the 10 shares of stock owned by the estate of Hermann Doscher; and Henry F. Cochrane voted the 10 shares of stock owned by him. This made a total of 3,500 shares of stock voted, which was all of the stock outstanding. There was no meeting held of the board of directors of the Franklin Brewing Company authorizing the execution or delivery of this mortgage of \$450,000. which is the subject of this suit; nor did any witness testify upon the trial that any such meeting was held. Immediately following the above-mentioned stockholders' meeting on August 10, 1915, the certificates for the 3,450 shares of capital stock of the Franklin Brewing Company owned by the estate of Claus Doscher were canceled, and new certificates for that 3,450 shares of stock were drawn up and executed, and distributed as follows: A certificate for 2.498 shares to David M. Neuberger; a certificate for 1 share each to Harry W. Bell and Hector Grassi; a certificate for 159 shares each to Henry and John Doscher; and a certificate for 158 shares each to Charles Doscher, Gesine Engel, Mathilda C. Behre, and Caroline Candidus-making a total of 3,450 shares of this stock; and at that time 50 other shares of the Franklin Brewing Company stock were already held, 10 shares each, by Henry, John, Charles, and the estate of Hermann Doscher, and Henry F. Cochrane. All of this stock was transferred to, and held and owned by, the above-named persons, respectively, prior to the execution or delivery of the mortgage of \$450,000 which is the subject of this suit; and ever since August 10, 1915, the said Henry, John, and Charles Doscher, and the said Gesine Engel, Mathilda C. Behre, and Caroline Candidus have been and still are the

owners of the certificates of stock above mentioned, and these said six persons are also the legatees under the will of Claus Doscher, deceased, and are each entitled to an equal one-sixth distributive share of that estate.

Immediately following the stockholders' meeting, and after the certificates for the 3,450 shares of stock had been executed and distributed as above mentioned, there was held on the same day, August 10, 1915, a nuceting of the board of directors of the Franklin Brewing Company. At this meeting Henry Doscher resigned as president, but continued as a director; John Doscher resigned as vice president and director; Charles Doscher resigned as secretary and treasurer and director; and Henry F. Cochrane resigned as director. David M. Neuberger was made president and treasurer and a director; Harry W. Bell was made vice president and a director, but never qualified; Hector Grassi was made a director; and John J. Welsh, the bookkeeper of the corporation, was made secretary. At this meeting of the board of directors no mention was made of the proposed mortgage of \$450,000 which is the subject of this suit, or of any mortgage, and no authority was given for the execution or delivery of any mortgage by the Franklin Brewing Company.

The mortgage for \$450,000 which is the subject of this suit was executed and delivered on August 10, 1915, but was not recorded until November 22, 1915. No certificate of consent of the stockholders of the Franklin Brewing Company was subscribed and acknowledged and filed or recorded in the office of the clerk or register of the county whenein the corporation had its principal place of business. Subsequent to the making and delivery of this mortgage, and pursuant to its terms, 450 bonds, of the face value of \$1,000 each, were made by the Franklin Brewing Company and issued to the executors of Claus Doscher, and by them in turn issued and delivered, 75 bonds each, to Henry, John, and Charles Doscher, and Gesine Engel, Mathilda C. Behre, and Caroline Candidus. At the time this mortgage was executed, neither the People's Trust Company nor any other person or persons paid to the Franklin Brewing Company any cash money for this mortgage, nor did any person or persons pay any money, furnish any labor, or give property to that corporation for either the mortgage or bonds in question. The defendant the People's Trust Company never took possession of the real or personal property covered by the mortgage in suit; but the Franklin Brewing Company continuously after the making and delivery of the said mortgage remained in the possession, custody, and control of all of the said property until the appointment and qualification of the plaintiffs, as trustees in bankruptcy herein, and the taking possession of the same by them. The plaintiffs, as trustees in bankruptcy herein, immediately upon their appointment and qualification, on March 19, 1917, took actual possession of all the real and personal property of the Franklin Brewing Company, and all of the said property is now in their actual possession.

Samuel Evans Maires, of Brooklyn, N. Y., for complainants. Wingate & Cullen, of New York City (Henry F. Cochrane, of Brooklyn, N. Y., of counsel), for defendant.

VEEDER, District Judge (after stating the facts as above). [1, 2] The validity of this mortgage is attacked on various grounds, which may be grouped as formal objections and objections which relate to the substantial merits. Considering the formal objections first, the complainants contend, in the first place, that the mortgage is invalid, because no certificate of consent of stockholders was filed in accordance with section 6 of the Stock Corporation Law of this state. The statutory requirement is that the mortgage—

"shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by a vote at a special meeting of the stockholders called for that purpose;

\* \* and a certificate under the seal of the corporation that such con-

sent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business."

It is a fact that this mortgage was consented to by the unanimous vote of all the stockholders at a special meeting called for that purpose, and apparently each stockholder also consented in writing. At the trial the defendant produced a certificate of such consent, dated August 10, 1915, signed by Henry Doscher as president, and by Charles Doscher as secretary, with the corporate seal affixed, and attested by the secretary. The testimony for the defendant is to the effect that this paper was executed on the day it bears date, and was given to an employé, who was a notary, to take the acknowledgments. The testimony is rather vague, and the notary had no recollection of such an incident. However, the paper in evidence is not acknowledged, and it is conceded that no consent was ever filed and recorded as required by statute.

In the next place, it is conceded that the mortgage was never formally authorized by the board of directors of the corporation. Section 34 of the General Corporation Law of this state prescribes that "the affairs of every corporation shall be managed by its board of directors," acting through a majority present at a meeting duly assembled. In this case, as already shown in the statement, the stockholders as such, comprising all the directors and officers, consented to the mortgage in a meeting duly assembled. A directors' meeting immediately followed, at which the old directors and officers, save Henry Doscher, in turn resigned, and new directors and officers were elected or appointed by the remainder of the board to fill the vacancies as they occurred. It was by these new officers that the mortgage, dated the same day, was executed. But the minutes of the meeting contain no reference to the mortgage.

Both these omissions undoubtedly constitute grave formal defects, but I do not think that they are necessarily fatal. In both instances the substance is proved. So far as the absence of a resolution of the directors as such is concerned, every director had, as a stockholder, and as part of a substantially continuous transaction, deliberated and acted upon the proposal. People's Bank v. St. Anthony's Church, 109 N. Y. 512, 17 N. E. 408, relates to a special statute designed to safeguard the peculiar interests of a religious corporation. Of course, I rely upon the continuity of the prearranged transaction. and the supposition that the resignation of the retiring directors was not effectual to relieve them of their responsibility for the culminating act performed by their successors pursuant to a plan theretofore agreed upon. Otherwise, there is a total absence of any authorization by the directors, for it is not claimed that the new directors assented to the mortgage, directly or indirectly. Likewise the consent of the stockholders is proved to have been given. As the Court of Appeals said in Rochester Savings Bank v. Averell, 96 N. Y. 467:

"The consent of stockholders is the important and essential thing. The filing is formal and subsidiary,"

This idea runs through all the cases, and in no case to which reference has been made has a mortgage been declared void where the stockholders had in fact consented. In Black v. Ellis, 129 App. Div. 140, 113 N. Y. Supp. 558, affirmed in 197 N. Y. 402, 90 N. E. 958, on other grounds, a majority of the court held that, in view of the finding of the court below that consent had been given, the mere failure to file proof of the fact did not render the mortgage void. A minority dissent was based upon the ground that the finding of the lower court really showed that the stockholders consented only in the sense that they did not object. In the case of In re Post & Davis Co., 219 Fed. 171, 135 C. C. A. 69, where the Circuit Court of Appeals for this circuit held that a chattel mortgage executed by a corporation without the required consent properly evidenced was invalid and could not be ratified, Judge Lacombe stated:

"There is no pretense that any written assent was ever signed, or that it was ever voted at any stockholders' meeting, special or general."

[3] And my conclusion that the failure to file the consent is not fatal derives no support from section 7 of the New York Stock Corporation Law (upon which the defendant relies), which provides in substance that whenever a mortgage as recorded recites that its execution was duly consented to or authorized by the stockholders, after public record thereof for more than one year, "and the corporation shall have received value for bonds actually issued under and secured by such mortgage, and interest shall have been paid on any of such bonds," such recital "shall be conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to," etc. For, as I shall show, the corporation did not receive value for the bonds issued under this mortgage, and hence this validating provision is inapplicable.

[4] Nor do I find to be well founded the complainant's further contention that the mortgage is void as to all the personal property intended to be secured thereby, because it was not filed and recorded within a reasonable time after its execution in accordance with sections 230 and 232 of the Lien Law of this state. The delay in recording was in fact more than three months. But the intermediate section (231) of the Lien Law expressly provides that:

"Mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation \* \* \* and recorded as a mortgage of real property, \* \* \* need not be filed or refiled as chattel mortgages."

Consideration of the further objections to the validity of the mortgage, which go to the substance rather than to formal requisites, is dependent upon findings of fact with respect to the situation on August 10, 1915, when the mortgage was made.

In the first place, the corporation was then plainly insolvent. Its books show that on July 31, 1915, its assets were \$935,720, its liabili-

ties \$1,076,054, leaving a deficiency of \$140,334. On August 31, 1915, the deficiency had increased to \$144,167, and on November 30, 1915, to \$147,332. On July 31, 1915, there was owing to unsecured merchandise creditors the sum of \$23,343, over \$20,000 of which was long past due. This had increased to \$33,318 on August 31st, and to \$57,963 on November 30th. In addition there was owing on notes to the North Side Bank, on and after July 31, 1915, the sum of \$27,-000. This indebtedness steadily increased until, at the time of the filing of the petition in bankruptcy, the sum owing to unsecured creditors amounted to \$176,723. During the month of July, 1915, the corporation's average daily bank balance was only \$923.86; from August 1st to August 10th only \$1,443; and on August 10th, when the mortgage was made, it had on deposit only \$951. During all this time, and long before, merchandise creditors, pressing for payment of their past-due accounts, were told by the cashier in more than one instance that the company had no funds.

The financial condition of the company was well known to the Doschers. They knew that it had lost money every year from 1903, save that a small profit had been made in 1905 and 1906. At the stockholders' meeting on January 21, 1915, where a financial report for the year 1914 was submitted, showing a loss of \$30,013, a resolution was unanimously adopted appointing a committee "to take the necessary and appropriate steps to wind up the business of the company." The minutes of successive meetings of the board of directors on March 16th and May 3d of the same year refer to the efforts being made to wind up the business; and the preamble to the resolution of the stockholders on August 10th, consenting to the mortgage in issue, after stating that the "company is indebted to the estate of Claus Doscher in a sum exceeding four hundred and fifty thousand dollars for money loaned and upon open account," continues:

"And whereas, the financial condition of the Franklin Brewing Company renders it impossible for it to pay said indebtedness in whole or in part, and unless a reorganization of the company is effected, and an adjustment of this indebtedness is arranged, the company will have to discontinue business and dispose of its property at great sacrifice and loss, both to the Franklin Brewing Company and the said estate of Claus Doscher."

Of course, it is entirely immaterial that the Doschers were financially able to pay any or all of the company's indebtedness if they saw fit. They were under no legal obligation to continue their advances, and it was inevitable that they would at some time cease to carry this burden, as the event proved.

The next material inquiry relates to the manner in which the aggregate amount of this mortgage was made up and the basis upon which it rests. The evidence shows that one of the Doschers instructed the company's bookkeeper to make out a statement of the aggregate of the following items: (a) Loans made by the Doscher estate to the company (\$178,850), with interest due thereon (\$15,310); (b) the so-called bond and mortgage account, being the \$200,000 advanced by Claus Doscher in 1906 to pay off the mortgage then out-

standing on the company's property, with interest due thereon (\$25,-000); (c) the \$12,000 mortgage on the parcel, No. 1360 Myrtle avenue, which the Doschers had agreed with Neuberger to cancel, with interest due thereon (\$400). The total of these items is \$431,560. For the remaining sum necessary to make up the total of \$450,000 the bookkeeper was instructed to make a mere book entry, and he described it, of his own accord, as reorganization expense. Of these items, then, the loan account, of \$178,850, concededly represented mere antecedent indebtedness for advances made from time to time. The \$12,000 mortgage on the property No. 1360 was neither paid nor canceled, and therefore represents no value. Nor did the book entry of \$17,000 and over.

The defendant contends, however, that the so-called bond and mortgage account of \$200,000 stands upon a different basis. It appears that on December 29, 1906, Claus Doscher delivered his check for \$200,000 to the company, and that on the same day the company paid to the Nassau Trust Company, the mortgagee named in the Malcolm Brewing Company mortgage of 1891, a like sum, with instructions to use the same in payment and cancellation of the bonds issued under that mortgage. This was done by January 9, 1906. when the mortgagee delivered to Doscher the mortgage and a satisfaction piece. This satisfaction piece was never filed. Claus Doscher's loan of \$200,000 on December 29, 1905, was originally entered in the company's books under the heading "Claus Doscher Loan Account." But on January 31, 1906, this item was transferred to a new account then opened, called "Bond and Mortgage Payable Account," and so remained until bankruptcy. By whose direction or authority this change was made does not appear. By a provision of the agreement by the executors of Claus Doscher with Neuberger the former agreed to "discharge and cancel of record a certain mortgage of two hundred thousand (\$200,000) dollars, now a lien on, and of record against, the Franklin Brewing Company." This agreement was not performed, and the mortgage was finally satisfied of record, upon the application of the complainants as trustees, without the production of the original mortgage, by an order of the Supreme Court dated October 8, 1917.

[5-7] On these facts the defendant's claim that the mortgage was continued, and that Doscher succeeded to the rights of the mortgagee by subrogation, cannot be sustained. To entitle a person to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or have made the payment under an agreement that he should receive and hold an assignment of the debt as security. A mortgage executed to secure a specific debt ceases to have any force after the payment of that debt, and cannot be revived to secure a new obligation without a new grant. In this case the proof shows nothing more than the delivery of Doscher's check to the company and the payment by the company to the mortgagee. The mere unauthorized entry of this mortgage as such on the books of the company does not constitute a new grant, so as to enable Doscher to

be subrogated to the original bond and mortgage, which had been

paid on January 9, 1906.

So far, then, as the items which made up the \$450,000 mortgage are concerned, it is plain that the \$17,000 book entry and the unfulfilled promise to cancel the \$12,000 mortgage on the Myrtle avenue property represented no value whatever, and the so-called bond and mortgage account of \$200,000 represents nothing higher in the scale of obligation than the loan account, properly so called, of \$178,850. In other words, so far as the mortgage in issue was based upon any consideration whatever, it represented merely unsecured antecedent indebtedness. It is so described in the very first recital of the resolution adopted by the stockholders at their meeting on August 10, 1915, which reads:

"Whereas, the Franklin Brewing Company is indebted to the estate of Claus Doscher in a sum exceeding four hundred and fifty thousand dollars for money loaned and upon open account," etc.

But the defendant claims further that, even so, there was other valuable consideration given; and reference is made to (a) the further loan of \$56,000 to secure liquor tax certificate, to (b) the renewal of the \$27,000 loan by the North Side Bank, and to (c) the fact that the bonds issued under the mortgage carried only 4 per cent. interest. The matter of the \$56,000 loan for liquor tax certificate is provided for in the agreement of the Doscher estate with Neuberger. It reads:

"The parties of the first part, as executors, are to loan, or cause to be loaned, the money necessary to obtain the liquor tax certificates of the present customers of the company for the certificates due on the 1st day of October, 1915; such money so advanced to be secured by assignment or otherwise, so as to invest the parties of the first part, or the lender of such liquor tax money with the complete ownership of such tax certificates, and the money paid by the said customers in payment for such certificates, is to be set aside or paid over to the lenders as the same is paid to the said Franklin Brewing Company by such customers. The said Franklin Brewing Company to execute any and all instruments required by the lenders to further secure them for the money so loaned."

Of this provision it is to be observed, in the first place, that it is a separate agreement, entirely apart from the mortgage in issue, made with a person who had no connection with the company; and the license money provided for forms no part of the mortgage, but is an independent transaction. Moreover, the executors promise merely "to loan, or cause to be loaned, the money necessary to obtain the liquor tax certificates of the present customers," and "such money so advanced to be secured by assignment or otherwise"—the company to "execute any and all instruments required by the lenders to further secure them for the money so loaned." The Doscher estate did afterwards loan this sum of \$56,000, under an agreement made with the company on September 20, 1915; but the separate and independent character of the transaction is shown by the fact that \$35,000 of this \$56,000 loan was repaid, and the lenders have proved their claim in bankruptcy for the balance.

The renewal of the \$27,000 loan by the North Side Bank (of which Henry Doscher was vice president) is not claimed to have been made under any written agreement. Henry Doscher testified that he had an oral understanding with Neuberger that the loan would be renewed. Neuberger denies this, and states that it was merely renewed in the usual course of business. It was doubtless renewed because it could not be collected. This inference is also applicable to the defendant's final contention that the reduction of interest from the legal rate to 4 per cent., as specified in the mortgage, constituted a valuable consideration. If, as I have found as a fact, the company was insolvent, and in view of the recital of the resolution adopted by the stockholders on August 10, 1915, that the financial condition of the company rendered it impossible for it to pay the indebtedness in whole or in part, consideration can hardly be based upon the rate of interest. In short, I find that, not only was no value received by the company at the time the mortgage was made, but that, so far as it was not purely fictitious, it was based solely upon antecedent unsecured indebtedness.

[8-10] Under such circumstances the complainants contend that the mortgage is void under section 66 of the New York Stock Corporation Law. This section relates (a) to transfers to officers, directors, or stockholders in particular, and (b) to conveyances, assignments, or transfers in general; and every transfer, assignment, or other act done in violation of its provisions is declared to be void. The complainants urge that the mortgage is void under both clauses. And such is my conclusion. The first clause of this section provides:

"No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash."

A mortgage is a transfer within the meaning of this section. Munson v. Genesee Iron & Brass Works, 37 App. Div. 203, 56 N. Y. Supp. 139; Caesar v. Bernard, 156 App. Div. 724, 736, 737, 141 N. Y. Supp. 659, 668, 669. There was no cash consideration for the mortgage, but merely a transfer by way of security for an antecedent debt. The transfer to the prohibited persons was indirect, in that the bonds were issued first to the executors of the Doscher estate; but they were immediately transferred by the executors to the individual beneficiaries under Claus Doscher's will. The statutory provision applies, therefore, if the company had refused to pay any of its notes or other obligations when due. There is no proof of refusal to pay any notes. There is abundant proof of refusal to pay merchandise creditors, who had supplied goods on open accounts. In three instances the proof shows a written offer and acceptance, but in two of these the amount actually due does not appear on the face of the writing, and can be ascertained only by an inspection of the books. In the case of the Shipley Construction & Supply Company, however, a written offer to supply a specified piece of machinery for a stated price was definitely accepted by the Brewing Company and the contract is complete on its face. It is of no consequence, for the purpose of the present inquiry, that a freight rebate of a few dollars was afterwards allowed on the

shipment.

Prior to the enactment of this section of the Stock Corporation Law a similar provision in the Revised Statutes (1 R. S. 603, 604) referred to "notes or other evidences of debt," and it must be assumed that no change in meaning was intended by the substitution of the word "obligations." The word "obligation" originally meant a bond containing a penalty with a condition for the payment of money or to do or suffer some act or thing. The meaning of the word has been gradually enlarged by the courts beyond its original meaning of a bond obligatory, and has come to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date or for the delivery of specific articles. However various have been the definitions given the word, the essential element has always been that it must be a written engagement by which a fixed duty is assumed. In other words, it must be complete on its face, and not dependent upon an examination of books of account or bills presented. Munzinger v. United Press, 52 App. Div. 338, 65 N. Y. Supp. 194. It is clear, therefore, that open accounts are not obligations; nor are made such by a written proposal and acceptance which does not disclose the amount due. But the contract of the Shipley Construction Supply Company is an obligation in the proper sense of the term, and the company's refusal to pay it supplies the remaining condition for the operation of the statute.

[11, 12] I am of opinion that the mortgage is also void under the

second clause of section 66. The provision is:

"No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by an officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid."

In view of the conclusions which I have already reached, the only material inquiry under this provision is whether this mortgage was made with the intent of giving a preference. What, then, is the meaning of intent to prefer as used in the statute? This language has been construed by the Circuit Court of Appeals for this circuit in Cardozo v. Brooklyn Trust Co., 228 Fed. 333, 142 C. C. A. 625, where the court adopted this statement of the court below:

"It seems to me that the true meaning is that, to constitute a preference, the corporation or its officer making the payment must have known or expected that it would have that effect. Irish v. Citizens' Trust Co. (D. C.) 163 Fed. 880. The statute is meant to apply when the corporation is confronted with the problem: How are the assets of the corporation to be used, not in carrying on its business, but in meeting its obligations? Olney v. Baird, 7 App. Div. 95, 110, 40 N. Y. Supp. 202. In other words, the question is whether the payment was made in contemplation of insolvency and winding up as an

impending fact, or in contemplation of continuing business in good faith; and this question must be determined, of course, as an inference from the surrounding facts."

See, also, In re Salvator Brewing Co. (D. C.) 183 Fed. 910.

If this be the criterion, I am of opinion that the intent in this case to prefer is established by the evidence. The Doschers had carried this unprofitable business for several years, and found themselves more deeply involved each year. They finally decided, as the corporate records expressly state, to wind up the business. Efforts to sell to other brewers were unsuccessful. Evidently, as a last resort, negotiations were opened with Neuberger, who was a lawyer with some experience in handling brewing properties. There is nothing in the evidence to indicate that the Doschers had any reason to expect that Neuberger would be likely to succeed where they had failed. My inference is that they were not concerned with the outcome. They had determined to shift the burden, and their sole concern was their investment. Since they had been unable to realize upon their investment by means of a sale, they evidently concluded that the best available alternative was to secure a first lien upon the property by way of mortgage, and thereby secure themselves against eventualities which their experience led them, with good reason, to expect. For they knew-indeed, they expressly admitted—that the financial condition of the company was such that their antecedent indebtedness could not be paid in whole or in part. The form of the agreement finally reached with Neuberger is significant of their intention, for they presented to him outright 2,500 of the 3,500 shares of the corporation then outstanding. Under all the surrounding circumstances, I can reach no other conclusion than that they believed and intended that the mortgage in issue would effectively prefer them over other creditors of the company who were clamoring for payment.

Apart from the statute, I think the conclusion that this mortgage is null and void would necessarily follow upon grounds of equity and good conscience. The question of jurisdiction has been determined by a prior decision of this court. Karasik et al. v. People's Trust Co., 241

Fed. 939.

A decree will be granted for the relief prayed for in the complaint. It must be settled on notice on or before December 31st.

# KARASIK et al. v. PEOPLE'S TRUST CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 239.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit by Louis Karasik and others, as trustees in bankruptcy of the Franklin Brewing Company, against the People's Trust Company. individually and as trustee under an alleged mortgage. From a decree for complainants (252 Fed. 324), defendant appeals. Affirmed. See. also, 241 Fed. 939.

Wingate & Cullen, of New York City (H. F. Cochrane, of Brooklyn, N. Y., of counsel), for appellant.

S. E. Maires, of Brooklyn, N. Y., for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree appealed from affirmed, with costs.

#### OFFICER v. J. L. OWENS CO.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

No. 5082.

- 1. JUDGMENT \$\infty 713(2)\$—MATTERS WHICH MIGHT HAVE BEEN LATIGATED.
  - Where a second action is based upon a different cause of action, but between the same parties, the judgment in the former operates as an estoppel in the latter as to every point or question which was actually litigated in the first action, but is not conclusive relative to other matters which might have been, but were not, decided.

2. Judgment \$\sim 585(4)\$—Defensive Matter as Cause of Action.

Where defendant had in a previous action recovered against plaintiff, the holder of his notes, for plaintiff's breach of contract, and the court submitted as an element of damage defendant's liability on the outstanding notes, held that, in an action on such notes, defendant was estopped by the judgment from setting up the want of consideration.

- 3. ESTOPPEL \$\infty 68(2)\$—EQUITABLE ESTOPPEL—QUASI ESTOPPEL.
  - A party who, by act or by silence when he ought to speak out during the trial of an action, takes and holds a pecuniary advantage over his adversary, either by enhancing his recovery or maintaining his defense on one theory of law or fact, raises a quasi estoppel against himself from securing a recovery or maintaining a defense to his advantage, etc., upon an inconsistent theory in a litigation of the same issue between the same parties in a subsequent proceeding.
- 4. ESTOPPEL \$\sim 91(1)\$—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

Where defendant in a previous action against plaintiff, the holder of his notes, recovered judgment for plaintiff's breach of contract, and one of the elements of damage submitted was defendant's liability on the outstanding notes, held, that defendant's collection of a part of the judgment, etc., raised an equitable estoppel, which precluded him from defending an action on the notes on the ground of want of consideration.

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5. JUDGMENT \$==617-DEFENSES CONCLUDED.

The estoppel of a judgment or a quasi estoppel arising from the conduct of a party to litigation is as applicable to defensive matter as to matter by way of recoupment, set-off, or counterclaim.

6. ESTOPPEL \$\infty 68(2)\$—EQUITABLE ESTOPPEL—QUASI ESTOPPEL.

Where defendant in a previous action recovered against plaintiff, the holder of his notes, for breach of contract, and the question of defendant's liability on the notes was submitted as an element of damage, held, that defendant cannot escape the quasi estoppel on the ground that the court erred in the submission, and in refusing to allow defendant to increase the amount of his prayer for damages, etc.

7. ESTOPPEL 68(2)—EQUITABLE ESTOPPEL—QUASI ESTOPPEL.

Where in a previous action against plaintiff, the holder of his notes, defendant recovered for breach of contract, *held*, that the quasi estoppel which precluded defendant from asserting the want of consideration for the notes in a subsequent action could not be avoided on the ground that there was no mutuality.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by the J. L. Owens Company against I. E. Officer. Judgment for plaintiff, and defendant brings error. Affirmed.

P. L. Solether, of Minneapolis, Minn. (Benjamin Drake, of Minneapolis, Minn., on the brief), for plaintiff in error.

Francis B. Hart, of Minneapolis, Minn. (J. A. Mansfield, of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. This writ of error assails a judgment upon a directed verdict in favor of the plaintiff below, J. L. Owens Company, a corporation, against the defendant, I. E. Officer, on the ground that he was estopped by the proceedings and judgment in a prior action between these parties, which involved the crucial issues in this case, from maintaining the defense he pleaded.

The basis of this action is six promissory notes, aggregating \$10,-000, which the company alleged that Officer made and delivered to it for value received, but which he has never paid. The defense of Officer is that there was never any consideration for the notes, and that the consideration failed, in that the consideration was the performance by the Owens Company of its covenants in a contract between it and Officer, made on March 8, 1912, at the same time he made and delivered the notes, and that the company failed to perform these covenants. In his answer, however, he not only pleaded this defense, but he also pleaded that there was another action pending in the court below between the same parties as this action and for the same cause, which he commenced on June 5, 1915. That action was No. 338 in the court below, and it was an action by Officer against the company for damages for the breach of its covenants in the contract of March 8, 1912, in many respects, on account of which he asked and recovered a judgment for \$15,000. The action here under consideration was

No. 351 in the court below. In his answer in this No. 351 Officer also set forth the various breaches of its covenants by the Owens Company which he had alleged in No. 338, averred that he was damaged thereby in the sum of \$30,000, prayed that this action No. 351 abate until No. 338 should be finally determined, and that the plaintiff take nothing by this action. The Owens Company alleged in its reply that in the action No. 338 Officer had pleaded in his complaint as breaches of the contract by the Owens Company all the matters alleged in his answer in this No. 351, that No. 338 had been tried, that all the matters and things set out and alleged in Officer's answer in this case, and the specific damages he had averred were sustained by him by reason of any breaches of the contract, had been tried, adjudicated, and determined in that action. The company then denied each and every allegation in the answer not thereinbefore admitted, qualified, or explained.

At the trial of this case the Owens Company introduced in evidence the six promissory notes and rested. Officer introdced evidence tending to sustain the averments of his answer. He then admitted in open court that all the allegations of facts in the reply were true. Owens Company introduced the judgment roll in No. 338 and the charge of the court to the jury in that case, which disclosed these facts: Officer alleged in his complaint for damages in that case that at the time the contract was made he executed and delivered to the company his promissory notes for the \$10,000, and as collateral security therefor certain promissory notes and mortgages made by a telephone company; that he received no consideration for any of them, and that the consideration for them failed; that the company failed and refused to perform any part of the agreement of March 8, 1912, to his damage in several ways; that he had demanded a return of all the notes and mortgages and the company had refused to deliver any of them; and he prayed for a judgment of \$15,000. In its answer to that complaint the company denied that the notes were without consideration, and denied that the consideration therefor had failed. It denied that it had failed to perform its part of the agreement, and denied or explained the averments of breaches and damages set forth in Officer's complaint. At the close of the company's evidence at the trial in case No. 338 on a Saturday the court informed counsel for the parties what he intended to charge the jury, and that he should instruct them that, if they found that the Owens Company had committed such a breach or such breaches of the contract that Officer was justified in abandoning it, one item of damages which Officer would be entitled to receive by their verdict would be \$10,000, and interest from August 8, 1912, on account of his liability on his outstanding notes for \$10,000. and the court subsequently so charged. On the subsequent Monday after this announcement the trial continued. The plaintiff moved to amend the prayer of his complaint to ask a recovery of \$25,000, instead of \$15,000; but the court denied that motion, charged the jury as he had declared he would, instructed them on the other issues in the case, and that they could not render a lawful verdict for more than \$15,000. because that was all the plaintiff asked in his complaint and they returned a verdict for Officer for that amount. After the verdict, and before the judgment, several motions were made in the case. At the hearing on these motions the court stated that, if counsel for either party would make a motion for a new trial, he would grant it, although he knew of no error in the trial, except possibly his failure to allow Officer's motion to increase the amont he prayed for in his complaint; but counsel for each party declined to make such a motion. Thereupon the judgment for \$15,000 in favor of Officer in No. 338 was rendered.

When the facts just stated had been proved in the case now in hand, and the parties had closed their evidence, the court directed the jury to return a verdict for the Owens Company on the ground that Officer was estopped by the proceedings in case No. 338 from maintaining its only defense in this action, to wit, that the notes for \$10,000 were without consideration, and that the consideration therefor had failed, and judgment accordingly was rendered.

Counsel for Mr. Officer opened their argument for a reversal of this judgment with the contention that the evidence in this action conclusively proved that there never was any consideration for the notes for \$10,000, and that the consideration therefor failed, and that, if this position is untenable, there was some evidence to that effect, and therefore the court should have submitted the question of consideration to the jury. But, if the court below was right in its conclusion that Officer was estopped from maintaining his claim of want and failure of consideration by the proceedings in case No. 338, the question whether or not there was any substantial evidence in support of that claim in this case is immaterial, and may be here dismissed.

[1, 2] Their second proposition is that as this action, though between the same parties, is not upon the same cause of action as No. 338, the proceedings and judgment in that action work no estoppel against Officer's litigation of the question of consideration vel non in this action; but the rule is that where the second action is upon a different cause of action, but between the same parties as the first, or their privies, the judgment or decree in the former operates as an estoppel in the latter as to every point or question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been but were not litigated or decided. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 542, 131 C. C. A. 82, 88.

Officer pleaded in No. 338 that the notes were without consideration and that their consideration had failed, and the Owens Company alleged in its answer to that complaint that the notes for the \$10,000 were the \$10,000 mentioned in paragraph 1 of the contract of March 8, 1912. That paragraph reads:

"Now, therefore, in consideration of the mutual promises herein contained, and in consideration of the payment of \$10,000 by the party of the second part to the party of the first part, as evidenced by notes for said amount secured upon collateral, as hereinafter provided, the parties hereto have agreed as follows."

Then follow the various covenants of the parties, from which it appears that these notes for \$10,000 and the collateral notes to secure them were given to establish a credit and to pay for goods to be sold by the company to Officer as its sales agent, goods which he alleged in his complaint in No. 338 he never received. The contract was an exhibit to the pleadings, and it was strong and persuasive evidence, not only that the notes were the consideration for the contract, but that the covenants of the company therein to appoint Officer its exclusive sales agent in the territory specified and to perform the other acts it agreed to do were the consideration for the notes, and a thoughtful reading of the contract leaves no doubt that, if those notes and the collateral notes which secured them had not been given, those covenants would never have been made, and no damages for their breach would ever have accrued to, or been recovered by, Officer. If, the day after the contract was signed and the notes for \$10,000 were delivered, or at any other time before either party had committed a breach of the covenants therein, an action had been brought by Officer to avoid or recover the notes on the ground of a lack or failure of consideration for them, the fact that the Owens Company had made the covenants in the agreement would have been an irrefutable and fatal answer to it, and this demonstrates the fact that there was other consideration for them than the performance of one or more of the covenants in the making of the covenants themselves.

The court charged the jury in No. 338, in view of the pleadings and the contract, which are before us, and the evidence in that case. which is not before us, that Officer never received any of the goods which the contract provided he might buy, and have credit for the payment of the purchase price of, on account of the notes for \$10,-000, and the collaterals he gave, that he might recover the value of the collaterals, and "that his promissory notes to the amount of \$10,000 are still outstanding and constitute a liability against him; therefore one item of damage that the plaintiff would be entitled to would be \$10,000, with interest thereon since August 8, 1912, to date." There is only one ground on which the court could have given that charge, and that is that, notwithstanding the facts that the goods had not been delivered by the company and there had been breaches of some of its other covenants, there was a valuable consideration for the notes in the making by the company of its covenants, and that that consideration had not failed. If it had determined that there was no consideration for the notes, or that the consideration therefor had failed, the notes would have been void in the hands of the company, and there was evidence in this case that there was no evidence in No. 338 that the notes have ever been indorsed or transferred, Officer would not have been liable upon them, and the court would not have instructed the jury that he was so liable. or that he was entitled to more than \$10,000, on account of that liability. The result is that the record has convinced us that the issues, whether or not there was any consideration for the notes for \$10,000, and whether or not the consideration therefor failed, were made by the pleadings, presented to the court for determination by

the pleadings and the evidence, decided by the instructions to the jury recited, and adjudged by the former action No. 338, and that this adjudication estopped Officer from again litigating those issues in this action.

[3, 4] There is another reason why he may not defeat the enforcement of his liability upon these notes, and that is that he has obtained and has collected a part of a judgment against the Company for damages allowed to him in No. 338 on the express ground that he is liable to pay the notes for \$10,000 and interest. His acceptance of the benefit of the first judgment raises a quasi estoppel against him from asserting in this action that he is not liable. L. Owens Co. v. Officer, 244 Fed. 47, 48, 53, 156 C. C. A. 475. party who by act or by silence when he ought to speak out during the trial of an action takes and holds a pecuniary advantage over his adversary, either by enhancing his recovery or by maintaining his defense on one theory of law or of fact, raises a quasi estoppel against himself from securing a recovery or maintaining a defense to his advantage, or to the disadvantage of his adversary, upon the opposite or an inconsistent theory in a litigation of the same issue between the same parties in a subsequent proceeding. Davis v. Wakelee, 156 U. S. 680, 685, 689, 690, 691, 15 Sup. Ct. 555, 39 L. Ed. 578; Phila., Wab. & B. R. R. v. Howard, 13 How. 307, 332, 333, 336, 337, 14 L. Ed. 157; Davis v. Cornwall, 68 Fed. 522, 524, 15 C. C. A. 559; Michels v. Olmsted, 157 U. S. 198, 201, 15 Sup. Ct. 580, 39 L. Ed. 671; Smith v. Boston Elev. Ry. Co., 184 Fed. 389, 106 C. C. A. 497, 37 L. R. A. (N. S.) 429; Kansas Union Ins. Co. v. Burman, 141 Fed. 835, 842, 73 C. C. A. 69; 1 Herman on Estoppel, 535; 16 Cyc. 799, 800; 11 Amer. Enc. (2d Ed.) 466, 449. These conclusions have not been reached without a deliberate consideration of the many arguments and authorities presented by counsel for Mr. Officer in opposition thereto, but those arguments and authorities have either proved inapplicable or have failed to overcome the reasons in support of the conclusions reached.

[5] Counsel say that their claim of lack and failure of consideration is purely defensive matter, but the estoppel and quasi estoppel are as fatal to defensive matter as to matter by way of recoupment. set-off, or counterclaim, as is well demonstrated by the opinion in Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578, They cite, in support of their claim that Officer's recovery of damages for the company's breach of the contract was not such an election of remedies as estopped him from asserting his defense to the notes in this action. Hollehan v. Roughan, 62 Wis. 64, 22 N. W. 163; Barmon v. Lithauer, 43\* N. Y. 317; Smith v. Carlson, 36 Minn. 220, 30 N. W. 761; Vogel v. Osborne, 34 Minn. 454, 26 N. W. 453. If that proposition be granted, it is not inconsistent with the propositions on which the estoppel and quasi estoppel in this case rest, to wit, that a material issue tried and adjudged in one action estopped each of the parties to it from again litigating that issue or avoiding that adjudication in a subsequent action by the same parties and that the securing and holding by a maker of a note of a judgment for damages for breach of contract on the ground that he is liable to

the defendant on his note issued as a consideration for the contract raises a quasi estoppel against him from defeating on the ground that he is not liable on the note a subsequent action against him

upon it by the judgment debtor in the first action.

Nor is there anything inconsistent with these propositions in the decisions cited. In none of them did these propositions arise or were they considered. For example, in Hollehan v. Roughan, 62 Wis. 64, 22 N. W. 163, the plaintiff was induced by fraud to buy a warranted horse and to give his note for \$125 for it. He tendered the return of the horse and demanded the return of the note and then sought to recover the face value of the note, for the failure to return it. The court held that as the proof was that the note was past due and in the hands of the vendor, and that it was void for the fraud proved, the maker could not recover, because the note was of no value and could not be used to injure him; but there is nothing in that case relative to the issue here. There the maker of the note rescinded the contract for fraud, and sued to recover the face value of his note because the defendant failed to return it, and thus to complete the rescission. In the case at bar Officer affirmed the contract, brought his action for its breach, and recovered damages on the ground that he was liable to pay \$10,000 and interest on his notes, and now he seeks to defeat a recovery on them on the ground that he is not liable to pay anything upon them. The other cases just cited are as far afield as Hollehan v. Roughan.

[6] Other contentions of Mr. Officer's counsel are: (1) That the question of consideration for the notes for \$10,000 was not tried nor adjudged in No. 338, but the reasons for the opposite conclusion have been stated and have prevailed; (2) that in submitting No. 338 to the jury the court failed to notice that the notes for \$10,000 were past due and were in the hands of the company, and so erred in its charge that Officer was liable to pay them, and that they should allow a recovery of damages to the amount of \$10,000, and interest on that account, and that it also erred in denying the motion of Officer to increase the amount he prayed for in his complaint. If so, all that is immaterial in this action now. J. L. Owens Company v. Officer, 244 Fed. 47, 53, 156 C. C. A. 475. If there was error in those respects in the trial of No. 338, counsel could have corrected them in that case: but it cannot do so in this. They were notified on the Saturday before the Monday when the court charged the jury that it would instruct them that, if they found for Mr. Officer, they should allow him \$10.-000 and interest as damages on account of his liability on the notes. At any time before the court charged the jury on the following Monday they could have renounced all claim for those damages, and could have requested the court to instruct the jury not to give any damages on that account, and the court without doubt would have granted their request. They took no such action, but moved to amend their complaint to increase the amount for which they prayed, so that they might be sure to recover the full \$10,000 and interest, and, when that motion was denied, accepted and insisted upon holding their judgment for \$15,000; and while the record is such that it is impossible to tell what part of that judgment is due to damages on account of Officer's

liability on the notes, it leaves no doubt that a very large part of it was on that account.

If there was error in the ruling of the court denying the motion to permit the amendment to increase the amount for which Officer prayed, his counsel might have corrected that error by accepting the offer, which was made after the verdict, of counsel for the Owens Company to consent to, and of the court to make, an order for a new trial. But counsel for Officer, perhaps wisely, declined the offer, took their judgment for the \$15,000, and insisted upon holding it, and Officer is now estopped by their acceptance and their silence from maintaining that there was any want or failure of consideration for the notes, or that he has not recovered all his damages for his liability upon them. If, after the rendition of the judgment in No. 338, he had brought another action for more damages on account of his liability on the notes for \$10,000, on the ground that he did not recover enough in his first action, the fatal answer would have been that the judgment in No. 338 was a conclusive adjudication that he did recover full damages on that account, that that issue was res judicata, and that answer is as fatal to the defense in this action as it would have been in that.

Counsel cite cases in support of the position that parties are not always estopped in second suits between them upon a different cause of action by rulings on the law or reasons given by the court therefor in the first suit; and this is conceded. But neither this position nor the citations rule the case at bar, and neither persuasive reason nor applicable authority has been found to overthrow the estoppels which the facts and the law of this case establish.

[7] It is contended that, since estoppels are mutual, there can be no estoppels here, because, if there had been a verdict for the Owens Company in No. 338, Officer could not have invoked that judgment as an estoppel of the Owens Company from maintaining its action on the notes: but that is so because in that case the record of the proceedings and the supposed judgment would not have shown that it was founded on a decision of court or jury that there was no consideration for the notes. It would not have shown that it might not have been rendered on the ground that the Owens Company never committed any breach of the contract. In the case in hand, however, the record of the proceedings in No. 338 discloses the fact that the judgment in that case rests on the decision by the court and jury that there was no fatal want or failure of consideration for the notes, and if at the close of the evidence in No. 338 the court had notified counsel that it would instruct the jury that there was such a lack or failure of consideration, and that for that reason there could be no recovery of damages against that company, and if it had subsequently so instructed, and the Owens Company had accepted the instruction, and a verdict on that ground, without objection or request, and the record had disclosed the fact that the verdict was caused by that issue and instruction, the Owens Company unavoidably would have been estopped from thereafter maintaining an action on the notes, on the theory that there was a valid consideration for them.

Finally, complaint is made that the question of consideration vel non

was not in issue, was not litigated, was not certain, and was not necessarily tried and adjudged. But the pleadings and proceedings at the trial and thereafter, recited in the earlier part of this opinion, satisfy that these complaints are not well founded.

The judgment below must therefore be affirmed; and it is so ordered.

## STENNICK v. JONES et al.

(Circuit Court of Appeals, Ninth Circuit, August 6, 1918.)

#### No. 3139.

1. Logs and Logging \$\ightharpoonup 3(7)\$—Contracts—Construction.

Under a contract for the purchase and sale of stumpage, which provided that bankrupts should construct a railroad with funds furnished by defendant, etc., held, that the title to the road was to remain in defendant until certain advances were repaid, though part of the money represented the purchase price of stumpage conveyed by the bankrupts to such defendant.

2. VENDOR AND PURCHASER \$\simega335-Part Performance-Relief.

Where defendant was ready and willing to proceed and did not rescind the contract, the bankrupts, though they advanced money and did acts in part performance, were not entitled, after default, to recover back what was advanced or done.

3. Damages \$\infty 74-Forfeiture-Agreement.

Where a contract is for a long time, and of a character where actual damages are uncertain of estimation, a provision for a forfeiture in case of substantial breach will be enforced after inquiry, provided it is not unconscionable.

- 4. Damages \$\iff 77\$—Construction—Provisions for Liquidated Damages.

  Whether a stipulation to pay a sum of money in event of breach of contract is to be regarded as a penalty or an agreed ascertainment of damages is to be determined from the intent of the parties as gathered from the contract.
- 5. Damages \$\sim 85\to Forfeiture Clause.

Under a contract providing for the sale of stumpage and construction of a railroad by the bankrupts with funds to be advanced by one of the defendants, *held*, that the forfeiture clause included the railroad and equipment, and, being reasonable, defendant was, on bankrupts' breach, entitled to enforce a forfeiture of the whole property.

6. Damages \$\sim 85-Breach-Waiver.

Where no objection was made to defendant's delay in furnishing money to construct a railroad, such delay, though a technical breach of the contract, must be deemed waived, and does not deprive defendant of the right to enforce a forfeiture in event of nonperformance by the opposite party.

7. Contracts \$\infty 316(1)\to Breach\to Waiver.

Where a supplemental contract provided that in event defendant, who was to furnish funds to construct a railroad, was unable to sell bonds on or before a date fixed, either party might rescind, and neither rescinded, the failure of defendant to furnish funds before the date fixed was waived.

8. Logs and Logging \$\infty\$3(7)\to Contracts\to Construction\to Breach.

A contract providing for the construction of a railway by the bankrupts, etc., and for the acquisition by defendant, which was to furnish the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

funds, of certain timber lands, held not broken by defendant, though there was a delay on its part in acquiring the lands.

9. Bankruptcy = 163-Preferences-What Constitutes.

Where a contract between the bankrupts and defendant, which furnished funds to enable the bankrupts to construct a railway, provided that, on the bankrupts' default, defendant should be entitled to forfeit the property, etc., held, that a voluntary delivery of the property to defendant, the bankrupts having defaulted, was not a preferential transfer, under Bankr. Act, §§ 60, 70e (Comp. St. 1916, §§ 9644, 9654).

10. Logs and Logging \$\iff 3(7)\$—Contracts—Construction—Forfeiture.

Where a contract for the construction by the bankrupts of a railroad in connection with a lumbering project authorized defendant, which was financing the project, to declare a forfeiture on the bankrupts' breach, held, that the forfeiture provisions did not extend to property of the bankrupts not used in constructing the road or otherwise included in the contract.

11. BANKRUPTCY \$\infty 287(3) \to Accounting \text{Equity-Jurisdiction.}

Where defendant declared a forfeiture under a contract providing for the construction of a railroad by the bankrupts, held that, on a suit for an accounting by the trustee of the bankrupts, in which general relief was prayed, the court had authority to grant relief on account of the forfeiture of property not included in the contract, and the trustee was not required to bring action at law for conversion.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by Parker Stennick, trustee in bankruptcy for the Hamilton Creek Timber Company and the Rainier Lumber & Shingle Company, against Willard N. Jones and others. From a decree for defendants, complainant appeals. Reversed and remanded.

Thomas Mannix and Guy L. Wallace, both of Portland, Or., for appellant.

Guy C. H. Corliss, of Portland, Or., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a suit by Stennick, trustee in bank-ruptcy, against three certain defendants for an accounting for certain personal property transferred to the defendant Jones and others, and for value of certain improvements, and that defendants be required to pay for the same to the trustee in bankruptcy for the benefit of creditors, and that a trust fund be declared out of which the creditors may share, and for general relief.

In 1912 one Dodge owned about 1,520 acres, and defendants 8,200 acres, of timber land in Skamania county, Wash. Jones had one-third interest in 260 acres with defendant Kribs. Kribs owned one-third interest in the remaining part of the land, the other two-thirds being owned by outside persons. Dodge then owned two sawmills, and certain relatives of his controlled the Dodge Lumber Company of San Francisco.

After negotiations an agreement was reached to the effect that the timber lands owned by Kribs and Jones and Dodge and the outside parties should be transferred, and they were transferred to J. K. Lumber Company, organized by Kribs and Jones, and bonded for \$900,000

bonds, and trust deed being dated January 1, 1913. On January 27, 1917, the J. K. Lumber Company, to be called "The J. K. Company," as party of the first part, and the Hamilton Creek Timber Company, called the "Hamilton Company," the Rainier Lumber & Shingle Company, called the "Rainier Company," and E. H. Dodge, as parties of the second part, made a written contract containing substantially these provisions: After reciting that the parties of the first part owned and were about to acquire timber lands as security for an issue of bonds, and that the parties of the second part were desirous of cutting and manufacturing timber, and were willing to convey to the first party certain timber owned by them, the J. K. Company agreed that it had or would acquire title to about 8,000 acres of timber land in Skamania county, Wash., on which there were, in round numbers, 441,000,000 feet of timber, and that it would use its best endeavors forthwith to get title to approximately 75.000.000 feet of additional timber in a near-by section; that when it acquired title to the timber it would mortgage the same as security for the bond issue of \$900,000; that it would use and apply from the proceeds of the bonds such necessary sums, not exceeding \$215,000, as might be needed to construct two railroads for logging, one up Hamilton creek, the other up Rock creek; to construct and equip a sawmill with a capacity of 20,000,000 feet of lumber per annum; to purchase railroad equipment for both railroads, and construct and equip logging camps capable of handling 300,000 feet of logs per day. The Hamilton creek railroad was to be completed within six months after the fund of \$215,000 was available, and the Rock creek railroad was to be finished within one year after the completion of the construction of the Hamilton creek road. The parties of the second part agreed to "arrange for and carry on all the construction work and obtain the equipment and proceed forthwith to construct as required." The J. K. Company was to pay over moneys as needed for construction and equipment from the bond sale proceeds, upon receipt from the Hamilton and Rainier Companies and Dodge of bills therefor and certified accounts of expenditures certified and verified to be correct by the president or treasurer of the Rainier Company. The Hamilton and Rainier Companies and Dodge agreed to convey to the J. K. Company, before the trust deed was recorded, good title to certain described lands, containing thereon approximately 93,400,000 feet of timber. The Hamilton and Rainier Companies and Dodge contracted to repay to the I. K. Company the difference between \$155,000, the price to be paid for the lands containing the 93,400,000 feet, and the amount actually expended by the J. K. Company for construction and equipment as provided by the provisions of the contract, in 10 equal annual payments, on December 15th of each year, with interest at 6 per cent. per annum. The I. K. Company, when the land was released from the trust deed and the timber removed, was to convey back the fee of all lands conveyed by the parties of the second part. The J. K. Company agreed to sell, and Dodge and the Hamilton and Rainier Companies were to buy, 658,000,000 feet of timber on the land then owned or to be acquired by the J. K. Company for \$1,383,000, with interest from January 1, 1913, at designated prices per thousand for the year 1913,

prices increasing each year after 1913, payments to be made to the trustees under the trust, or until the bonds were paid, and thereafter

payments to go to the J. K. Company.

It was agreed that when Dodge and his associates shall have repaid to the J. K. Company the amounts advanced for construction and logging and mills and equipment over and above the amount paid by the Dodge people for the timber conveyed by them to the J. K. Company, that the railroads, mills, and equipments should "thereupon belong" to Dodge and the lumber companies, subject, however, to the faithful performance of the covenants and agreements made by Dodge and the lumber companies, and subject also to the lien of the trust, or in so far as it might cover such property. The Hamilton and Rainier Companies and Dodge agreed to cut not less than 50,000,000 feet during each calendar year, and, in the event of failure, to pay to the J. K. Company certain specified amounts as values. After certain provisions with respect to the use of money derived from the logging and manufacture of timber and the selection of timber first to be cut, there was a forfeiture clause as follows:

"(11) The second parties agree that in the event of their failure to fully comply with all of the terms, conditions, and provisions of this agreement, the mill property of the Rainier Lumber & Shingle Company, now located at Rainier, Oregon, and the mill situated in section thirty-five (35), township three (3) north, range seven (7) east, Skamania county, Washington, and all of the railroad equipment, sawmill and logging equipment purchased for the logging of the lands covered by this agreement, either with funds of the first party or with funds of the second parties, shall forthwith become the property of the first party, and may be used by said first party for the logging and manufacture of the logs and lumber of the timber referred to in this agreement or any other timber, and the second parties forthwith agree in the event of such default to transfer and convey all of such mill property by good and sufficient deeds of conveyance, and in the event of such default of the second parties, the first party is hereby authorized to take possession of such mill property and equipment and use and employ the same, and said second parties agree not to interfere with such possession and use of said property by said first party."

Another agreement supplementary to the one just referred to was made January 27, 1913, providing, among other things, that, in the event of the failure of the J. K. Company to provide necessary funds for the construction and equipment of the railroads and sawmills contemplated in the original agreement, on or before May 1, 1913, the J. K. Company, at the request of the Dodge interests, would reconvey the lands and timber conveyed or to be conveyed free and clear of all incumbrances by the J. K. Company. It was also agreed that neither the J. K. Company nor Jones nor Kribs would acquire any interest in timber land adjoining a certain tract described in the original agreement, except the 75,000,000 feet which was to be acquired under the original agreement; that the J. K. Company, when all the timber should be paid for, would allow the Dodge people interest on \$1,383,000 from January 1, 1913, to the day when the \$215,000 for construction purposes was made available to the Dodge interests; and that in the event of the failure of the J. K. Company to sell the bonds provided for in the original agreement, on or before May 1,

1913, either of the parties to the original agreement or to the supplementary agreement should have the option to declare the original and

supplementary agreements void and of no effect.

Railroad construction up Hamilton Creek was commenced in the spring of 1913, but the road was never completed. When December, 1913, arrived Dodge had drawn \$215,000, and under the evidence was without funds and was really insolvent, although the fact of his involved financial condition does not appear to have been known to Jones or Kribs or the J. K. Company.

While the Dodge interests were thus seriously embarrassed financially and on October 3, 1913, another agreement was made between the parties to the previous agreements with a view of securing Kribs and Jones for joining Dodge and his companies in a note for \$50,000. By this agreement Dodge and his companies assigned to Kribs and Jones as collateral certain shares in the Dodge Lumber Company, with agreement respecting the voting power of said stock, and the voting power constituting a controlling interest in the Hamilton and Rainier Companies, and another lumber company, and also conveyed to Kribs and Jones, as collateral security, the interest of the makers of the note in the original and supplemental contracts made January 27, 1913.

On July 1, 1914, there would be due the interest on the \$750,000 of bonds which had been issued, and six months thereafter another installment of interest would be due. Taxes would also have to be Furthermore, it appears that Dodge had not paid the \$6,000 due December 15, 1913, or the interest on the \$60,000, as required by the provisions of the contract providing for payment of such sum in 10 equal payments with interest at 6 per cent, per annum. Nor had he finished the construction and equipment of the Hamilton creek railroad, nor had he done anything toward the construction of the Rock creek railroad, nor had he commenced to construct a sawmill. The evidence is very clear that the financial situation of Dodge and his associates was such that he would be wholly unable to proceed to carry out the terms and provisions of his contract. Then it was. about February 28, 1914, that the J. K. Company notified Dodge and the Rainier and Hamilton Companies (for brevity called "associate companies") that they were in default in certain features of the contract, and that the J. K. Company would treat the contract as violated, and that unless payment was made of \$6,000 with interest within 30 days from the date of the notice, and that unless Dodge and his associates proceeded to carry out the other provisions of the contract with respect to which they were in default, by proceeding to complete the Hamilton Creek Railroad and the Rock Creek Railroad by January 1, 1915, and by proceeding with the logging operations as required by the contract, it, the J. K. Company, would treat their rights under the agreement as having been forfeited, and would take possession under the contract.

Negotiations between creditors and the Dodge people with a view to some settlement were pending, but did not assume any definite form. On May 12, 1914, the J. K. Company served a formal declara-

tion of "forfeiture," but gave an option available until January 1, 1915, to Dodge and his companies, or any other persons or corporations, "to set aside the forfeiture" and "reinstate" the contract, provided they furnished the J. K. Company with satisfactory evidence of financial ability to proceed with the contract in accordance with its terms. The J. K. Company, acting in accord with this declaration of forfeiture, took possession of the interest of Dodge and his associates, and proceeded to carry on the logging business on its own account. The creditors of the Dodge interests, after consideration of the whole situation, including the wisdom of bankruptcy proceedings, finally on June 27, 1914, concluded not to go on with any plan whereby the creditors were to carry out the logging contract.

Thereafter, in July, 1914, involuntary petitions in bankruptcy were filed against Dodge and his associate companies, and after adjudications Stennick, plaintiff herein, was appointed trustee of all the bank-

rupts.

Thereafter the trustee brought suit in the state court in Oregon to rescind the contract for fraud, especially in misrepresenting the quantity of timber on the Kribs tract, but the court, after hearing evidence, found no fraud, and upon appeal the Supreme Court of the state affirmed the decree of the lower court. Stennick v. J. K. Lumber Co., 85 Or. 444, 161 Pac. 97. The Supreme Court in the learned opinion of Mr. Justice McBride also considered the alleged breaches of the contract by the J. K. Company, and, after discussing the forfeiture clause and the situation of the parties, took the view that the clause was enforceable. But on motion for rehearing the court stated that the original opinion rendered had been filed in the belief that under the record issues besides that of fraud were directly involved, whereas they were not, and therefore what had been said upon matters other than fraud might be regarded as dictum. Stennick v. J. K. Lumber Co., 85 Or. 444, 166 Pac. 951.

Thereafter in the federal court the trustee instituted the present suit, made up of three causes of action, wherein he seeks to have the alleged transfer made May 12, 1914, declared a preferential one, and to have the forfeiture clause of the contract held to be of no validity, and in no event as including all the property, particularly the railroad, taken by defendants acting under the contract. The court heard evidence and dismissed the bill upon the merits, and the

trustee appealed.

[1] Much of appellant's argument is to the point that the contract required the Hamilton and Rainier Companies to furnish and provide their own railroad plant and equipment for the purpose of carrying out the contract, and that the \$155,000 which was to be paid for lands containing 93,400,000 feet of timber belonged exclusively and absolutely to the bankrupt corporations in lieu of their timber land; that the Jones and Kribs interests were to lend the bankrupt corporations the additional sum of \$60,000 over and above the \$155,000 to aid in providing the railroad plant and equipment, this \$60,000 to be secured by mortgage or lien on the railroad plant and equipment and to be paid in the 10 equal annual installments, as more fully detailed in the

statement of the contents of the contract, and that the Jones and Kribs interests had no financial interest in the railroad plant, equipment,

and other property except the \$60,000 loan.

The error of this position is made clear by consideration of the following facts and circumstances: The main thing in the contract was sale and purchase of stumpage. Neither of the bankrupts nor Dodge had the legal title to the railroad which in fact was to be built upon I. K. Company lands out of moneys derived from the sale of the bonds of the J. K. Company. The Dodge people had rights to cut timber on stipulated terms. The contract was predicated upon such an arrangement, and by the language employed we gather that the purpose of the parties was that the legal title to the right of way and of the railroad itself, as well as of all other property, should remain in the J. K. Company until that company was fully repaid \$60,000 of the \$215,000 furnished by it to aid in the construction and equipment of the road. The \$60,000 was to be repaid in the 10 annual installments, and when it was paid then Dodge was to receive a legal title to the railroad. Reference to the pertinent clauses of the agreement shows that it was after the Dodge people shall have repaid to the J. K. Company the amount advanced for the construction and equipment over and above the amount paid by the Dodge people to the J. K. people that the railroad and equipment should belong to the Dodge people subject to the performance under the contract. Thus the attitude of the I. K. Company became like that of a vendor who has made a contract of conditional sale expressly retaining legal title until the property shall have been fully paid for by the vendee. Some confirmation of this view is to be found in the provision of the contract wherein the I. K. Company agreed to give to the Dodge people a right of way over lands owned by the J. K. Company, or to be owned by it, for railroad purposes, with logging rights, and upon performance of the contract to convey to the Dodge people good title thereto upon condition that the right of way should be used for railroad purposes only. But there was no present grant of a right of way: it was an executory contract to convey at a future time when the parties of the second part had performed. It cannot be disputed that Dodge was ultimately to be paid \$155,000 for his land, but there was no provision that such sum was to be paid to him when the \$215,000 was turned over to the Dodge people. The \$215,000 to come from bond sales was to be put at the disposition of Dodge expressly in order to enable him to construct, with a view to get at the timber. The money furnished, however, was that of the J. K. Lumber Company. In proceeding with the work of development Dodge's position was analogous to that of an agent for a principal. That this is the true view is also shown by the provisions of the agreement that the total amount of money to be furnished by the J. K. Company "for all the purposes above mentioned" should not exceed \$215,000, and that the Dodge people should arrange for or carry on all such construction work and arrange for the purchase of equipment. Evidently, by the language itself, construction and equipment were the uses to which the \$215,000 were to be put, not purchase of timber or land.

The specific agreement that, when the Dodge interests had repaid the sum advanced for construction and equipment over and above the amount paid by the Dodge interests for the timber conveyed to the J. K. Company, the railroads, mills, and equipment should "thereupon" belong to the Dodge people, is so plain in fixing the condition and event when ownership should attach that it becomes susceptible of but the one construction.

It is also clear that the trust deed included all of the railroad property and equipment, land and all, and was not executed by Dodge or the Dodge corporations, but only by the J. K. Company, which issued the bonds, and which turned over the \$215,000 to Dodge to proceed with under the contract. Dodge had an equity in the timber and in all of the other property referred to in the contract, but the essential points which call for consideration are that it was the J. K. Company which was really expending the \$215,000, and that the contract pertains to the expenditure by the J. K. Company of this sum for the purposes of construction and equipment, as specifically mentioned in the contract.

[2-5] To the contract, as we have expressed our understanding of it, the relation of the forfeiture clause is next to be considered. It is urged that the parties meant the forfeiture clause to give to the I. K. Company the right of user as distinguished from the right of ownership in the event of a substantial breach, and that, if it had been intended that the forfeiture clause should be liquidated in its nature. the railroad would have been expressly included in the clause. fairs had drifted to a situation, however, where, as already shown, there was a substantial breach by the Dodge interests, for they had not only failed in executing most important undertakings on their part, but they had refused to proceed with their contract. The fact that they had advanced money and done acts in part performance could not relieve them of their obligations under the contract. The J. K. Company were ready and willing to proceed. Hence the rule of contract laid down in Hansborough v. Peck, 5 Wall. 497, 18 L. Ed. 520, fits the case, and the Dodge interests will not be permitted to recover back what was advanced or done. The J. K. Company did not rescind the contract. Their attitude was to hold fast and give to Dodge opportunity to proceed, and to do so even by reinstatement and extension under the terms of the contract. Refusal by the Dodge people followed, and the J. K. Company, acting under the terms of clause 11 of the contract, became owners, with right of user, and were given possession by the Dodge interest and took possession. Sanders v. Brock, 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532. Cases may be multiplied where, upon an equitable showing to excuse a breach of contract, courts of equity have compelled a party who has received money to reconvey or refund. Such cases are usually where there has been a rescission of the contract by the one party or a mutual rescission, and where the facts disclose that the purchaser is equitably entitled to recover back purchase money. There are also many decisions where, the measure of damages for the breach of a contract by a vendor being ascertainable without difficulty, forfeiture will not be enforced. But these equitable doctrines do not override the principle that parties may make a contract to run for years, and of a character where, actual damages being uncertain of estimation, there may be provision for a forfeiture or transfer of ownership in case of a substantial breach, which the courts, after inquiry, will enforce. Edmunds v. Spanish R. P. & P. Co. (D. C.) 206 Fed. 92. The principle which controls and as upheld in Sun Printing & Publishing Co. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, is that the intent of the parties is to be arrived at by a proper construction of the agreement; and whether a particular stipulation to pay a sum of money is to be regarded as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Among other things the court there said:

"The principle seems to be, from a consideration of all the authorities, that where the parties are competent to contract, are equally masters of the situation, and deal at arm's length, the court of equity will not disturb the measure of damages established by the parties themselves, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court, and lead it to believe that, although so nominated in the bond, in the letter, it is not included within the spirit of the contract, or within the contemplation of the parties."

In the present case the doctrine stated is clearly applicable, for the evidence is that in the first notice of forfeiture the J. K. Company gave Dodge 30 days in which to make the \$6,000 payment which he had failed to make when due, and also gave him 30 days in which to proceed and execute the other clauses of the agreement. More than that, after the 30 days had expired, and until May 12, 1914, efforts, which must be accepted as had in the best of faith, were made with creditors of Dodge to work to some solution of the difficulties which were presented. But in June the creditors concluded that they would not go on with the contract, and, as Dodge and his associates were wholly unable to proceed, there occurred the fundamental breach. which, particularly considering the serious financial obligations of the J. K. Company, authorized the J. K. Company to act by taking possession and proceeding with logging operations. Possession of the lands, title to which was in the J. K. Company, must have included possession of the railroad bed and mill on the lands; and keeping in view the main purposes of the contract, that it was an executory one for the sale and purchase of stumpage on certain land, the proper construction is that the forfeiture clause was meant by the parties to cover and control the damages to be awarded by the one in default if it should occur that the contract as a whole was not carried out. Hoagland v. Segur, 38 N. J. Law, 230; Pomeroy's Eq. Juris. § 442, pp. 741, 744; Story, Equity, pp. 775, 778. It is clear that the equipment, not part of the realty, was designated and brought under the forfeiture clause. Ranger v. Great Western, 5 H. L. Cases, 71, is not directly pertinent to the provisions of the contract here involved.

Appellant makes no strong showing for equitable relief, as under 252 F.—23

the evidence the damages which the appellees have suffered seem to have been considerably greater than the value of the property forfeited. The difference between the contract price of the stumpage on one of the tracts and the value of such stumpage at the time of the breach of the contract by the Dodge interests was over \$480,000, to which should be added the \$60,000 due and the \$50,000 loaned on the note.

[6, 7] It is earnestly said that in May, 1914, when the forfeiture was availed of, the J. K. Company was in no position to insist on forfeiture, because it had itself broken the contract by (a) failure to furnish the \$215,000 within the time specified in the contract; (b) not purchasing the 75,000,000 feet of timber as called for by the contract. There was a delay which ran beyond May 1, 1913, the date named in the contract when the J. K. Company was to furnish the \$215,000 to Dodge. This delay, which extended until some time in Tune, was because of obstacles in the matter of the sale of the \$900,000 of bonds: but it was disregarded at the time by Dodge. who went on with no word of dissatisfaction, and worked under the contract, and drew moneys as needed, until he had exhausted the whole \$215,000, and could get no financial support to go further. Dodge cannot on this account now avoid the right which the contract gave to the J. K. Company to enforce the forfeiture clause upon grounds already discussed. Phillips v. Todd (Mo. App.) 180 S. W. 1039. Furthermore, under one of the supplementary contracts between the parties, it was expressly provided that if the J. K. Company was unable to sell the bonds on or before May 1, 1913, either party might rescind the contract. Neither party elected to rescind.

[8] With respect to the contemplated purchase of 75,000,000 feet of timber, it is to be remembered that the J. K. Company was to use its best endeavors to acquire title to such quantity as might be agreed upon by the parties to the contract. 15,000,000 feet were acquired. The evidence goes to show that while there was discussion over this timber there was no definite selection of the timber by Dodge. Jones and Kribs deny that there was any understanding concerning the particular 75,000,000 feet and its acquisition by any definite time, and Dodge testified that the acquisition of such timber was to be had by using \$150,000 to be reserved from the bond sale money. It is evident that Dodge never made a demand that any of this timber be purchased and never expected that it would be until the bonds had The trust deed itself contemplated the sale of bonds for been sold. purchase of timber at not over \$1.25 a thousand feet, and that good title would be vested in the J. K. Company. To carry this plan out might have taken some time, and we do not think that, in the absence of any complaint at the time, default on the part of the J. K. Company can be inferred merely because it did not act more promptly.

It is said that under the terms of the contract over 441,000,000 feet of timber was to be paid for absolutely, whether in existence or not, and that there was a shortage of 50,000,000 feet, which could not be made up by including 50,000,000 feet of "burned stumps of

no merchantable value." The assumption is unwarranted, as there is ample evidence that much of this 50,000,000 feet was cruised as merchantable, and in fact was. Estimates of timber were, of practical necessity, the guiding features in settlements to be made, and, there being no bad faith, estimates must control. If the timber actually cut had exceeded the amount of the estimate, Dodge would have had the benefit; it was fair for both parties.

[9] We cannot see how the transaction of May 19th, when the bankrupt concerns voluntarily delivered over to the J. K. Company, can be held to have been a preferential transfer as defined by the bankruptcy statutes. Sections 60, 70e, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562, 565 [Comp. St. 1916, §§ 9644, 9654]). The J. K. Company had the right to act not as a general creditor, but under the contract, and the Dodge interests yielded their possession under the provisions of the contract. Park v. Cameron, 237 U. S. 616, 35 Sup. Ct. 719, 59 L. Ed. 1147; Harris v. First Nat. Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528.

[10] Appellant asks a ruling that, even if it be held that the rail-road equipment and plant were part of the realty, the defendants should nevertheless pay for the value of certain property, such as utensils of trade, which was taken, but was not included at all in the

contract.

Of course, the J. K. Company was limited in its rights by the contract, and could take no property which belonged to the bankrupts except that which was clearly affected by the provisions of the contract, and which we have said is confined to the property included in the contract. This is too plain for discussion; and equally certain is it that the trustee in bankruptcy has a remedy whereby he can recover any such property so wrongfully taken or the value thereof for the benefit of the creditors. All property, therefore, which was bought by Dodge out of the \$215,000 was fairly within the terms of the contract and became subject to forfeiture. But other property not purchased out of such fund, and not attached to the realty, should rightfully pass to the trustee.

[11] The appellees, however, take the position that even if property outside the contract was taken, there can be no recovery for such property in this suit, which is for accounting, and that the trustee's remedy is by an action at law for conversion. With this proposition we cannot agree. The suit being for accounting and general relief, and the issue as to what property was affected by expenditure under the contract having been testified to as one involved, the court may retain the cause, and require that an accounting be made by the defendants to the trustee for any and all property taken by them or any of them not embraced in the contract as we have construed it. Camp

v. Boyd, 229 U. S. 522, 33 Sup. Ct. 785, 57 L. Ed. 1317.

As it would be more practicable that an accounting should be had before the District Court, which did not allow in favor of the trustee any account for the value of any personal property taken by defendants, not bought with any of the \$215,000 heretofore referred to, we think that the case should go back to the District Court, with di-

rections that, under the declarations of the rights of the parties as indicated, an account be taken, and thereafter decree be entered upon the matters referred to as may be equitable and just.

Reversed and remanded.

## FEDERAL MINING & SMELTING CO. v. DALO.

(Circuit Court of Appeals, Ninth Circuit. August 5, 1918.)

No. 3127.

1. MASTER AND SERVANT €==97(2)—INJURY TO SERVANT—ADOPTING PRECAUTIONARY MEASURES—DUTY OF MASTER.

That occasionally, when ore was drawn from a chute, the ore above the top of the chute would not fall, was sufficient to charge the master with the duty of anticipating the danger, and of adopting reasonable precautionary methods to prevent repetition.

2. Master and Servant €==107(5)—Injury to Servant—Safe Place to Work.

The dangerous condition of plaintiff's working place, due to chute in floor of mine becoming clogged with ore, was not a condition produced by workmen themselves in the progress of the work, and for which the master was not responsible.

Master and Servant \$\iff 97(2)\$—Injury to Servant—Defective Appliances.

Danger due to ore becoming clogged in chute in floor of mine could be anticipated, and master was bound to guard against the same, since it resulted from method of master's work.

- 4. MASTER AND SERVANT ← 293(14)—SAFE PLACE TO WORK—INSTRUCTIONS.

  In action by plaintiff servant for injuries due to falling into ore chute in floor of mine, court's instructions as to reasonably safe place, inspection, and repair held to sufficiently cover essential features of the case.
- 5. Witnesses \$\iiii 219(5)\$—Privileged Communications—Waiver.

  Plaintiff servant, by testifying that one of results of accident was hernia, did not waive privilege given by Rev. Codes Idaho, \$ 5958, where he did not testify that a physician had attended him, and it was not error to exclude testimony of physician to effect that he had treated plaintiff for hernia before accident.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Angelo Dalo against the Federal Mining & Smelting Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Featherstone & Fox, of Wallace, Idaho, for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., Therrett Towles, of Wallace, Idaho, and Fred Miller, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error recovered a judgment in the court below for damages for personal injuries sustained while working as a mucker in a mine of the plaintiff in error. While walking along the sixth floor of the underground tunnels of the mine,

the defendant in error fell into a chute, whereby he was seriously in-The floor of the tunnel was filled with a large pile of ore, completely covering the opening of the chute, so that it was impossible to observe its position. The defendant in error, together with other workmen in the mine, had for 12 days prior to the accident passed over this ore, and had made thereon a beaten pathway. During that time the chute, extending two floors below, was full of ore. There were other employés whose duty it was to draw the ore from the chutes from below, and to carry the same from the mine. The defendant in error had nothing to do with this operation. Occasionally, when the ore was drawn from a chute, the ore above the top of the chute would not fall. The plaintiff in error employed a chute tender for the purpose of loosening the ore which was arrested in or above the chute. Three hours before the time of the accident the ore had been drawn from the chute into which the defendant in error fell, but the ore over the top of the chute on the sixth floor did not fall, and the defendant in error was not aware of that fact, nor was he warned of the dangerous condition of the floor.

[1] At the close of the testimony the plaintiff in error moved for an instructed verdict, and it is now contended that the motion should have been sustained, on the ground that the evidence failed to show negligence on the part of the plaintiff in error. It is said that it was not chargeable with negligence in failing to discover and remedy the dangerous condition of the chute sooner than it did, for the reason that the hanging of the ore above the chute was of infrequent occurrence, and that there was no negligence in failing to anticipate it. The argument is not convincing. The fact, which is admitted, that the same situation had occurred before, was sufficient to charge the master with the duty of adopting reasonable precautionary methods to prevent its repetition. The answer to the complaint states that ore chutes frequently hung up and had to be loosened, and that, if not loosened, the ore might suddenly drop and carry the person who might be standing thereon.

[2] Nor do we find merit in the contention that the plaintiff in error should not be held for negligence for the unsafe condition of the working place, for the reason that it resulted from changing conditions attending the progress of the work. This contention, and the authorities which are cited to sustain it, are not applicable to the situation here presented. The dangerous condition of the working place where the accident occurred was not one of those which are produced by the workmen themselves in the progress of work, and for which the master is not responsible. It was a dangerous condition which arose from the method in which the work was done. It was a danger which could readily have been averted. The measures which the plaintiff in error had taken to avert it were not adequate. There was evidence tending to show that no provision was made for inspection of chutes after the ore had been drawn therefrom, to determine whether ore had hung at the floors. The chute tender had drawn the ore from the chute into which the defendant in error fell three hours before the accident. He did not know, nor did he or any one take steps to

acertain, whether any of the ore hung upon the sixth floor. No contention is made that the plaintiff in error is excused by reason of the fact that the chute tender was the fellow servant of the injured employé.

It is assigned as error that the court below refused to instruct the

jury that:

"The plaintiff in this case does not claim that the defendant mining company was negligent in not warning the plaintiff of the possibility of chutes hanging up above the floor, and you are instructed that failure to so warn or instruct is not negligence which caused or contributed to the accident; therefore the plaintiff cannot claim a recovery against the defendant in this case because of such failure."

These instructions were refused, as the court said, for the reason that "in the main they are covered by the general instruction." But aside from this a sufficient answer to the assignment is found in the fact that the requested instructions contained an incorrect statement of the facts, for the complaint distinctly alleged that:

The defendant "negligently and carelessly failed to take any precautions, give any warning or notice, or to do or perform any act, either to inform plaintiff of said conditions or to remove the danger threatened therefrom."

[3, 4] It is contended that it was error to refuse to instruct the jury that, before they could find the defendant guilty of negligence in failing to discover and remove the danger which resulted in the accident, they must find that, in view of all the circumstances, sufficient time had elapsed before the accident to enable the defendant, in the exercise of ordinary care, to have discovered and removed the danger. Cases are cited which hold that where the employes' working place becomes casually and unexpectedly dangerous, as where a hole is left alongside the track of a railway company, or in the floor of a building, or where there is negligent construction of appliances used by workmen, the jury should be instructed that the master is not liable for injuries to workmen occurring before he has knowledge of the existence of the danger, or reasonable opportunity to obtain such knowledge. The principle involved in these cases has no application here. Here the danger was not one which was not to be anticipated by the master. It was a danger which resulted from the very method of the employer's work, and one which it had reason to expect, and which it therefore was bound to guard against. We think the instruction which the court gave, and to which no exception was taken, sufficiently covered all the essential features of the case. The court said that the obligation rested upon the plaintiff in error to see that the place was reasonably safe in the first place, and then, "by the exercise of reasonable care in the way of inspection and repair, to see that the place is kept and maintained in a reasonably safe condition."

[5] A physician was called by the plaintiff in error to testify that he treated the defendant in error for hernia, while attending him professionally, at a time prior to the accident. An objection to the testimony was sustained, on the ground that the information sought was privileged, under the Idaho statute (section 5958, Revised Codes),

which, after expressly affirming "the policy of the law to encourage confidence and to preserve it inviolate" in certain actions, provides:

"A physician or surgeon cannot, without the consent of his patient, be examined in civil actions as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for his patient."

It is not claimed that the defendant in error testified that the physician had attended him, or had given him any information. He confined his testimony to the physical injuries which he suffered as the result of the accident, one of which, he said, was hernia. The plaintiff in error now contends that by so testifying as to his injuries he waived the privilege of the statute, and cites cases which sustain its contention, and it especially relies upon 4 Wigmore on Evidence, § 2389, where it is said:

"The bringing of an action in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment."

The views of the learned text-writer on evidence are always entitled to respectful consideration, and much may be said in favor of the equity of the view which he takes. He admits that it is against the weight of authority. We are not convinced that we ought to follow it in this case, especially in view of our ruling in Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 823, 125 C. C. A. 305, and the decisions of the Supreme Court of Idaho construing the statute of that state. Jones v. City of Caldwell, 20 Idaho, 5, 116 Pac. 110, 48 L. R. A. (N. S.) 119; Jones v. City of Caldwell, 23 Idaho, 467, 130 Pac. 995; Brayman v. Russell & Pugh Lumber Co. (Idaho) 169 Pac. 932. In the first of those cases the Supreme Court of Idaho denied that it had "the power or the authority to repeal said statute by judicial decision," and said:

"It is also very clear that our statute forbids and prohibits the examination of a physician without the consent of the patient, and this privilege extends to the individual witness, and not to the consultation or transaction in which he was a physician."

We find no error. The judgment is affirmed.

# PATTERSON TRANSFER CO. v. SCHLUGLEIT. (Circuit Court of Appeals, Sixth Circuit. August 3, 1918.) No. 3106.

No. ox

1. MUNICIPAL CORPORATIONS \$\infty 706(6)\$—Collision in Street—Negligence —Question for Jury.

In action by plaintiff pedestrian for injuries due to collision with automobile within or near intersecting streets, question of negligence *held*, under evidence, for jury.

2. TRIAL @==178-DIRECTED VERDICT.

Upon defendant's motion for directed verdict, the evidence will be viewed in the light most favorable to plaintiff.

It is the duty of the driver of an automobile himself, independently of the conduct and intentions of drivers of other vehicles, to exercise reasonable caution and care as respects the safety of others in approaching and passing over foot crossings of city streets.

4. MUNICIPAL CORPORATIONS €= 705(1)—Collision at Street Intersection—Duty of Automobile Driver.

The amount of care and caution required of an automobile driver, in approaching and passing over foot crossings of city streets, is to be proportioned to the amount of travel.

5. Municipal Corporations \$\sim 705(2)\$—Use of Streets—Duties.

The general rule concerning the rights and reciprocal duties of travelers, one on foot and the other in an automobile, is that both have equal rights, but that each in the exercise of his rights is bound to use ordinary care respecting the other.

6. Municipal Corporations \$\sim 705(1)\$—Use of Streets—Duties.

After a pedestrian has entered upon a street crossing in a prudent manner, he is entitled to the exercise of reasonable care on the part of drivers of subsequently approaching machines.

7. MUNICIPAL CORPORATIONS \$\sim 705(10)\$—Use of Streets—Duties.

After a pedestrian has entered upon a street crossing in a prudent manner, he is not bound, as a matter of law, to be continually looking or listening for automobiles.

8. MUNICIPAL CORPORATIONS \$\igsim 706(7)\$—Collision at Street Intersections
—Contributory Negligence—Question for Jury.

Where a pedestrian, after having prudently entered upon a street crossing, is injured by collision by an automobile, the question of contributory negligence is one of fact.

9. Trial =296(13)—Instructions—Correction.

In action by pedestrian for injuries due to collision with automobile, where ordinance giving pedestrian right of way at crossing was introduced in evidence without objection, defendant's complaint as to giving of instruction that plaintiff had right of way will not be sustained; charge being modified as limited by the ordinance and defendant reserving no exception and making no assignment to charge as modified.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge

Action by Alfred Schlugleit against the Patterson Transfer Company. Verdict and judgment for plaintiff, and defendant prosecutes error. Affirmed.

Steen & Klewer, of Memphis, Tenn., for plaintiff in error.

Randolph & Randolph, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Action to recover damages for personal injuries sustained by Schlugleit, plaintiff below, through alleged negligent operation of an automobile in Memphis, Tenn., on the evening of January 18, 1917. The automobile was owned by the Patterson Transfer Company, defendant below, and operated by Walter E. Lott, superintendent of defendant's warehouse department, and the injuries were inflicted within or near the intersection of Exchange

avenue and Second street. Plaintiff recovered verdict and judgment

in the sum of \$4,000, and defendant prosecutes error.

[1] The fact that the injuries were inflicted by an automobile owned by defendant and then in control of its agent, and the amount of recovery, are not in dispute. The controversy hinges on the question whether the injury was caused through the fault of Lott or that of plaintiff himself. The course of Exchange avenue is east and west, and that of Second street north and south. It is plain enough that when plaintiff was struck by the automobile he was attempting to cross Second street along a course within the lines (extended) of the north sidewalk of Exchange avenue; yet the parties differ as to the direction in which he was walking, whether from west to east or east to west, and as to the effect of this feature upon the case. The plaintiff testified that in going to the place of crossing he walked north on the west side of Second street "until he got to Exchange avenue, crossed Exchange avenue," and then "crossed at the very corner of Exchange avenue and Second street, \* \* \* going from the west to the east side of Second street"; that "before going east" he "looked in all directions" and "saw nothing coming," saying that his sight was good, but that he was "deaf and could hear very little"; that he had gotten about half across Second street when he felt the impact (of the automobile) and did not know anything more." No witness in terms contradicted this testimony.

The plaintiff called Lott, who in substance testified: That while going in a Ford runabout from the company's warehouse to its office on Second street "the eletcric headlights blew out, probably caused by an oversupply of gasoline which was permitted to get into the engine"; that upon discovering this he "stopped and lighted his front oil light." While on Second street, and nearing Exchange avenue, "just a short distance north of the crossing where pedestrians would pass," he "became blinded by an automobile with a very bright light, and felt his car come in contact with something, but had no idea what it was." He then turned into Exchange avenue "to avoid traffic." He returned, however, and "saw an elderly man near the middle of Second street, a short distance north of Exchange avenue," who was being assisted to his feet by another man, and Lott then removed the injured man, plaintiff, to the home of his friend. Lott further stated that in going south on Second street he overtook a horse-drawn wagon, a large express wagon, and followed it "for the distance of about a half block," at a speed of "about six miles an hour," until the wagon turned west into Exchange avenue. He says that his oil lamp afforded enough light to "see 20 feet ahead"; that an arc light was in operation at the intersection of Second street and Exchange avenue, "so that one could see a man crossing at the intersection"; that he "felt the impact (collision with plaintiff) on the left front of the car about on a line with the front left wheel"; that he was then driving his car on the west side of Second street, about half way between the curb and the middle of the street; that he was "keeping a lookout on approaching the crossing, and there was nothing" between his car and the express wagon before he was blinded.

The plaintiff and Lott were the only witnesses called by either side whose testimony tends to show that plaintiff was struck by defendant's automobile or how the collision happened. Defendant called Mr. Goodlett, who testified that while he and a young lady were in an automobile traveling south on Second street, she called his attention to a man lying in Second street, and that he went to the assistance of the man, who proved to be the plaintiff. The witness states that "the old man was trying to get up," and that he was assisting him when Lott returned, as stated, after driving his car into Exchange avenue. Both Goodlett and Lott testify that plaintiff was lying at or near the middle of Second street; the former saying he was about "12 feet from the north curb line of Exchange avenue," and the latter that he was "a few feet north of the north line of the crossing, probably about 20 feet."

[2] At the close of all the testimony a motion of defendant to direct a verdict in its favor was overruled, and exception and assignment followed. We think the motion was rightly denied. We need only to state the rule that upon defendant's motion it was the duty of the trial judge to take that view of the evidence most favorable to the plaintiff. There are several facts which should be observed and remembered. The evening was dark, and Lott with his oil lamp could not see more than 20 feet ahead. In these conditions he placed his car behind a large express wagon and kept it there throughout a distance of half a block in going south on Second street to Exchange avenue, driving on the west side of Second street, as he says, "about halfway between the curb and the middle of the street." When the express wagon reached Exchange avenue it turned west into that street, and Lott must then have deflected the course of his car toward the center of Second street where, all the witnesses agree, plaintiff was stricken down. What, then, is to be said of Lott's conduct in approaching the crossing in question? It is reasonably certain that, prior to the time the express wagon was turned west into Exchange street, Lott did not keep his car in position either to be seen, for instance, by pedestrians entering the crossing from the west side of Second street, or to enable Lott himself to see such pedestrians; and it is not claimed that the express wagon carried a light. Lott says he was keeping a lookout; but the extent of his so-called lookout is explained by his testimony that "there was nothing between him and the express wagon in front of him before the time he was blinded." The evident meaning of this is that Lott was not blinded until after the express wagon opened his view to the crossing and intersection; indeed, he says he was blinded by the lights of another automobile about the time he felt his car strike something, he did not know what. If we now recall the facts: (a) That the course of the express wagon and Lott's car south on Second street was midway between the center and the west curb line of the street; and (b) that the collision took place at the center of Second street—we shall see that Lott has failed to explain why he did not discover plaintiff and take measures to avoid colliding with him during the interval between the time he turned his car away from the express wagon and the time he was blinded. One of two conclusions inevitably ensues: Either Lott followed behind the express wagon too long, and so failed to place himself and his car in position seasonably, and irrespective of the course the express wagon might take, to ascertain the condition of the crossing over which he intended to drive, or he failed to keep a lookout between the time the obstruction of the express wagon was removed and the time he was at once blinded and brought into collision with the plaintiff; and in either event he is open to the inference that

he failed in the discharge of an obvious duty.

[3, 4] It is the duty of the driver of an automobile himself, indedependently of the conduct and intentions of drivers of other vehicles, to exercise reasonable caution and care as respects the safety of others in approaching and passing over foot crossings of city streets; this results from the well-known dangers attending the movements of automobiles in crowded streets. The amount of care and caution to be exercised by the driver is, of course, to be proportioned to the amount of travel, pedestrian and vehicular alike, that usually gathers and passes over particular crossings. Commonwealth v. Horsfall, 213 Mass. 232, 235, 100 N. E. 362, Ann. Cas. 1914A, 682; Irwin v. Judge, 81 Conn. 492, 501, 71 Atl. 572; Hannigan v. Wright, 5 Pennewill (Del.) 537, 541, 63 Atl. 234; Grier v. Samuel, 4 Boyce (Del.) 106, 108, 86 Atl. 209; Lorah v. Rinehart, 243 Pa. 231, 233, 234, 89 Atl. 967; Liebrecht v. Crandall, 110 Minn. 454, 456, 126 N. W. 71; Lauson v. Fond du Lac, 141 Wis. 57, 60, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30; Leach v. Asman, 130 Tenn. 510, 514, 172 S. W. 303; Deputy v. Kimmell, 73 W. Va. 595, 598, 80 S. E. 919, 1 L. R. A. (N. S.) 989, Ann. Cas. 1916E, 656; O'Dowd v. Newnham, 13 Ga. App. 220, 225, 80 S. E. 36, as modified in Giles v. Voiles, 144 Ga. 853, 856, 88 S. E. 207.

We may here recur to plaintiff's entrance upon the Second street His testimony would naturally have been accepted upon the motion to direct, in view of the darkness and the position of defendant's car behind the unlighted express wagon. Further, plaintiff might well have progressed so far on the crossing as not to have observed (and in view of his deafness he probably would not have heard) the approach and passage of the express wagon behind him, and still have been overtaken and struck by defendant's car; indeed, he must have walked nearly half the distance along the crossing before the express wagon turned into Exchange avenue, or defendant's car turned away from the wagon and toward the point of collision. These conditions were not affected by the fact, if it was a fact, that several cars, including the express wagon, approached the intersection shortly before plaintiff had reached the middle of the crossing; this is but common experience as respects the movements of automobiles; such a circumstance certainly cannot be said as matter of law to be inconsistent with the testimony of plaintiff that, upon entering the crossing, he looked in all directions and saw nothing coming; we need not repeat that the darkness was calculated to conceal both the unlighted express wagon and defendant's car immediately behind it.

[5] The general rule concerning the rights and reciprocal duties

of travelers upon a street, one on foot and the other in an automobile is that both have equal rights in the use of the street, but that each in the exercise of his rights is bound to use ordinary care respecting the other. Lane v. Sargent, 217 Fed. 237, 240, 133 C. C. A. 231 (C. C. A. 1); Hennessey v. Taylor, 189 Mass. 583, 584, 76 N. E. 224 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; Schock v. Cooling, 175 Mich. 313, 323, 141 N. W. 675; Leach v. Asman, supra, 130 Tenn. 515, 172 S. W. 303. In the instant case, however, it is to be observed that an ordinance of the city of Memphis upon the subject of street crossings was received in evidence and without objection. The ordinance provides:

"Sec. 505. Regular street crossings for persons on foot shall be at points from one corner of a street or alley directly at right angles with the street or alley, and this whether any footway is specially placed along said line or not."

"Sec. 506. Foot passengers, crossing streets or alleys at points marked out by ordinances as regular crossings, shall have precedence or right of way over all vehicles."

In Leach v. Asman, supra, 130 Tenn. 515, 172 S. W. 303, the Supreme Court of Tennessee apparently recognizes the right of a municipality of the state to prescribe locations for street crossings. Upon the motion to direct, neither the court nor the counsel appear to have made any allusion to the ordinance, though in the course of the charge a question relating to it arose, which will be considered later. Whatever legal effect, if any, may be ascribed to section 506 of the ordinance, certainly the provision could not have been helpful to defendant under its motion to direct; nor is it necessary here to consider the provision, since the assignment as to denial of the motion is fairly met by the general rule, before pointed out, touching the respective rights and duties of persons using a street.

[6-8] The natural inference to be drawn from plaintiff's testimony is that he prudently entered the crossing in question at its west end and followed it eastwardly until he was struck by defendant's automobile. True, he was found endeavoring to arise at a point shortly north of the crossing; but this variation in his course is sufficiently accounted for by the efforts he was making to get upon his feet. After a person has once entered upon a street crossing in a prudent manner, he is entitled to the exercise of reasonable care on the part of drivers of subsequently approaching machines; in proceeding thence along the crossing, whatever one may do in the way of caution for his own protection, he is not bound as a matter of law to be continuously looking or listening for the approach of automobiles. Hennessey v. Taylor, supra, 189 Mass. 585, 586, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; Knapp v. Barrett, 216 N. Y. 226, 230, 110 N. E. 428; Schock v. Cooling, supra, 175 Mich. 324, 141 N. W. 675. At most, in such circumstances the question of contributory negligence is one of fact. See cases just cited, and Leach v. Asman, supra, 130 Tenn. 515, 172 S. W. 303; Tiffany & Co. v. Drummond, 168 Fed. 47, 48. 93 C. C. A. 469 (C. C. A. 2).

The remaining assignments of error concern two statements contained in the general charge. One was:

"The undisputed evidence is that the plaintiff left the west side of Second street and that he was found about the middle of Second street."

This was modified later by a further statement to the jury:

"You are the exclusive judges of the weight of the evidence and the credibility of the witnesses."

The idea that the direction plaintiff pursued on the crossing was west, and not east, before alluded to, grows out of the testimony of Lott that plaintiff did not pass between the express wagon and his car. It is claimed that this was opposed to plaintiff's testimony that he entered the crossing at the west side of Second street and walked east until he was struck by the automobile. If he had been walking west, he hardly could have been struck, as he was, on his left side by Lott's car. We cannot think it important to dwell upon this feature of the defense. Lott's statement was calculated to expose the meagerness of his lookout, rather than to contradict the testimony of plaintiff.

[9] The other statement contained in the charge, and now complained of, is that the court instructed the jury that in crossing the street plaintiff had the "right of way." This instruction, it is true, was given; but, upon exception being reserved, the trial judge explained that he meant to give the term "right of way no further significance than that implied by the reading of the ordinance." The ordinance is quoted above, and we have seen that it was received in evidence without objection. No request concerning its effect was made by either side; and we think the trial judge's explanation operated to restore the precise situation which existed at the time the ordinance was received in evidence. In a word, the portion of the charge to which exception was reserved was in effect eliminated; and, it is to be added, no exception was reserved and no assignment is made to the charge as modified.

It results that the judgment must be affirmed, and an order will be entered accordingly, though we cannot assent to the claim made that the writ of error was prosecuted merely for delay, and hence the allowance of damages asked under our rule 26 is denied.

## LAKE v. MUDGETT et al.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3132.

1. Receivers \$\iffsize 128\$—Priority—Receivers' Certificates—Estoppel.

A purchaser of corporate bonds secured by mortgage, who failed to make known his ownership of the bonds until after receivers' certificates were issued on the consent of the other bondholders, and made prior to the lien of the mortgage, could not, after the enterprise as conducted by the receivers had proven a failure, assert that he had not consented to the issuance of certificates, and that his original lien under the mortgage was entitled to priority.

2. RECEIVERS \$\infty\$ 128-Application of Insurance Proceeds-Title to Property.

A bondholder of a corporation, who failed to object to a sale of the property and assets of the corporation, could not object that proceeds of fire insurance policies were applied under orders of court to the obligations of the receivers, instead of towards the payment of the bonds; the loss having occurred after the sale, so that it fell upon the purchaser, and not the seller.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by Arthur C. Lake against Alfred B. Mudgett and another, receivers of the Bear River Paper & Bag Company. From an order denying full payment of certain mortgage bonds, and directing payment of certain expenses incurred by the receivers, complainant appeals. Affirmed.

Appeal from an order denying to appellant, Arthur C. Lake, full payment of certain mortgage bonds issued by the Bear River Paper & Bag Company in 1910, and directing that the expenses and liabilities subsequently incurred by receivers of the company (through sanction of the court) be first satisfied, and that the remaining assets be distributed pro rata among all the bond-holders; and the question is whether appellant is estopped to claim priority in respect of the lien of such mortgage as against the expenses and liabilities so incurred by the receivers.

The facts disclose remarkable instances of effort and failure to establish a successful manufacturing business. During the course of the business it seems to have comprised the manufacture of sulphite pulp, wrapping paper and other papers, and paper bags. The plant was located and the business carried on at Petoskey, Mich., and according to the record the business was begun by the Petoskey Fiber Paper Company. That company failing, its property was sold under proceedings to foreclose a mortgage, and the plant lay idle for some years prior to 1910, when it was taken over by the Bear River Paper & Bag Company. On July 1st of that year the Bear River Paper & Bag Company issued coupon bonds in the sum of \$200,000, securing their payment through mortgage of its property in trust to the International Trust Company of Boston, Mass., the mortgage being duly recorded in Emmet county, Mich. The company commenced operations in January, 1911, and continued only until June of that year. On the 22d of that month, Frederick L. Reynolds, as a stockholder and creditor of the mortgagor company, commenced suit against the company in the court below "on his behalf and on behalf of such other stockholders and creditors of the defendant corporation as shall elect to join in the prosecution of this suit," setting out specifically his interest as stockholder and creditor, describing the business and financial conditions of the company, and praying the appointment of receivers. The company filed answer, admitting the allegations of the petition and joining in its prayer. An order was entered finding the existence of the mortgage indebtedness before mentioned, with accrued interest, and of outstanding open accounts and bills payable to the amount of \$60,000; that the company was unable to pay its debts as they matured; and appointing Leon W. Chichester and Alfred B. Mudgett as receivers, vesting in them the property and assets of the company, with power to conduct its business, subject to the supervision of the court. Later, upon petition of the receivers and upon notice given "to all known creditors, and no one appearing to oppose it," an order was made. August 28, 1911, empowering the receivers to borrow money and to issue interest-bearing certificates in the sum of \$50,000, which were to be a first lien on all property subject to the bonds mentioned, and moreover "a first lien prior and superior to the lien of said mortgage securing said bonds upon the consent and approval in writing of this order by the said International Trust Company." September 27, 1911, the Trust Company filed an instrument consenting that "any and all certificates that may be issued by the receivers under said order shall be a first lien prior and superior to the lien of said mortgage."

Subsequently the receivers met with serious difficulties in the prosecution of the business, and endeavored to overcome them by leasing the property to another company. This plan was followed for several years, but failed for reasons that need not be set out. It is enough to say that the receivers secured an offer of \$150,000 from George A. Fernald & Co. of Boston, Mass., for the entire property and assets of the company, and that they filed a petition, August 29, 1916, alleging that upon investigation they were satisfied the property ought to be sold, that in their opinion the offer should be accepted, and praying for an order accordingly. An order was made requiring the creditors and stockholders of the company to show cause on September 25, 1916, why the offer should not be accepted, and directing a copy of the order meanwhile to be served personally upon the creditors and stockholders, and

also to be published in a named newspaper of Petoskey.

At the time appointed to show cause the appellant, Arthur C. Lake, filed a petition alleging that on September 20, 1910, he purchased \$5,000 par value of the company's bonds, and praying for an order "that notice be given to him of any future proceedings or orders." So far as the record shows, this was his first appearance in the cause. It is stated in a petition filed by the receivers January 30, 1917, and it is not denied, that on the date fixed to show cause, September 25, 1916, an order was made authorizing and directing the receivers to accept the offer of Fernald & Co. It further appears, without denial: (a) By that petition, and also by another petition, filed on June 21st following, that the offer of Fernald & Co. was accepted September 30, 1916; and (b) by the petition of January 30, 1917, that after such acceptance, and while the receivers were in possession of the property and assets, for the purpose of carrying out the order directing acceptance of the offer, a portion of the property was destroyed by fire. Prior to the dates of these petitions. on December 22, 1916, the court in effect found upon petition of the receivers that the policies of insurance covering the property so destroyed by fire contained clauses which inadvertently made losses arising under the policies payable to the trustee under the mortgage, while it was the intention that such losses should be payable to the receivers for the protection of their obligations in preference to the interest of the trustee; and an order was made directing that the money received under the policies be paid to the receivers for use and distribution under further orders of the court, and that a copy of the order be mailed to the trustee.

June 21, 1917, the receivers presented a petition, setting forth their sale and conveyance of the property and assets free and clear of all prior liens and incumbrances, their payment of various obligations created under previous orders of the court, and stating a balance of \$14,116.68, which would be reduced by some minor expenses of administration, and praying an order to approve and confirm such sale and conveyance, and the other acts and doings of the receivers, and to direct distribution of the remainder pro rata among the holders of the outstanding mortgage bonds, upon which the court directed that the creditors and stockholders, the mortgage trustee, and Albert E. Lake. attorney for certain creditors, be notified to show cause, on July 6, 1917, why an order should not be entered as prayed in the petition. According to the record, Arthur C. Lake was the only creditor who presented objections. He filed an answer, in effect admitting that the trustee under the mortgage gave its consent to the issue of receivers' certificates in the sum of \$50,000, and alleging that before doing so it obtained the consent of all holders of the bonds except himself, but that "it does not appear of record" that the trustee "consented to the issuance of any notes or the incurring of any obligations by the receivers in addition" to the \$50,000 in certificates of indebtedness, and further that he did not consent to the issuance of any certificates. The remaining objections are so far as deemed necessary considered in the opinion. The matters set out in the petition of the receivers and objected to by Arthur

C. Lake were heard upon evidence, and the prayer of the petition was granted. The appeal is based on this order.

A. E. Lake, of Chicago, Ill., and Earl W. Munshaw, of Grand Rapids. Mich., for appellant.

Clapperton & Owen, of Grand Rapids, Mich., for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] 1. Appellant stands strictly upon the lien created by the mortgage. He admits that holders of bonds so secured may waive the lien, and indeed claims that all the holders of bonds under the mortgage, except himself, have in fact waived the lien; but he insists that neither the acts of the other bondholders nor those of the trustee under the mortgage operated as a waiver of his lien. Appellant's theory is that, having once obtained the benefit of the lien, he should not be deprived of it without his explicit consent. The basis of his position, as we understand the contention, finds expression in the rule concerning mortgages of private enterprises, as distinguished from decisions relating to mortgages of corporations of quasi public character, like railroads: stated otherwise, there is no necessity, for example, as respects the issuance of receivers' certificates with priority of lien in working out financial embarrassments of purely industrial enterprises, similar to the public necessity existing under kindred embarrassments of common carriers of passengers and freight. It is to be observed, however, that this distinction concerns the power of a court to provide for supplanting a mortgage lien by an order authorizing the issue of receivers' certificates, and not the right of the bondholder to surrender the benefit of the lien. Among the cases cited respecting the distinction mentioned are Doe v. Northwestern Coal & Transportation Co., 78 Fed. 62, 73 (C. C.); International Trust Co. v. Decker Bros., 152 Fed. 78, 83, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152 (C. C. A. 9); In re J. R. & J. M. Cornell Co., 201 Fed. 381, 387 (D. C.); Hanna v. State Trust Co., 70 Fed. 2, 7, 16 C. C. A. 586, 30 L. R. A. 201 (C. C. A. 8). Decisions of this class, although dealing with mortgages of private corporations, usually recognize the right of the bondholder to give up or otherwise to waive the benefit of his lien; indeed, such decisions are in no wise opposed to the equitable principle that a bondholder may so conduct himself with respect to receivership proceedings as to preclude him from insisting that an order of the court is invalid for want of his affirmative consent. Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 463, 464, 6 Sup. Ct. 809, 29 L. Ed. 963. True, that case concerned railroad interests; and yet the contention there made touching lack of affirmative consent on the part of certain bondholders is in principle analogous to the contention here urged; emphasis is given to the analogy by reason of the affirmative consent and sanction given by the present trustee to all the orders entered below in the belief, as we shall see, that it was acting with the approval of all the bondholders. 12.45

The truth is that appellant was put to an election whether he would seasonably oppose or would abide by the orders entered from time to time in the receivership proceeding. He purchased the bonds from the plaintiff. Reynolds, in the very case from an order in which he appeals. Reynolds sold only part of his bonds to appellant, and was a bondholder as well as a stockholder during the entire period of the receivership. Fernald & Co. owned the rest of the bonds. It was believed throughout by that company, by the trustee under the mortgage, by the receivers, as also by the court itself, that the Fernald Company and Reynolds owned the entire issue of the bonds. Appellant gave no intimation that he held the bonds in suit until the date fixed, September 25, 1916, to show cause why the property and assets of the mortgagor company should not be sold for \$150,000. On that date, as we have seen, appellant caused a petition to be filed in the cause disclosing his ownership of \$5,000 par value of the bonds; even then he did not object to the sale, although the consideration to be paid was \$50,-000 less than the total issue of the outstanding bonds. Besides, the receivership proceeding had been commenced as a representative suit more than five years before, June 22, 1911; and no reason is perceived, none is even suggested, why appellant should not seasonably have appeared in the suit and interposed objections if he had any to the issue of the receivers' certificates and the incurring of the other obligations before they were sanctioned by the court. When speaking of appellant's long concealment of his purchase of bonds and contrasting his conduct with that of the other bondholders, the learned trial judge said:

"\* \* Having kept silent and permitted the expenditure of these moneys, the issuance of the receivers' certificates, with the priority which was attempted to be given (appellant) cannot now be heard to complain. He knew that the other bondholders were putting up the money and were financing this enterprise; that they were attempting to preserve the plant and make it worth something, and to put it in a condition where it might be sold. He kept silent, not only as to his ownership of this portion of the bonds, but also as to any objection that he had to that proceeding, and, in equity, I do not think that he can claim at this time the benefits of what he permitted others to do. \* \* He had notice of all the orders for the issuance, and of the issuance, of the receivers' obligations, and still he kept silent until the money had been expended and until the enterprise proved to be a failure, and then he seeks to have himself preferred to those who have borne the burdens. I do not think that a court of equity can lend its aid to such a contention."

We approve these findings and the conclusion of the court. The appellant's silence explains the fact that he did not consent to the issuance of the receivers' certificates; that is, as we interpret the course he pursued, he did not affirmatively consent; but, unless form is to usurp substance, his conduct is none the less binding upon him. True, it is urged that the evidence fails to show that appellant was aware of the facts ascribed to him in the opinion of Judge Sessions. Presumably the appellant would have kept in touch with the acts of the receivers, since he admits that the interest accruing on his bonds was in default throughout the entire litigation. Testimony was introduced at the hearing of July 6, 1917, which tends to show that appellant was conversant with the various proceedings taken and orders made during

the receivership. The testimony was calculated to elicit denials from both appellant and his brother (his attorney), yet neither offered himself as a witness. It is a significant fact that appellant nowhere denies that he knew of the receivers' applications for the orders, or of the orders themselves, as they were severally entered. The acts of the receivers, as we have already said, extended over a period of more than five years, and it was not until the other bondholders had supplied the money necessary to meet the expenditures incurred in building up the plant and developing the business that appellant objected. The trial judge heard the testimony and was familiar with the situation from beginning to end, and in the circumstances pointed out we are not disposed to disturb his findings.

2. Among appellant's objections to the reports of the receivers it is stated, and made the subject of an assignment of error, that they made improvements and betterments of the property and incurred indebtedness without the approval of the court. These assertions are in effect refuted by what is shown in the statement of facts, and particu-

larly by the findings of the court.

[2] 3. The assignment relating to appellant's objection that the fire insurance proceeds should have been applied toward payment of the bonds and not obligations of the receivers is met: (a) By the proceedings and order in which the policies of insurance were reformed, so as to require the moneys derived under them to be paid to the receivers, instead of the mortgage trustee, and applied according to the orders of the court, as pointed out in the statement of facts; and (b) by the fact that the fire occurred after the offer of Fernald & Co. to purchase the property and assets of the company had been accepted under the court's authority and direction—in other words, the loss occasioned by the fire was the loss of the purchaser, not the seller, and appellant has at no time objected to the sale.

4. Several contentions are made, whish have neither fact nor assignment to justify them. One is, for instance, that there was "collusion between the trustee, Fernald & Co., and the receivers." There was no issue tendered, and no testimony offered below, in relation to such a charge. It is not suggested that Reynolds' course was actuated by any improper motive, and yet appellant's bonds are but part of the Reynolds bonds. Appellant does not seem to appreciate the evidential effect of the concurrence of all the other interested parties in the very proceedings and orders which he alone challenges. Whatever rights he may have originally possessed, his long neglect to assert them, and the inevitable misleading effect of this upon the court and parties alike, must be held to estop him from claiming priority in virtue of the mortgage lien.

The order appealed from will be affirmed, with costs.

## REICHMAN v. HARRIS.

#### McCONNELL et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1918.)

Nos. 3055, 3070.

- 1. Extradition \$\sim 32\$—Interstate Extradition—Sufficiency of Charge.

  In proceedings for the rendition from one state to another of persons charged with crime, courts will not indulge in technical tests of the sufficiency of a charge, where it substantially describes the crime, if there is some appropriate allegation and evidence that a charge has in reality been duly made in the state where the crime is alleged to have been committed.
- 2. Extradition \$\iffsize 32\$—State Extradition—Sufficiency of Charge.

  In a proceeding before a magistrate for the arrest of a person charged with crime in another state, brought in the state to which he is alleged to have fled, it must appear that in the state where the crime was committed he stands charged through indictment or affidavit before a magistrate, or by some other equivalent accusation sanctioned by the laws of that state.
- 3. False Imprisonment = 12-Fugitives from Justice-Warrant-Sufficiency.

A warrant issued by a justice to arrest an alleged fugitive, issued on information on oath "that the offense of fugitive from justice has been committed and accusing M. H. thereof," even if considered in connection with oath reciting that accused had unlawfully entered state from Mississippi, "where he is charged with the crime of murder," was not fair and regular on its face, but void, as failing to state how, or under what competent official sanction, accused was charged in Mississippi, in view of Thomp. Shan. Code Tenn. §§ 7323, 7324, 7326, and Rev. St. U. S. § 5278 (Comp. St. 1916, § 10126).

4. False Imprisonment €==12—Defenses—Void Warrants.

A void warrant, not fair and regular on its face, affords an officer attempting to serve it no protection as against an action for false imprisonment, since he is chargeable with knowledge of its defects.

5. Homicide \$\infty\$111-Resistance of Arrest-Justification.

Although a person may with reasonable force resist an officer attempting unlawfully to arrest him, yet his resistance must be proportionate to the danger threatened, and he may not kill the officer, unless the circumstances fairly and honestly lead him to believe that he is in imminent danger of death or great bodily harm.

6. False Imprisonment \$\iff 39-\text{Resistance to Arrest-Instructions.}

In an action for false imprisonment, involving infliction of personal injury by defendants acting under a void warrant while attempting to enter plaintiff's house, where the evidence was conflicting as to the grounds for plaintiff's resistance, it was error to grant motion to direct a verdict.

7. Sheriffs and Constables \$\infty\$ 100—Liability for Acts of Deputies.

Where the act of the deputy sheriff is an official act and causes an injury, the sheriff is answerable, if the act is done in execution of the deputy's office, even though he may be mistaken as to the lawfulness of the act.

8. FALSE IMPRISONMENT \$\infty 19-Parties-Joinder.

In an action for false imprisonment, brought against a sheriff and his deputies, the sheriff was properly joined with the deputies as parties defendant, notwithstanding they both acted in their official capacity.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

9. Courts &=352—Jurisdiction—Federal Courts—Diversity of Citizenship—Special Findings.

In an action for false imprisonment, where on the issue as to jurisdiction based on diversity of citizenship it was specially found that plaintiff "is and was a resident of the state of Mississippi at the day of bringing this suit," such finding was sufficient to sustain an inference that plaintiff was both a citizen and resident of the state of Mississippi, and that therefore the court was vested with jurisdiction.

In Error to the District Court of the United States for the Western

District of Tennessee; John E. McCall, Judge.

Action by Mathew Harris against J. A. Reichman, L. F. McConnell, J. W. King, and others for false imprisonment. Judgment was entered against all defendants except Reichman for compensatory and exemplary damages, and against Reichman for compensatory damages, and a new trial was denied to all defendants except King. Reichman severed, and brought separate writ of error, whereupon other codefendants secured leave to bring error in forma pauperis, and proceedings in error of McConnell alone were brought into the record, and the proceedings were heard together. Reversed and remanded.

Charles M. Bryan, of Memphis, Tenn., for plaintiff in error Reichman.

Province M. Pogue, of Cincinnati, Ohio, and William P. Metcalf and Elias Gates, both of Memphis, Tenn. (Pogue, Hoffheimer & Pogue, of Cincinnati, Ohio, and Metcalf & Metcalf and Gates & Martin, all of Memphis, Tenn., of counsel), for plaintiffs in error McConnell and others.

James H. Malone and John E. Bell, both of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Mathew Harris, in an action for false imprisonment, involving in aggravation of damages alleged unlawful invasion of his home and arrest of himself and infliction of serious personal injuries,1 recovered a verdict against the following defendants: J. A. Reichman, Walter Lee, L. M. Linson, L. F. Mc-Connell, Ed. Bradley, Ira Williams, and J. W. King-for \$22,500 as compensatory damages, and also a verdict against all these defendants, except Reichman, for \$22,000 as exemplary damages, and judgment was entered accordingly. A new trial, however, was granted in favor of King, though denied as to the other defendants. Reichman procured an order of severance and sued out a separate writ of error, upon failure of his codefendants in the judgment rendered against him and them jointly to unite with him in prosecuting error. Later, however, these codefendants secured orders allowing them to prosecute writs of error in forma pauperis, and under stipulation of counsel the bill of exceptions and the printed record prepared in the Reichman proceeding are to be treated as filed on behalf of all the

<sup>&</sup>lt;sup>1</sup> Relying on Burson v. Cox, 6 Baxt. (Tenn.) 360, 363, 364, as to the character of action ultimately adopted.

defendants below who are prosecuting error, and further the proceedings in error of L. F. McConnell are identical in form with all the other proceedings allowed in forma pauperis, though the latter are omitted from the printed record to save expense. The two cases in error were consequently heard together in this court, and they will be

disposed of in one opinion.

The recoveries in issue were based upon acts and injuries charged against all the plaintiffs in error, and committed for the most part at the residence of Harris on the night of October 26, 1915, though he also relies on other and later wrongful acts and injuries. Harris resided at the time in Capleville, near Memphis, Tenn., and the whole trouble and injury grew out of efforts to arrest a claimed fugitive from justice, who was erroneously supposed to be at the residence of Harris on the night in question. Reichman was then the sheriff of Shelby county, Tenn.; Lee, Linson, Bradley, and Williams were deputy sheriffs under Reichman; and McConnell was a constable of the county. Lee, having information that Manuel Harris (a nephew of plaintiff) was "wanted for murder in Mississippi," secured on his own oath a warrant from a justice of the peace of Shelby county, October 18, 1915, to arrest Manuel Harris for "the offense of fugitive from justice." Through previous arrangement Lee received a telephonic message from a storekeeper at Capleville, just after dark on the evening of October 26, that "a strange negro, supposed to be the nephew of Mathew Harris," "had gone down to Mathew's residence," and that if Lee "would come down right away" he "could get him." Thereupon Deputy Sheriffs Lee and Linson, with at least two other men, went in an automobile to a point near plaintiff's residence, when the two deputies proceeded on foot to the residence. They took positions at the only outer doors of the house. Lee at the front and Linson at the back door. Alarm and trouble were aroused almost immediately, and there is conflict between the testimony of the inmates of the house and that of Lee and Linson as to some of the initial and important facts. In view of the contentions of counsel and certain rulings of the learned trial judge, it will be helpful to look into this part of the

Mathew Harris and his wife, with their little child and their nephew, Isiah Griffin, were the only persons inside the house; it is certain that Manuel Harris was not there. Harris, his wife, and the nephew testify that between 7 and 8 o'clock in the evening some one came to the front of the house (to the door, as the wife says) and called out for Mathew Harris; that the wife asked, "Who are you?" or "Who is that?" but "they would not tell who they were." She, however, answered that Mathew Harris was not there, but that her nephew and little child were there. She was then told to have her nephew "to come out here." The nephew testifies that he picked up a pistol and opened the back door to see who was there, when (in his language) "somebody shot at me, and the smoke burned my head, and I knocked the door to, and fell inside the house," and his aunt cried out, "You have done shot my child." He says some one then called out: "Stand

there with your pump gun; kill him if he tries to come out; don't let anybody out." The witness says, further, that he "never fired a shot that night." However, two of the men remaining in the automobile testify that, when the first shooting occurred at the rear of the house, two shots were fired; and Mathew, his wife, and the nephew all testify that within the house the way to the front door was obstructed by an unfolded bed, which usually necessitated using the back door when passing into or out of the house in the evening. Mathew Harris says the men "refused to tell who they were, and I did not know who they were"; his wife saying, "The first time I knew they were white men was when I got outside the house that night." Harris and his wife and nephew all testify in effect that none of the men stated at any time that evening that he was an officer, or that there were any officers there.

On the other hand, Lee testifies that he knocked on the door, that Mathew's wife asked, "'Who is that?' and I said, 'Is Mathew here?' She said, 'No, he is not here,' and she said, 'Who is that?' and I said, 'This is an officer: come to the door a minute: I want to see you.'" Lee also says, upon hearing persons inside the house walking towards the back door, he called to them: "Do not go out that back door; there is an officer at the door. \* \* \* There is four officers around this house." Linson testifies that he heard Lee knock at the front door and call out: "You need not try to run out the back door. You can't run out the back door. The house is surrounded with officers, and you can't get away." Further, that a half minute later he heard the back door open; that "this boy walked out the door, and the thought struck me—I had my pistol drawn on him, I would let him get out far enough so he could not jump back in the house before he saw me, and I saw a pistol in his right hand, \* \* \* and I saw some one else coming out the door with a Winchester rifle, and I stepped to the corner of the house, and said, 'Get back in there before I kill you,' and when I said that the boy turned right around and started back in the house, and just as he entered the door he shot at me, and I tried to shoot him in the head at the time"; and further that the boy's shot "was the first shot fired that night; I had not fired any before that." Lee, referring to this matter, said: "There were no more shots fired in the back, but when these two shots were fired Linson hollered to me, 'Look out! they are coming back in there,' and at this time I had done opened this front door—it had one of those cheap locks on it—and I turned the knob and went in the hall and started in this room and turned the door open." Upon going farther into the house and using a flashlight, he required Mathew's wife to precede him, stating that with her ahead of him he did not think there would be any shooting, but that she turned into another room, and Mathew then shot at him with a Winchester rifle. Mathew admits firing the rifle, but says: "I shot to make him get back. I did not know what he was up to. I shot at the light. I did not know who he was; he did not tell me his name or nothing." According to the testimony of the defendants, this was the third shot fired; but Mathew Harris and his nephew, Isiah Griffin, testify that a number of shots had been fired into the house from the outside, particularly from the front, before Mathew fired. In speaking of the shooting at the back door, when his nephew fell and his wife screamed, as already stated, Mathew says: "About that time the man on the front shot three or four times, and of course I was excited." Another feature of the evidence is: Harris and his wife and the nephew in effect testify that none of the officers stated that they were seeking Manuel Harris or even mentioned his name; while Lee testifies that he told the wife he had "come for Manuel Harris, supposed to be Mathew's nephew."

It is insisted for the defendants that the testimony thus far alluded to tends to show the commission of two felonies, one by plaintiff's nephew, Isiah Griffin, in firing as it is claimed upon Linson, and the other by plaintiff himself, Mathew Harris, when he fired at Lee, and that these were crimes committed in the presence of the officers, and so justified the course they pursued, even though they resorted to the use of firearms in effecting an entrance into the home of the plaintiff. The trial court instructed the jury, on motion of counsel for plaintiff, that the verdict should be "one of liability" against all the present plaintiffs in error. This left only a question of plaintiff's citizenship and the amounts of damages, compensatory and exemplary, to be considered by the jury. Upon these subjects we shall have something further to say; but neither the claim so urged by counsel nor the ruling of the court can be fully understood without calling attention to still further facts, since it is contended for Harris that the officers so far abused any legal authority they may have possessed as to condemn them as trespassers ab initio.

The rest of the testimony hardly can be said to be in material conflict. When Mathew Harris fired his shot, Lee left the house, and subsequently broke a window and placed a metal pail of burning sulphur in the house to drive the inmates out. The wife and her little child came out, and were directed to go to another person's house in the neighborhood. Mathew and the nephew, however, remained inside, though, as the deputies state, they were told that they might safely come out, if in doing so they would hold up their hands; but Mathew testifies that these men said they would kill him, and that he was afraid to go out. Many shots were meanwhile fired into the house, and Mathew was severely wounded. Later, dynamite was used, which resulted in blowing up part of the house; Mathew stating it "tore up everything." One of Mathew's eyes was blown out. an arm and hand and one of his legs were mutilated, so that he seems to have been reduced from a strong man, an efficient blacksmith, to a lifelong cripple, unfit for his occupation. In bringing about these results Lee and Linson called to their aid the other deputies and the constable, plaintiffs in error, and also outsiders; and the services of these men were enlisted upon representations of Lee and Linson that the two felonies before mentioned had been committed in their pres-Towards morning Mathew and the nephew were removed to the automobile, tied together, and carried to Memphis-Mathew to a hospital and the nephew to the jail.

To justify the violence resorted to, Lee says he thought Manuel Harris was in the house, and that, in view of the felonies claimed to have been committed in the presence of the officers, as stated, no more force was exerted than was necessary to effect arrests on that account, as well as the arrest of Manuel Harris. Later Lee gave directions at the hospital to have him notified when Mathew Harris might be in condition to leave. This was carried out, and Lee threatened to take him to jail unless he would give bail; and a bond was given. It appears that for firing the shot in his house on the night in question Mathew Harris was indicted for an assault with intent to commit murder; that he was tried and convicted in the criminal court of Shelby county, but that the verdict was set aside and a new trial granted; and that later he was discharged, "either upon an agreed verdict of not guilty or at the direction of the Attorney General for Shelby county."

We have here a remarkable instance of the conflict that may arise between persons who, through misconception on one side or on both sides, seek to exercise or enforce rights designed for the common security alike of the public and of the individual home. Here were officers entitled as well as bound rightly to enforce the law, and a private individual entitled to protection against wrongful invasion of his home. It must be apparent that to resist an officer in the lawful exercise of his right to arrest is as reprehensible as it is for an officer

wrongfully to enter the home of a private individual.

We come to the defenses specified in the pleas of the plaintiffs in error. All united in a plea of the general issue, and the deputy sheriffs and constable interposed additional pleas, alleging that they were acting in their official capacities as lawful officers of Shelby county, and setting up in justification of their acts: (1) The warrant secured, as already stated, from a justice of the peace of Shelby county to arrest Manuel Harris as a fugitive from justice; (2) the charge, above pointed out, that Mathew Harris assaulted Walter Lee with intent to commit murder, a felony under the laws of Tennessee, stating (a) that the assault was committed in the presence of the officers, and (b) that the officers had reasonable grounds to believe the offense had been committed, and that as such officers of Shelby county they were "authorized to make arrest," that they sought to arrest Mathew Harris, were resisted by him, and used no more force than was necessary to overcome his resistance; and (3) a warrant subsequently issued by a justice of the peace of Shelby county, to wit, October 29, 1915, for the arrest of Mathew Harris because of an alleged "offense of assault to murder." Reichman, the sheriff, relies on all these features of the pleas, except the one in relation to the warrant for arrest of Manuel Harris as a fugitive from justice; but it will conduce to clearness if we first consider the defenses of the deputies and the constable.

1. At the very threshold of the claimed justification, we are met with contention for plaintiff that the warrant for the arrest of Man-

uel Harris was void; and such was the ruling of the court below. A copy of the warrant and of the oath upon which it was issued ap-

pears in the margin.2

It is not claimed that any proceeding had been instituted in Mississippi looking to the indictment or arrest of Manuel Harris. The only reason disclosed by the record for seeking the issue of this warrant is that in July, 1915, a letter was received at the office of the sheriff of Shelby county, Tenn., from the sheriff of Tunica county, Miss., stating that Manuel Harris had "committed murder, and there was a reward for him." The letter was not produced. Lee testifies that he made a note of it in his book July 16, 1915; that he had information that Manuel Harris was stopping "every now and then at Mathew Harris' home," though he specifically denies that he was "acting individually to get that reward." It will be observed that Lee states in the oath he made to secure the warrant that on the \_\_\_\_\_\_ day of October, Manuel Harris unlawfully entered the state of Tennessee, "a fugitive from justice from the state of Mississippi, where he is charged with the crime of murder"; and so far as appears this was the sole basis for the statement shown on the face of the warrant:

"Information on oath having been made that the offense of fugitive from justice has been committed, and accusing Manuel Harris thereof."

It had been provided by statute of Tennessee that any magistrate might, upon stated conditions, issue a warrant to arrest any person found in the state "charged with any crime committed in any other state, \* \* and liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor thereof." One of the conditions, additional to that just quoted, upon which such a warrant may be issued is the presence of "complaint, on oath, setting forth the offense and such other matters as are necessary to bring the case within the provisions of law." "If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the Governor," he may be committed or required to give bail according to the nature of the offense charged, "allowing sufficient time to obtain the warrant

<sup>2</sup> State of Tennessee, Shelby County—ss.: To Any Lawful Officer of the State: Information on oath having been made that the offense of fugitive from justice has been committed, and accusing Manuel Harris thereof.

You are hereby commanded, in the name of the state, forthwith to arrest Manuel Harris and bring him before me, or some other magistrate of said county to answer the charge.

Given under my hand and seal, this 18th day of October, 1915.

Sworn to and subscribed before me, this 18th day of October, 1945.

John M. Maher, J. P. [Seal.]

from the Governor." At the end of such time "he shall be discharged unless he is demanded under warrant of the Governor, or unless the magistrate see good cause to commit him to some other day, or to require him to give bail for his appearance at such day, to await a warrant from the Governor." Sections 7323, 7324, and 7326, Shannon's Code (Ed. 1896); Id. (Ed. 1917).

Although no judicial interpretation of this statute has come to our attention, yet the first inquiry naturally arising under the statute is whether the warrant discloses facts which would sanction its issue. In other words, is the warrant fair and regular on its face? This requires consideration of the conditions prescribed by the Tennessee statute. It will be observed that the crime it contemplates is one which has been "committed in another state," and is of such character as will render its perpetrator "liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor" of the other state, and the perpetrator in contemplation is a person "found in this state charged" with such a crime. This denotes a status, a condition, of the person so found; i. e., a person already charged with the crime at the place of its commission. Further, the sworn complaint upon which a justice of the peace may rightfully issue a warrant of arrest must set forth not only the offense, but "such other matters as are necessary to bring the case within the provisions of law." Let us see whether the offense and other essential matters were set forth in this warrant. It is not shown whether the warrant either included or was accompanied by the oath on which it was issued. If the warrant is considered apart from the oath, nothing is found to indicate either the nature of the offense or the place of its commission, which would render Harris liable to be delivered over upon demand of the Governor of another state as a "fugitive from justice" or otherwise. If, on the other hand, the oath is to be treated as part of the warrant, it is there stated that Manuel Harris had unlawfully entered Shelby county. Tenn., "a fugitive from justice from the state of Mississippi, where he is charged with the crime of murder"; but the oath does not state how or under what, if any, competent official sanction Harris was so charged in Mississippi, nor can it be presumed, in view of the testimony concerning the sheriff's letter already alluded to, that any showing of the official character mentioned was made before the magistrate. Certainly the statute does not in terms sanction such an omission as this; on the contrary, according to the very terms of the statute, it would seem that such a showing was a matter "necessary to bring the case within the provisions of law." This statute does not purport to invest a justice of the peace with power to issue a warrant upon evidence of a character different from that prescribed by the federal act (section 5278, Rev. Stat. [Comp. St. 1916, § 10126]), and that act requires production of an authenticated "copy of an indictment found or affidavit made before a magistrate" of the state from which the person so charged is alleged to have fled. This evidential feature is fairly embraced within the meaning and intent of the Tennessee statute, since comparison of that statute with section 5278 and the second paragraph, § 2, art. 4, of the federal Constitution, shows that the state provisions were designed consistently to aid those of the federal Constitution and statute on the subject of fugitives from justice as between the states and territories.<sup>3</sup>

[1, 2] What, then, was the effect of the omission either to state in the oath (and we may treat the oath as the statutory complaint required) or otherwise to show under what if any competent official action Harris was charged in Mississippi with having there committed the crime of murder? In proceedings looking to the rendition from one state to another of persons charged with crime, courts will not indulge in technical tests of the sufficiency of a charge where it substantially describes the crime (Pierce v. Creecy, 210 U. S. 387, 401, 28 Sup. Ct. 714, 52 L. Ed. 1113; and see Matter of Strauss, 197 U. S. 324, 325, 334, 25 Sup. Ct. 535, 49 L. Ed. 774); but the courts must be able to find some appropriate allegation and evidence that a charge has in reality been duly made in the state where the crime is alleged to have been committed. And we understand the rule to be that in a proceeding before a magistrate for the arrest of the person so charged, brought in the state to which he is alleged to have fled, it must appear by admissible proof that in the state where the crime was committed he stands charged through indictment or affidavit before a magistrate or by some other equivalent accusation sanctioned by the laws of that state. State v. Hufford, 28 Iowa, 391, 394, 396; Malcolmson v. Scott, 56 Mich. 459, 461, 466, 23 N. W. 166, opinion by Justice Campbell; Forbes v. Hicks, 27 Neb. 111, 116, 42 N. W. 898 (the state statutes involved in the foregoing cases were similar to the Tennessee statute in question here); People ex rel. Lawrence v. Brady, 56 N. Y. 182, 186, 187; Matter v. Heyward, 1 Sand. (N. Y.) 701, 707; Matter of Leland, 7 Abb. Prac. N. S. (N. Y.) 64, 66; Ex parte A. W. McKean, 3 Hughes, 23, 25, Fed. Cas. No. 8,848; Ex parte Morgan (D. C.) 20 Fed. 298, 308; Ex parte Cubreth, 49 Cal. 435, 437; Ex parte Lorraine, 16 Nev. 63. And it has in effect been held that such evidential showing was necessary, even in the absence of a statute, say like that of Tennessee. In Matter of Washburn, 4 Johns. Ch. (N. Y.) 106, 114, 8 Am. Dec. 548; Matter of Fetter, 23 N. J. Law, 311, 320, 57

Constitution or statute upon this subject. In spite of conflict in decisions of an early period touching the power of a state to enact legislation of an auxiliary character on that subject (2 Moore on Extradition, § 542, and citations), it is safe to say that such legislation is not now open to objection. Burton v. New York Cent. R. R. Co., 245 U. S. 315, 318, 38 Sup. Ct. 108, 62 L. Ed. 314; Matter of Strauss, 197 U. S. 324, 330, 25 Sup. Ct. 535, 49 L. Ed. 774 et seq.; Commonwealth v. Tracy, 5 Metc. (Mass.) 536, 549, 550, 49 Am. Rep. 63, Chief Justice Shaw announcing opinion; Ex parte Ammons, 34 Ohio St. 518, 519; Robinson v. Flanders, 29 Ind. 10, 14; In re Mohr, 73 Ala. 503, 510; Kurtz v. State of Florida, 22 Fla. 36, 42, 1 Am. St. Rep. 173; Dennison v. Christian, 72 Neb. 703, 707, 101 N. W. 1045, 117 Am. St. Rep. 817, affirmed without opinion 196 U. S. 637, 25 Sup. Ct. 795, 49 L. Ed. 630. These decisions do not differ in principle from the recent ruling in Stellwagen v. Clum, 245 U. S. 605, 613, 614, 38 Sup. Ct. 215, 62 L. Ed. 507, to the effect that state statutes intended to avoid certain classes of conveyances and so to promote the equal distribution of insolvents' estates although leading to different results in different states, were not inconsistent with the power of Congress to establish uniform laws on the subject of bankruptcy.

Am. Dec. 382; State v. Anderson (S. C.) 1 Hill, 330. Nor can such a showing be excused upon counsel's theory that the time required to secure a proper warrant would enable the fugitive to escape arrest by passing "from state to state in immunity, while those who pursued him sought to get warrants." This is to ignore the declared legislative policy of Tennessee; it is to assert a degree of license in the matter of arrests which would open the law to serious abuse and render it an instrument of oppression; these statutory provisions were framed with reference, not alone to actual fugitives, but also to the rights, the individual liberty and security, of innocent persons as well. Upon this subject Justice Campbell said in Malcolmson v. Scott, supra, 56 Mich. 465, 23 N. W. 168: "Fundamental rules of constitutional immunity cannot be relaxed."

- [3] It should be constantly borne in mind that the statute of Tennessee does not purport to deal with domestic crimes; it concerns crimes committed in other states, and provides only for the arrest of persons who are there charged with the commission of such crimes and subsequently found in Tennessee. This distinguishes the instant case from that of Burton v. New York Cent. R. R. Co., supra, 245 U. S. 315, 38 Sup. Ct. 108, 62 L. Ed. 314; and the distinction derives emphasis from Tarvers v. State, 90 Tenn. 485, 499, 16 S. W. 1041, opinion by the late Mr. Justice Lurton. It must follow that the magistrate was without jurisdiction to issue the warrant for the arrest of Manuel Harris as a fugitive from justice, and that, whether the warrant be treated as including the oath or not, it was not fair and regular on its face, and was void.
- [4] 2. We may now recur to the special defenses set up in the pleas of the deputy sheriffs and the constable in justification of their conduct toward Mathew Harris. The theory of those defenses, as we interpret them, is that the officers rightfully entered the premises of Mathew Harris in virtue of the warrant for the arrest of Manuel Harris, and that while engaged in the execution of that warrant Mathew Harris resisted and fired upon them, and so committed a felony in their presence which justified his arrest and all the acts he complains of. It may be conceded that if the warrant had been valid, and there was in fact reasonable ground for believing that Manuel Harris was in the residence of Mathew Harris, Lee and Linson would have been entitled, upon demand and notice of their object, to enter the residence for the purpose of arresting Manuel, and to resort to such force as was necessary to ascertain whether he was in fact there and to effect his arrest; but the rule is that a void warrant, certainly where it is not fair and regular on its face, affords an officer no protection, since he is chargeable with knowledge of its defects. Malcolmson v. Scott, supra, 56 Mich. 464, 23 N. W. 166; Sanford v.

<sup>4</sup> McCaslin v. McCord, 116 Tenn. 690, 707, 708, 94 S. W. 79, 8 Ann. Cas. 245, and citations; Commonwealth v. Reynolds, 120 Mass. 190, 196, 21 Am. Rep. 510; State v. Smith, 1 N. H. 346; Semayne's Case, 3 Coke, 185, 186, par. 3; Harvey v. Harvey, 26 Ch. D. 644, 649, 650; 16 L. R. A. 500 to 504, note. See, also, sections 6999, 7000, Shannon's Tenn. Code (Ed. 1917); and Id. (Ed. 1896), giving to officers the right to enter dwellings in the execution of process concerning arrests for the commission of exclusively Tennessee offenses.

Nichols, 13 Mass. 286, 287, 288, 7 Am. Dec. 151; Piper v. Pierson, 2 Gray (Mass.) 120, 122, 61 Am. Dec. 438; Lueck v. Heisler, 87 Wis. 644, 647, 58 N. W. 1101; Heller v. Clark, 121 Wis. 71, 76, 98 N. W. 952: Vinton v. Weaver & Veazie, 41 Me. 430, 431; Elsemore v. Longfellow, 76 Me. 128, 131; Casselini v. Booth, 77 Vt. 255, 257, 59 Atl. 833; Hussey v. Davis, 58 N. H. 317; Allen v. Gray, 11 Conn. 95, 102; Jordan v. Henry, 22 Minn. 245, 246; Gorton v. Frizzell, 20 Ill. 292, 295: Stephens v. Wilkens, 6 Pa. 260, 262; Poteete v. State, 9 Baxt. (68 Tenn.) 261, 265, 40 Am. Rep. 90. Lee, for example, was bound to know that the law did not invest the magistrate with power to issue a warrant for the arrest of Manuel Harris as a fugitive from justice in the absence of appropriate showing that he stood charged in Mississippi with the crime mentioned by Lee in his oath. Thus Lee and also Linson attempted, not merely to execute a void warrant, but in legal effect acted without a warrant, and in either view were trespassers. Commonwealth v. Crotty, 10 Allen (Mass.) 403, 405, 87 Am. Dec. 669, and citations, approved in West v. Cabell, 153 U. S. 78, 86, 14 Sup. Ct. 752, 38 L. Ed. 643; Commonwealth v. Martin, 105 Mass. 178, 181; Tackett v. State, 3 Yerg. (11 Tenn.) 392, 394, 24 Am. Dec. 582; and see State v. Mann, 27 N. C. 45, 47. The attempt, then, to justify entering the residence, or even the premises, of Mathew Harris in virtue of the warrant of arrest must fail.

In support of the pleas, however, counsel take the further position that Isiah Griffin without just cause fired at Linson, that this was the commission of a felony in the presence of the officers, and that for the commission of this offense Lee was entitled to enter the house for the purpose of arresting the offender at the time Mathew Harris fired upon him. This seems at last to be claimed as the real justification for Lee's entry into the residence of Mathew Harris. We thus reach several disputed questions of fact, and upon their solution must depend whether either Isiah Griffin or Mathew Harris in reality committed a crime. To illustrate: Did Isiah fire upon Linson at all? If so, were the conditions such as reasonably to create in him a belief that he was in imminent danger of death or of great bodily harm, and thus to justify him in resorting, if in fact he did resort, to extreme measures in self-defense? If such conditions did not exist, if in truth he fired upon Linson in circumstances not reasonably calling for the use of a deadly weapon, it well may be that he committed an offense in the presence of an officer, for which Lee was entitled, upon notice of his official character and purpose, to enter the residence to arrest the offender (Shannon's Code [Ed. 1917] §§ 6997-6999), for we are now dealing with an alleged Tennessee offense exclusively.

[5] Further, if Lee's entry into the house was without justification, still Mathew Harris was not for that reason alone entitled either to kill him or use a deadly weapon to repel him. Although a person may with reasonable force resist an officer attempting unlawfully to arrest him, yet his resistance must be proportioned to the danger threatened. A person has no right to kill an officer seeking to make an unlawful arrest, unless the circumstances lead him fairly and honestly to believe that he is in imminent peril of death or of great bodily harm; he

may not resist with a deadly weapon in the absence of well-founded reason to apprehend greater injury than the unlawful arrest. James Galvin v. State, 6 Cold. (46 Tenn.) 283, 291, 292; Williams v. State, 44 Ala. 41, 43, 45; Stockton v. State, 25 Tex. 772, 776; Briggs v. Commonwealth, 82 Va. 554, 564; Creighton v. Commonwealth, 84 Ky. 103, 104, 4 Am. St. Rep. 193; State v. Underwood, 75 Mo. 230, 238; State v. Row, 81 Iowa, 138, 150, 46 N. W. 872; State v. Spaulding, 34 Minn. 361, 366, 25 N. W. 793; Brooks v. Commonwealth, 61 Pa. 352, 357, 100 Am. Dec. 645; People v. Carlton, 115 N. Y. 618, 623, 624, 22 N. E. 257; State v. Scheele, 57 Conn. 307, 313, 315, 18 Atl. 256, 14 Am. St. Rep. 106; State v. Ward, 5 Har. (Del.) 496, 500. The question of entrance into a home for making an arrest without a warrant, it is true, did not arise in these decisions; but, in view of the statutes of Tennessee last cited, we regard the ruling principles of those cases as applicable here as tests of whether the use of firearms was justified. The same principles have been applied, and with much force, where entrance into the dwelling had been made, not by officers, but by mere intruders. Pond v. People, 8 Mich. 149, 176; State v. Middleham, 62 Iowa, 150, 155, 17 N. W. 446, and citations; and, by analogy, Hull v. State, 74 Tenn. 249, 261; Johnson v. State, 100 Tenn. 254, 261, 45 S. W. 436; Beard v. United States, 158 U. S. 550, 564, 15 Sup. Ct. 962, 39 L. Ed. 1086.

In thus pointing out principles of law that will be applicable or not according as the facts are ultimately found, it is by no means intended to intimate whether Mathew Harris did or did not commit the felony charged against him. The case is one of its own kind as respects Mathew Harris. According to the testimony of Linson himself, when the back door of the house was opened and the two men were coming out, one as he says with a pistol and the other with a Winchester rifle, he warned them to "get back in there before I kill you," and admittedly fired at Griffin, although saying that Griffin fired first. Clearly the men so warned were Mathew Harris and Griffin. Since Lee and Linson were at the house without a valid warrant, it is certain that Mathew Harris was not obliged, in obedience to Linson's warning, to retreat into the house (Beard v. United States, supra, 158 U. S. 564, 15 Sup. Ct. 962, 39 L. Ed. 1086; Pond v. People, supra, 8 Mich. 176); yet he did retreat, and only to find Lee entering the house from the front door, with Mathew's wife walking immediately in front of him. Surely Mathew was not bound to retreat again; but even considering the warning, and the firing that had already taken place, it cannot be concluded as matter of law that Mathew rightfully sought to repel Lee's entrance and approach by firing his rifle. This situation, like that of Griffin's alleged firing, presents questions of fact; and we do not see how such questions can be answered by a court. As Mr. Justice Peckham said in reversing and remanding the case of John Bad Elk v. United States, 177 U. S. 529, 532, 20 Sup. Ct. 729, 44 L. Ed. 874, and when speaking of the rights of the defendant who had resisted and killed an officer attempting unlawfully to arrest him without a warrant (177 U. S. 537, 20 Sup. Ct. 732, 44 L. Ed. 874):

\*\* \* The law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the

officer had no such right. What might be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offense had been committed."

Again, in Pond v. People, supra, where the facts were exceptionally calculated to provoke the use of a deadly weapon against trespassers, Justice Campbell said (8 Mich. 182):

"It is claimed \* \* \* that we are authorized to pronounce upon the case the judgment which the facts warrant. Had the facts spread out in the bill of exceptions been found as a special verdict by the jury, this would be true. But, as the case stands, we can only consider them as bearing upon the instructions given or refused." <sup>5</sup>

- [6] And it scarcely need be added that upon the motion in the instant case to instruct the jury that the defendants were liable, the court was required to take that view of the evidence which was most favorable to them. It was therefore error to grant this motion.
- 3. The deputies and the constable in another plea, as already pointed out, alleged the arrest of Mathew Harris under a warrant accusing him of the "offense of assault to murder" and issued some three days after the events of the night of October 26th at his residence. The warrant was issued and directed to "any lawful officer of the state" by a justice of the peace, October 29th; this was done upon the oath of defendant Lee, and the return made thereunder showing execution of the warrant was signed in the name of defendant Reichman, sheriff, by defendant Linson, his deputy. The return, however, bears date October 26th—an obvious error. The offense charged in this warrant is the one claimed to have been committed by Harris when firing upon Lee at the residence on the night of October 26th, and the warrant seemingly resulted in the indictment, conviction, and ultimate acquittal of Harris. Apart from the relation of Sheriff Reichman to the return made under this warrant and the effect it may have upon his liability, it is not necessary to notice the plea setting up this arrest; for, although defendants made the arrest the subject of a special request which was refused and exception reserved, no assignment was made in that behalf.
- 4. As to Sheriff Reichman, who was not in fact present at the Harris residence, two questions arise. One is whether he is liable at all, and the other whether he is liable jointly with the deputies and the constable.
- (a) The first of these questions leads to an inquiry into the capacity in which the deputies acted. The testimony of the deputies is that they
- <sup>5</sup> The facts and the occasion for this expression of the law are plainly distinguishable from the situation confronting Justice Carpenter in Cook v. Hastings, 150 Mich. 289, 291, 114 N. W. 71, 14 L. R. A. (N. S.) 1123, 13 Ann. Cas. 194, where it was said: "The trial court should have directed a verdict against defendant Hastings." In the instant case the question of right to enter the residence of Mathew Harris for the purpose of making an arrest depended upon whether Griffin had in fact committed a felony in the presence of the officers; and while in Cook v. Hastings the right to make an arrest for the commission of an offense in the presence of an officer is distinctly recognized yet no claim was there made that any offense had been so committed. See 150 Mich. 290, 114 N. W. 71, 14 L. R. A. (N. S.) 1123, 13 Ann. Cas. 194.

were all at the residence of Mathew Harris during more or less of the night in question, and that they acted throughout as deputy sheriffs. This in substance is reiterated in their pleas. Further, the warrant procured three days later for the formal arrest of Mathew Harris, and in apparent furtherance of the previous acts of the deputy sheriffs, shows as we have seen that it was executed in the name of Sheriff Reichman. The sheriff has not repudiated this official use of his name, nor has he offered any testimony disputing that of his deputies. It results that the acts done in effecting the arrest of Mathew Harris for his alleged felony must for the purposes of this decision be treated as official acts.

[7] The rule of law applicable to such a situation is settled. Where the act of the deputy is an official act and causes an injury, the sheriff is answerable; and this is true where the act is done in execution of the deputy's office, even though he may be mistaken as to the lawfulness of the act, for otherwise no action could ever be maintained against a sheriff for the misconduct of his deputy. Knowlton v. Bartlett, 1 Pick, (Mass.) 270, 273; Waterbury v. Westervelt, 9 N. Y. 598, 603; Morgan v. Chester, 4 Conn. 387, 388; Woodgate v. Knatchbull, 2 T. R. 148, 155, 156; Spencer v. Moore, 19 N. C. 264, 265; King v. Brown, 100 Tex. 109, 112, 94 S. W. 328; 1 Cooley on Torts (3d Ed.) pp. 222, 223; and see Jones v. Van Bever, 164 Ky. 80, 97, 174 S. W. 795, L. R. A. 1915E, 172. Although the sureties of the sheriff are not parties here, yet the controlling principles laid down in these cases and by Judge Cooley are necessarily involved and applied in decisions granting recovery against a sheriff or other like officer and his sureties for misconduct of the officer or his deputies. Lammon v. Feusier, 111 U. S. 17, 20, 4 Sup. Ct. 286, 28 L. Ed. 337 et seq.; National Bank of Redemption v. Rutledge (C. C.) 84 Fed. 400, 402, et seq., by Hammond, J.; Johnson v. Williams, Admr., 111 Ky. 289, 295, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416; Brown v. Weaver, 76 Miss. 7, 19, 20, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512, and citations; State v. Boepple (Mo. App.) 198 S. W. 502, 503. And see Bernard v. Bowe (C. C.) 41 Fed. 30, 31 (D. C., per Wallace, J.). We do not overlook McLendon v. State, 92 Tenn. 521, 22 S. W. 200, 21 L. R. A. 738; we think the facts of the instant case distinguish it from the decision in that case. There the sheriff acted under an order "void on its face," and was "presumed to have known the law" (92 Tenn. 525, 22 S. W. 200, 21 L. R. A. 738); while here both Reichman and his deputies treat the acts of the latter as justified because of the felony they allege to have been committed by Mathew Harris in the presence of the deputies, and upon this hypothesis the statute is relied on as in effect standing in the place of process in the sense that in such instances it authorizes arrest to be made without a

[8] (b) Upon the question whether Reichman is liable jointly with the deputies and the constable, counsel urge, in the first place, that Reichman can be held only in case his deputies were acting in their official capacities, and that in this event the deputies are not liable, except to their principal; and, next, that if the deputies were acting

personally. Reichman is not answerable for their acts. Thus it is argued that there is no way in which the sheriff and his deputies can be held jointly in this case. This does not question the right to join the constable with the sheriff. If we are right in the view already expressed that upon the present record the deputies must be treated as having acted officially, it is not necessary to consider the question of joinder on the theory that their acts were personal. We are not convinced that the official character of the acts prevents the joinder. is true that, if a settled rule of judicial decision prevailed in Tennessee forbidding joinder in such circumstances, we should be bound by it (Robbins v. Pennsylvania Co., 245 Fed. 435, 437, 157 C. C. A. 597 [C. C. A. 6]); but we have not been referred to any decision in that state which lavs down such a rule. However, it is said that a rule to this effect is deducible from certain of the decisions. For example, Rose v. Lane, 3 Humph. (Tenn.) 218, decides that a deputy sheriff, whose duty was simply to execute process, could be held personally liable for acts done "beyond the obligations of his office" (219): and this was the question for decision. The deputy had undertaken in the owner's behalf to collect certain notes and accounts and had neglected to do so. The sheriff was not a party to the suit. Though in the opinion it was stated arguendo that the deputy was not liable for his official acts except to his principal, the statement was not necessary to the decision and was referred to in Vance v. Campbell, 8 Humph. (Tenn.) 524, 527 as having been made "incidentally." Moreover, Vance v. Campbell and also Robertson v. Lassan & Dugan, 7 Cold. (Tenn.) 159, 161, were statutory proceedings of a summary character against deputy sheriffs; recovery was allowed in the former and denied in the latter according to the provisions of the respective statutes. Although the statement in Rose v. Lane is reiterated in the Robertson Case, yet the statute itself distinctly controlled the proceeding; summary action can scarcely furnish a guide for general procedure. In State ex rel. v. Slagle, 115 Tenn. 336, 338, 339, 89 S. W. 326, the statement of Rose v. Lane again finds expression; but there the sole question was whether the offices of deputy sheriff and constable were incompatible in the sense that the same man could not hold both. It therefore cannot be safely said that there is any established rule of decision in Tennessee to which the joint action under review is opposed.

It is also contended that the rule so claimed against joinder is deducible from certain statutes of Tennessee. It is pointed out, for instance, that the sheriff is required by statute to give an official bond, and is authorized to have as many regular deputies as he may desire (Thompson's Shannon's Code, §§ 443, 448); but that there is no provision exacting bonds of deputies. Attention is called in the next place to the statute which provides that, where judgment is rendered against the sheriff for the "default" of his deputy, he may recover judgment summarily on motion against the deputy. Id. § 5370, par. 2. Counsel for plaintiff claim that this provision is to be read in connection with section 5359. This section authorizes judgment with 12½ per cent. damages to be taken on motion against a sheriff for making improper return upon an execution directed to him or failure to pay over money

collected thereon; but it is said that since the enactment of the Code in 1858 no such judgment could be taken against the deputy, and this appears to be correct. Id. note 2, p. 2214. It would therefore seem that these statutory provisions relate only to summary proceedings, first, by an execution creditor against the sheriff; and, second, by the sheriff against any of his deputies whose "default" has resulted in a judgment against his principal. Whether this is a true interpretation of these statutes or not, it is certain that they do not in terms relate to a case like the one at bar; they make no provision for a case where either the sheriff and his deputies together, or his deputies alone, participate in the commission of positive acts, such as the infliction of personal injuries upon a third person, or trespass upon his property, in the execution of a duty and power reposed in the sheriff and the deputies alike. If, for instance, the sheriff had been present and taken part in committing the injuries inflicted upon Harris at his residence, it is hard to believe—indeed, it is not claimed—that in the absence of justifying circumstances the sheriff and his deputies could have escaped joint liability for the injuries so committed. This we think is equally true as respects such positive acts of the deputies in the absence of their principal, since the sheriff in contemplation of law is always present with his deputies in the execution of their offices. As Judge Cooley said in his work on Torts (volume 1 [3d Ed.] p. 223):

"The fact that the sheriff is responsible does not relieve the deputy, who is equally liable with the sheriff for all his positive misfeasances."

## Again (page 228):

"It was once held in Massachusetts that a sheriff who was not present when his deputy, in the service of a writ, committed a trespass, could not be held liable as a joint trespasser with him; but the better doctrine is, that the sheriff, by construction of law, is always present with the deputy who bears his process, and is legally responsible for his acts."

In Waterbury v. Westervelt, supra, 9 N. Y. 598, 603, Judge Denio said:

"It is an elementary principle that in torts he who procures a command is equally liable with him who does the act, and they may all be sued jointly or severally at the election of the plaintiff. The deputy in this case is made liable, not from any official relation to the matter, but because he has voluntarily invaded the plaintiff's right of property; the sheriff is made liable, because in law he is considered as having commanded the act to be done. The existence of such command is established, by showing the relation between them."

See King v. Orser, 4 Duer (N. Y.) 431, 437, 438, by Judge Duer; Hoye v. Raymond, 25 Kan. 665, 666; Morgan v. Chester, supra, 4 Conn. 387, 388; Balme v. Hutton, 9 Bing. 471, 473, 474; Southern Bell Telephone Co. v. Francis, 109 Ala. 224, 233, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; Remlinger v. Weyker, 22 Wis. 366; Pond v. Leman, 45 Barb. (N. Y.) 152, 154, and citations; Crocker on Sheriffs (3d Ed.) p. 18. We are not unmindful of the fact, pointed out by Judge Cooley, that a contrary doctrine prevails in Massachusetts (Campbell v. Phelps, 1 Pick [Mass.] 62, 11 Am. Dec. 139, approved in Parsons v. Winchell, 5 Cush. [Mass.] 592, 594, 52 Am. Dec. 745);

but we agree with the view expressed by Judge Denio, who, in Waterbury v. Westervelt, supra, 9 N. Y. 604, concluded that the dissenting opinion of Justice Wilde in Campbell v. Phelps was "more consistent with legal analogies than the one which prevailed."

Differences exist between counsel upon a subject kindred in principle to that of the ruling decisions just cited; it is ratification. We need not allude to the maxim that ratification is the equivalent of a prior command, nor to its analogy in principle to the rule applicable to sheriffs, since the question does not arise under the assignments. Few, if any, of the states provide a more liberal system of procedure than that of Tennessee, and, we are convinced that the question of full redress against all the defendants should be determined in a joint action.

- 5. It is insisted for Harris, as we have seen, that the officers, including the constable, so far abused any legal authority they may have possessed as to condemn them as trespassers ab initio; and it is urged on behalf of Bradley and Williams, deputy sheriffs, and also McConnell, constable, that they were called to the aid of Lee and Linson with good cause to believe that the felony charged had been committed in the presence of the officers. Since the judgment will have to be reversed, and the cause remanded, it is not necessary to discuss these questions; they may arise under different facts and require different treatment at the next trial.
- 6. Upon the assignment for refusal to instruct the jury as requested on the subject of punitive damages respecting the acts of the defendants other than Reichman (against whom such recovery was denied), we think it enough presently to say that the rights of the parties are ruled by Beckwith v. Bean, 98 U. S. 266, 25 L. Ed. 124.
- [9] 7. A question of jurisdiction was presented in the court below, which we have purposely refrained from noticing at an earlier stage of the opinion. The basis of jurisdiction is alleged diversity of citizenship; the plaintiff averring that he is a resident citizen of Tunica county, Miss., and the defendants resident citizens of Shelby county. Tenn. This was met by plea in abatement, alleging that at the time suit was commenced, as well as at the date of filing the plea, Mathew Harris was a citizen and resident of Tennessee, and that the defendants were then citizens and residents of the same state. On motion it was ordered that the issues raised by the plea be heard and determined at the trial of the case upon the merits, and that meanwhile the defendants file their pleas to the merits. This order was carried out. Testimony was offered on both sides, and the jury specially found that plaintiff "is and was a resident of the state of Mississippi at the date of bringing this suit." We do not discover any error that would justify disturbance of this finding. It may fairly be inferred from the testimony and the instructions of the court, that the jury meant to find that plaintiff was both a citizen and resident of the state of Mississippi. This view was not questioned until the case reached this court. The finding was sufficient to vest the court with jurisdiction. Sun Printing and Publishing Ass'n v. Edwards, 194 U. S. 377, 383, 24 Sup. Ct. 696, 48 L. Ed. 1027; Mahoning Valley Ry. Co. v. O'Hara,

196 Fed. 945, 948, 116 C. C. A. 495 (C. C. A. 6); La Belle Box Co. v. Stricklin, 218 Fed. 529, 534, 134 C. C. A. 257 (C. C. A. 6). The fact of citizenship can, of course, be tested at the next trial. Submission of the issue to the jury was within the discretion of the court. Gilbert v. Davis, 235 U. S. 561, 568, 35 Sup. Ct. 164, 59 L. Ed. 360.

It can serve no useful purpose to pursue the assignments further, since enough has been said to indicate the views of this court upon the controlling questions. The judgment will be reversed, and the cause remanded for a new trial, because of the instruction that the verdict should be one of liability against the defendants who are prosecuting the two writs of error, and an order will be entered accordingly.

### GOLD HUNTER MINING & SMELTING CO. v. BOWDEN.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1918.)

No. 3122.

1. Master and Servant  $\rightleftharpoons$  289(15)—Action for Injury to Sebvant—Assumption of Risk.

A miner, injured by reason of the breaking of a drill which had previously been broken and welded, did not as matter of law assume the risk, if the breaking was due to improper welding; that being a question for the jury.

2. Pleading \$\sim 291(2)\$—Verification—Effect of Failure to Verify.

Under Rev. Codes Idaho, \\$ 4201, by which the "genuineness and due"

execution" of an instrument pleaded in defense is deemed admitted, unless denied by an affidavit filed, the failure to file such affidavit does not preclude plaintiff from denying the effectiveness of a release interposed as a defense.

3. RELEASE \$\infty\$34\to Construction and Effect\to Release of Damages for Personal Injury.

A release by an employé of claims for damages, because of personal injuries then believed by the parties to be of minor character, cannot be construed to cover other and very serious injuries, which afterwards developed from the same cause.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by William M. Bowden against the Gold Hunter Mining & Smelting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James A. Wayne, of Wallace, Idaho, for plaintiff in error.

Robertson & Miller and F. C. Highsmith, all of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Bowden recovered damages against his employer, the Gold Hunter Mining & Smelting Company, for personal injuries suffered on September 4, 1915, while operating a drill in a mine belonging to plaintiff. The mining company brought writ of error.

Bowden alleged that the company knew that it was unsafe to use steel which had been welded together after being broken, because the steel in mining operations was liable to break again at the place where it had been welded; that at the time of the accident he took a steel drill about 3½ feet long and put it in the machine, believing the steel to be sufficiently strong for the purpose for which it was furnished, but that the steel so taken had been broken, and thereafter had been carelessly welded together in a defective manner, and was not strong or fit for the purpose of being used as a drill, but was dangerous and unsafe, as the defendant company well knew; that he put the steel in the drill without knowing of the defective condition of the steel, but that when the machine was operated the steel, because of its defective and welded condition, broke at the point where it had been welded, and caused the machine to move forward suddenly, throwing plaintiff upon a muck pile and injuring him seriously. The company defendant admitted that welded steel had been furnished, but alleged that such steel was as safe as steel which had not been welded, and also pleaded contributory negligence, assumption of risk, and that after the injuries to the plaintiff there had been a settlement, and that plaintiff had given to defendant a written release, which was a complete bar to the action. The release, dated December 23, 1915, was in consideration of \$200, and released and discharged the mining company of and from all claims, demands, damages, actions, or causes of action on account of injuries resulting or to result from accidents which occurred on or about July 9, 1915, on account of a strained back and by reason of an accident having occurred on September 4, 1915, when he bruised his scrotum "by falling by reason of the breaking of a defective drill steel, and of and from all claims or demands whatsoever in law or in equity" which Bowden or his heirs or assigns "can, shall, or may have by reason of any matter, cause, or thing whatsoever" prior to the date of the release.

Bowden, who was an experienced underground mine worker, testified to the effect that he was drilling in a stope where there was about 16 or 18 feet of muck, leaving just room enough to stand on the edge and drill; that he was drilling a cut hole, and started the steel in the drill, but that after a revolution or two it broke in the center, the machine gave him a kind of lurch, his feet slipped, he struck on a boulder, and rolled down to the floor on the chute about 18 feet; that after he was injured he dragged his machine out, and the piece of steel was still in the end of the machine, and had been broken at a kind of an angle in the weld where the steel had been welded; that the weld was not completely together where it had broken from the jar, and that one end ran down probably about half or three-quarters of an inch into the weld; that he never had seen steel in an unwelded drill break in the middle, or right in the weld; that he thought the steel was sound, although he could have noticed the weld, but that he paid no particular attention to it at the time, but picked it up and used it; that the steel was delivered for the different machines after inspection by the tool sharpeners; that he had had steel drills which broke in use, some having broken in the chuck, and some right ahead of the weld, either half an inch above or half an inch behind; that upon occasions notice had been given of the fact that the steels that had been welded were breaking; that he had been told by the blacksmith that steel after it was welded would be weak, probably not right in the temper, but an inch or so ahead in the steel. Men experienced in welding steel drills testified at length concerning the manner and effect of heating and welding, and among other things said that a steel drill, if welded properly, will seldom break right in the weld.

[1] It is argued that Bowden assumed the risk of using welded steel, and that in the light of his testimony he understood and appreciated the risk of using a welded steel drill. The essential question, however, in respect to the drill, was not whether it was welded, but whether it had been welded in a defective and careless way, so as to make it unsuitable and unsafe for drill uses. The District Court pointed this issue out very clearly, by explicitly charging the jury that, inasmuch as Bowden well knew of the uses of welded steel, he assumed whatever risk was necessarily incident to the use of skillfully welded drills, and therefore could not recover for the alleged negligence of the company in furnishing welded steel.

But, in accord with the pleading of the plaintiff, the court further charged that there was an issue upon the question whether the piece of steel which broke was unskillfully welded, and told the jury that if the plaintiff did not know that the steel was defectively welded, and if by the exercise of reasonable care the inspectors for the mining company should have discovered that the welded joint was weak, in that the weld was defective, then negligence could be attributed to the defendant company, and inquiry could be made whether or not the accident was the result of the weakness in the steel.

We find no error in the submission of the questions referred to to the jury, or in the law as given by the court, particularly when it is observed that one of the witnesses called as an expert by the mining company testified that when steel breaks in the weld by his observation it is because of a poor weld.

The plaintiff in error contends that Bowden was guilty of contributory negligence; but we think the case called for the submission of the issue to the jury, and, as no exceptions to the charge upon contributory negligence were preserved by plaintiff in error, the point need not be dwelt upon.

[2] We now come to the matter of the release. Plaintiff in error cites section 4201 of the Idaho Statutes, which provides that:

"When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant"

—and argues that Bowden never denied the execution or delivery of the release, and never tendered back the consideration paid therefor. But the effect of failure to file an affidavit under the statute cited is merely to admit the genuineness and due execution of the release, and not to preclude the plaintiff from taking a position in avoidance of the effect of the contract, not inconsistent with the admission of genuineness and due execution. Austin v. Brown Bros., 30 Idaho, 167, 164 Pac. 95; Cordano v. Wright, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044. Replication denying the effect of the release was not required under the Idaho practice, which under section 4126 limits pleadings on the part of the plaintiff to complaint and demurrer to the answer. The effect, as asserted by the defendant's pleading, was deemed denied.

[3] In our opinion the release itself was properly construed by the District Court in ruling that it was valid as to injuries done to the scrotum and the earlier injury to the back, but did not go to the loss of a leg and other severe injuries, not connected with the injury to the back or to the scrotum, which plaintiff below suffered as the direct result of the accident, and which evidently developed after the release was executed. Texas & Pac. R. Co. v. Dashiell, 198 U. S. 521, 25 Sup. Ct. 737, 49 L. Ed. 1150. The evidence shows that at the request of the physician plaintiff met the agent of the indemnity insurance company at the office of the physician. The agent asked the physician if Bowden was in a serious condition. The doctor replied that the scrotum was badly bruised, and possibly he would have to take out a vein or two, that \$200 would meet all the bills, and that plaintiff would be able to go to work in three weeks. After some discussion, plaintiff signed the release, and the draft was made out. Plaintiff testified distinctly that he did not know at that time that he was settling for the loss of the leg, or for the injuries to his arm, and only claimed damages for such injuries by supplemental complaint filed May 3, 1916.

It would be a very strained construction to hold that plaintiff, a healthy man, in the prime of life, dependent upon a calling which requires unusual physical strength, intended to accept \$200 (all of which was paid by the indemnity insurance company to the hospital and physician, for attention to injuries received before the serious injuries to the leg and arm were developed) as full compensation for the permanently helpless condition in which he evidently is. A fair construction of the evidence is that the release was made under the belief by both parties that there were no injuries other than those spec-

ified, and they were deemed not serious.

The release having no relation to the issues as reduced and submitted to the jury for consideration, the point that there should have been a tender back became irrelevant.

Finding none of the assignments well taken, the judgment is affirmed.

WESTINGHOUSE TRACTION BRAKE CO. v. ORR, District Judge et al.

(Circuit Court of Appeals, Third Circuit. June 3, 1918.)

No. 2248.

EQUITY \$363-DISMISSAL ON MOTION OF DEFENDANT.

An order entered on the minutes, on motion of defendant, that the court "does now dismiss this bill for want of prosecution," was in effect a final decree, binding on defendant, which was not entitled at a subsequent term to a formal decree of dismissal "on the merits."

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In Equity. Suit by Niels A. Christensen and the Allis-Chalmers Company against the Westinghouse Traction Brake Company. On petition by defendant for mandamus or certiorari directed to Charles P. Orr, District Judge. Denied.

James K. Bakewell and Paul Synnestvedt, both of Pittsburgh, Pa., and Thomas B. Kerr, of New York City, for petitioner.

Joseph B. Cotton, of New York City, Willet M. Spooner, of Milwaukee, Wis., William R. Rummler, of Chicago, Ill., and Louis Quarles, of Milwaukee, Wis., for respondents.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This controversy is a supplement to Westinghouse Co. v. Christensen, 243 Fed. 901, 156 C. C. A. 413, and will be better understood if we preface the following opinion with a brief summary of what was there decided.

In the court below the bill was filed in March, 1916, by Christensen and the Allis-Chalmers Company, and (as amended) charged the Brake Company with infringing five patents, two of them being Nos. 621,324 and 635,280, called herein the first and the second patents respectively, both being for the same invention. On February 24, 1917, on the plaintiffs' motion the District Court dismissed the bill "without prejudice." Contending that sufficient undisputed facts appeared by the bill and the answer to present the question which of these two patents was valid, and that the District Court should have decided this question, the company applied to this court for a writ of certiorari in order to obtain a decision on this point. On July 3 we decided it, reversing the decree "so far, and so far only, as it affects the two patents referred to," and reinstating the bill "for further proceedings in conformity with this opinion." Our decision was that the second patent was invalid and should be so adjudged, and that the cause should proceed upon the first patent alone; the company to be at liberty "to urge any defense that may be available under its answer, with the same effect as if the bill had been originally brought under the first patent." We did not determine what the subsequent course of the litigation should be, but merely decided that the first patent alone should stand as the ground of the suit, leaving the parties to proceed thereafter as they might be advised. The question before us was not whether the court below had erred in dismissing the bill "without prejudice," but whether that court should have decided the question of validity between the two patents, the point being concededly raised by the bill and the answer; and even this question (as our opinion shows) was submitted to us by agreement of counsel at bar. We did not determine that the writ of certiorari was a proper method of procedure; the objection was argued but was waived, and counsel agreed that we should decide which patent was valid. We passed upon nothing else, and it is a mistake to suppose that we directed the District Court to try the case on the merits. Of necessity, we were obliged to reverse the decree, in order to decide which patent was valid, and (having decided it) we then sent the case back for further proceedings; but we did not even intimate what course the proceedings should take, but left that subject to be determined below in the usual manner.

On August 3 the mandate issued, and on September 3 the District Court fixed October 1 as the date of trial. On that day the company appeared with its counsel, exhibits, and witnesses; but the plaintiffs made no attempt to proceed, and did not appear, except by local counsel, who formally represented them in obedience to a rule of the Western district. Thereupon the company moved that the bill be dismissed for want of prosecution, so far as the first patent was concerned, and although the plaintiffs objected the court granted the motion. The clerk has certified (apparently from the minutes) that the court then declared the second patent to have been issued without warrant of law, and adjudged it to be invalid, entering also a formal decree to this effect. At the same time the minutes show that the following ruling was made as to the first patent:

"With respect to patent No. 621,324, the defendant appearing by its counsel, and the plaintiffs not appearing by counsel representing them, except by the local counsel required under the rules to be associated with foreign counsel, and motion having been made by the defendant that the bill be dismissed for want of prosecution, that motion must be sustained; but, it not appearing that the principal counsel for the plaintiff's have had actual notice of the time fixed for the final hearing in this case, and it being questionable whether or not local counsel had actual notice thereof, this court, over objections by Mr. Frazer who has been the local associate of the plaintiffs' principal counsel, does now dismiss this bill for want of prosecution, with leave to the plaintiffs at any time during the pending term to ask for a setting-aside of this decree for proper cause shown."

So far as appears, no formal decree was entered in pursuance of this ruling, but on the same date the following entry was made in the docket:

"Order entered on equity calendar: 'Oct. 1, 1917, dismissed for want of prosecution.'"

We think nothing else was required; the order, or ruling, or decree (whatever name may be given it) is found in the clerk's minutes, which are kept as part of his official duty, and is certified by him "from the record." The company has never denied that it correctly states what

took place, and the record shows, therefore, that the District Court finally disposed of the case on October 1, and by an act that was intended to take effect in præsenti dismissed the bill for want of prosecution, thereby sustaining the company's request that such action should then be had. But, being in doubt whether the plaintiffs' principal counsel had actually known the date of trial, the court out of abundant caution added:

"With leave to the plaintiffs at any time during the pending term to ask for a setting aside of this decree for proper cause shown."

This clause was unobjectionable, although it was superfluous; the plaintiffs would have had the same right during the term, even if no leave had been formally given. The term lasted until November 11, but the plaintiffs did not move to set aside, and the company was evidently satisfied with the court's action, for no motion was made to correct it. Therefore, when the new term began on November 12, the order of October 1—"this decree," as the court described it—continued without change, and in our opinion no further and purely formal order was needed. No doubt, such an order might have been entered; but it would have made no important change in what already appeared on the record, and there was no necessity to use again the same or similar language. The order of October 1 was not a direction that a decree should be entered in the future, but was an order expressly directed to take effect on that very day, with formal authority reserved to set it aside, if cause should be shown.

But, in any event, the order or decree became final at the end of the term, and the company so understood it, as appears from the motion it presented to the United States District Court in Chicago on December 7, where a similar suit on the same two patents was pending between the same parties. By that motion the company asked the Chicago court to dismiss the bill as to these patents on the ground that the Pittsburgh court had adjudged the second patent invalid, and had dismissed the bill as to the first patent "for lack of prosecution," averring, further, that the "decree for dismissal" as to the first patent had been coupled with leave to move for setting it aside during the term, and that the plaintiffs had made no such motion, and "therefore the decree became absolute on the expiration of the term." We are not advised by the record before us what action the court took in Chicago, but apparently no order was entered and the motion seems to be still under advisement. At all events, on January 3, 1918, the Brake Company turned once more to Pittsburgh, and moved there that a new decree should be entered, and on January 7 obtained such a decree, by which the bill was again dismissed as to three of the five patents—although as to these the decree of February 24, 1917, had never been attacked—and was now dismissed "on the merits" as to the first and the second patents.

This was an unusual step, and was taken under a misapprehension, as appears from the following unreported opinion of Judge Orr:

"An application has been made on the part of the plaintiff to vacate a decree entered in this court on the 7th day of January, 1918. The application was made on January 10. Notice was given to counsel for the plaintiffs on

the 31st of December, 1917, that application was made by the defendant to have a decree entered on January 3, 1918, and a form of such decree accompanied said notice. The application was made by the defendant at the time fixed, and the matter was held until the 7th of January, when the decree was entered. The plaintiffs' counsel, in the affidavit in support of their present motion, present a sufficient excuse for not being present at the time fixed in the notice served upon them, to wit, that storm conditions were of such a character that they were unable to give the matter the attention which it deserves. A brief statement of some of the features of this litigation may be proper.

"The case, being ready for trial near the close of 1916, was set for trial early in the year of 1917. Prior to the time fixed for trial, this court permitted the defendant to have its bill dismissed, and entered a decree to that effect, imposing certain terms. The decree of this court was subsequently reversed by the Circuit Court of Appeals with respect to certain of the patents involved, and the bill was reinstated for further proceedings with respect to said patents, in conformity with the opinion of the Circuit Court of Appeals. Again the case was on the trial list in this court and fixed for trial on October 1, 1917. On that day the plaintiffs failed to appear, and thereupon counsel for the defendant presented to the court a form of decree which conformed with the mandate of the Circuit Court of Appeals, which disposed of subject-matter of the controversy between the parties, excepting the rights of plaintiffs under patent No. 621,324. In the absence of the plaintiffs when the case was called for trial, the solicitors for the defendant moved the court that the bill be dismissed at the cost of the plaintiffs, for want of prosecution, and thereupon the court made the following ruling:

"'With respect to patent No. 621,324, the defendant appearing by its counsel, and the plaintiffs not appearing by counsel representing them, except by the local counsel required under the rules to be associated with foreign counsel, and motion having been made by the defendant that the bill be dismissed for want of prosecution, that motion must be sustained; but it not appearing that the principal counsel for the plaintiffs have had actual notice of the time fixed for the final hearing in this case, and it being questionable whether or not local counsel had actual notice thereof, this court, over objection by Mr. Frazer, who has been the local associate of the plaintiffs' principal counsel, does now dismiss the bill for want of prosecution, with leave to the plaintiffs at any time during the pending term to ask for a setting aside of this decree for proper cause shown.'

"To that ruling the defendant did not except. It may be noticed, also, that the defendant did not offer any testimony which would throw any light upon the merits of the controversy then existing between the parties. The term expired without anything being done on behalf of the plaintiffs or by the defendant. Subsequently, on January 3, 1918, as aforesaid, the defendant presented the following decree, which this court signed on the 3d day of January, as above stated:

"'This cause having come on to be heard, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

"That as to patents Nos. 680,842, 753,954, and 914,699 the bill is dismissed without prejudice to the rights of plaintiffs or either of them: Provided, however, that all depositions heretofore taken herein may be used in any pending or subsequent litigation between plaintiffs and defendant, or their privies:

"That as to patents Nos. 621,324 and 635,280 the bill of complaint is dismissed on the merits;

"'And that defendant do recover its costs, to be taxed under the direction of the clerk, and have judgment and execution therefor against the plaintiffs. "'Pittsburgh, January 7, 1918.'

"That decree is not in conformity with the facts, inasmuch as it states that as to patents Nos. 621,324 and 635,280 the bill of complaint is dismissed on the merits. The merits of the controversy were not considered by the court. By the use of the expression 'merits of the controversy' is not meant the relative rights—moral, ethical, or pecuniary—between the parties, but merely the

'subject-matter of the litigation.' The subject-matter of the litigation as a matter of fact was not considered by the court at the time such decree was entered, and in that respect the decree was contrary to the fact. What operated upon the mind of the judge who entered the decree of the court was the insistence by the defendant's counsel in the language quoted: 'That the plaintiff should not be allowed to obtain by indirection that which he was not permitted to obtain by direction.' In explanation of that, it was urged that, because of the reversal by the Court of Appeals of the decree dismissing the bill at plaintiffs' own instance, therefore the plaintiffs, by staying away from the trial, ought not to be able to effect a dismissal of their bill for want of prosecution. The real effect of the words 'upon the merits,' in the decree, was not seriously considered, as they should have been, had the principal counsel for the plaintiffs been present.

"A number of questions are raised in this motion, which are unnecessary to be considered, the chief of which is whether the order entered at the trial was such a decree as should not be changed after the term at which it is entered. The real reason for setting aside the decree or order of January 7, 1918, is because it is contrary to the fact in stating that the bill as to patent No. 621,324 was dismissed upon the merits. In so far as that appears in the decree, the same must be set aside. No other decree ought to be entered than that in accordance with the proceeding had on October 1, 1917, upon plaintiffs' own motion to dismiss the bill for want of prosecution. In the absence of some evidence or other showing which could have been offered to enable the court to determine the case with respect to the subject-matter of the litigation, an order must be entered, vacating the decree entered in this cause on the 7th of January, 1918."

Three days later, on January 10, the matter was again brought to Judge Orr's attention by the plaintiffs' motion to vacate the decree of January 7; and this motion was granted on February 11 (when the foregoing opinion was filed), and was followed on March 11 by the entry of a new decree again dismissing the bill as to the first patent for want of prosecution. Thereupon the petition now before us was filed, praying for a mandamus to reinstate the decree of January 7, or (in the alternative) for a certiorari to bring up the record in order that the Court of Appeals might "fully review the matter set up in this petition, to wit, the setting aside of the decree of January 7, 1918." The company's grievance is the decree of March 11, and the ground of attack is because it substitutes a dismissal "for want of prosecution" for a dismissal "on the merits."

The facts recounted show a situation that has come to abound in decrees, but the substance of things is plain enough. Three of the five patents were taken out of the case by the decree of February 24, 1917, which left only the first and second patents as the subject of dispute. The contest between these was decided by this court on July 3, and thereafter the second patent also was removed. Only the first patent was left, and as to this the bill was reinstated; the result being that (except for our decision) the litigation on this patent was just where it was before the bill was dismissed in the preceding February. Some of the testimony concerning the first patent had already been taken by deposition, and apparently the parties were about to reach a trial on the merits. At all events, a date had been set for the hearing, and the defendant was on hand ready to proceed. But the plaintiffs did not offer to go on, and being therefore in default were bound to accept the consequences. We are not called upon to determine what courses were

open to the company; it is enough to take note of the course that was actually followed, namely, an election to have the bill dismissed "for want of prosecution." The company made a motion to this effect, and the court granted it, entering an order at once which declared that the court "does now dismiss this bill for want of prosecution." In our opinion the order then entered was a final decree; nothing more than it contained was needed to make it complete, and the company, having obtained precisely what it asked for, is bound by the course it chose. Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578. We are not deciding what effect this decree of October 1 should have in any other proceeding; no such question is now presented, and we volunteer no opinion on that subject; we dispose of the pending controversy by holding that the company cannot now complain of a decree that was entered in exact accordance with its own motion.

The plaintiffs object to the pending petition on several other grounds, which we state in order that they may not seem to have been overlooked, namely: (1) That we have no authority to issue either of the writs prayed for, because neither is asked for in aid of our appellate jurisdiction; (2) that the exclusive remedy is an appeal from the decree of March 11; and (3) that under the circumstances the decree of October 1 could not be disturbed after the term expired on November 11, 1917. As to these objections, we shall only say, in order to clear up the situation as far as possible, that the District Court was right on March 11 in vacating the decree of January 7, but that no occasion then existed for entering a decree again dismissing the bill as to the first patent. The decree of October 1 had been in force from its date, and no additional order was necessary; and, whatever the scope of that decree may be, the company could not attack it after having obtained it precisely as it stands.

The petition for a mandamus, or for a certiorari, is refused.

UNITED STATES GYPSUM CO. v. MACKEY WALL PLASTER CO. (Circuit Court of Appeals, Ninth Circuit. June 10, 1918. Rehearing Denied October 14, 1918.)

### No. 3111.

1. LANDLORD AND TENANT \$\infty 92(1)\$—OPTION TO PURCHASE—SUFFICIENCY OF NOTICE.

Under a lease of real estate, with an option to the lessee to buy, expressly providing that, on its failure to notify lessor to the contrary in writing 60 days before expiration of the term, "it will thereby become obligated to make such purchase and pay the consideration," a letter written by lessee some time before, stating that it expected to give formal notice of its election not to purchase, was not equivalent to such notice.

2. VENDOR AND PURCHASER \$\infty\$=18(3)—OPTION CONTRACT—NOTICE OF ELECTION.

A notice of election under an option to purchase real estate to bind the party to whom it is given must be such as to bind the party giving it.

3. EQUITY \$\ightarrow\$385-Proof After Close of Hearing.

In a suit by the vendor for specific enforcement of a contract for the sale of a leasehold interest in land, where the lease prohibited its as-

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signment, except with written consent of the lessor, the court had discretion, after the close of the hearing, to permit complainant to supply proof that such consent had been obtained.

4. Courts €=350—Equity Rules—Depositions—Time for Taking. Equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi), which fixes the time for taking depositions, "unless otherwise ordered by the court or judge for good cause shown," does not limit the power of the court by order to permit the taking of depositions at any time.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit in equity by the Mackey Wall Plaster Company against the United States Gypsum Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 244 Fed. 275.

This is a suit for specific performance of an option contract. On June 15, 1909, the Mackey Wall Plaster Company, appellee, made a lease of certain premises to the United States Gypsum Company, appellant. The lease ran a year, with an option of purchase of all the property and rights described in the contract under certain conditions of payment. The property involved consisted of all the right, title, interest, and estate of the Plaster Company in and to a certain tract of land in Riceville, Mont., and a described tract near Great Falls, the latter tract having been acquired by the Plaster Company through an indenture of lease theretofore entered into between the Great Northern Railway Company and the Plaster Company on June 22, 1908, and subject to all of the terms and conditions therein set forth, a copy of which indenture of lease being attached to the contract of lease. By agreement on July 1, 1910, the lease and option were extended for five years, and thereafter, by an agreement dated July 6, 1915, the agreements of June 15, 1909, and July 1, 1910, were extended for the further period of one year from July 6, 1915. In the last extension the manner of the exercise of the option was provided for as follows: "Now, therefore, in consideration of the premises, \* \* \* it is agreed that the said instruments dated June 15, 1909, and July 1, 1910, be in all things and respects extended, renewed, and made valid and of full force and effect for the further period of one (1) year from and after the date hereof. And as a further consideration for said extension lessee agrees that, if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the lessor, Mackey Wall Plaster Company, upon the terms and conditions in said several instruments provided, it will at least sixty (60) days prior to the first day of July, 1916, give the lessors in writing a notice to the effect that lessee will not purchase the said property under and by virtue of said agreements; and it is agreed that if lessee shall neglect or fail to give such notice, at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase. \* is admitted that the Gypsum Company took possession of the property leased and remained in the enjoyment thereof during the term of the lease; that it paid all rents and otherwise lived up to the conditions of the contract and kept in possession thereof during the extensions heretofore referred to.

The appellant denied that it had elected to purchase the premises, and alleged that by letter dated April 19, 1916, it had notified appellee of its intention not to purchase. The Mackey Company, on the other hand, took the position that the option was exercised by the Gypsum Company by failure to give the notice referred to in the agreement of July 6, 1915, and accordingly, upon July 5, 1916, sent to the Gypsum Company deeds of conveyance to the property described in the agreement; but these deeds were returned by the Gypsum Company with the statement that it had not purchased the property. The Gypsum Company, appellant, also contends that the giving of

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the notice of nonacceptance was waived by the conduct of the Mackey Company, or that it had estopped itself to assert that such notice was never given, and further that, even if the option had been exercised specific performance of the agreement should not be decreed for the reason that the Mackey Company could not give satisfactory title to a part of the premises agreed to be conveyed inasmuch as a part of such premises were held under a lease from the Great Northern Railway Company to the Mackey Company, which lease contained the usual provision against assignment or subletting without the consent of the lessor, and because no satisfactory consent had been made by the Great Northern Railway Company.

The court decreed specific performance. The Gypsum Company appealed.

Scott, Bancroft, Martin & Stephens, of Chicago, Ill., Edwin L. Norris, of Dillon, Mont., and George E. Hurd, of Great Falls, Mont. (John E. MacLeish, of Chicago, Ill., of counsel), for appellant.

Cooper, Stephenson & Hoover, Ransom Cooper, and W. H. Hoover,

all of Great Falls, Mont., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Examination of the option contained in the agreement of July 6, 1915, discloses that the burden is put upon the Gypsum Company to give to the Mackey Company a notice in writing at least 60 days prior to July 1, 1916, should the Gypsum Company not avail itself of the option to purchase, and that if the Gypsum Company should neglect or fail to give such notice at least 60 days before July 1, 1916, it would thereby become obligated to make the purchase. It was evidently understood by the parties to the agreement that the Gypsum Company well understood the terms of the contract, because in a letter of July 14, 1915, addressed to the Gypsum Company, the Mackey Company notified the Gypsum Company that while it considered the terms of the supplemental contract to be "clear and unambiguous," vet to the end that there might be no question as to the terms the Mackey Company wrote its "construction" of the contract, wherein, after referring to the previous agreements and to the fact that the only change was that concerning election not to purchase, it used this language:

"The only change therein is that in case you fail to notify us of your election not to purchase on or before 60 days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you in manner as set forth in said contract of June 15, 1909, all of the properties," etc. "\* \* \* The notice to be given under said contract of July 6, 1915, shall be sufficient if deposited in the United States mails, postage prepaid, and inclosed in an envelope addressed to either of us at the city of Great Falls, county of Cascade, state of Montana."

Upon April 19, 1916, the manager of the Gypsum Company wrote to Mackey, the president of the Mackey Company, at Minneapolis, the following letter:

"Dear Sir: On May 5th our option to purchase your mill property at Great Falls expires. I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th. We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless. If you care to come

down and talk the matter over, we will be glad to have you do so. Expect to give you formal notice on May 5th that we do not care to purchase your property."

Thereafter Mackey went to Chicago, and about April 28th had a conference with the manager of the Gypsum Company. Possibilities of continued lease were spoken of, but according to the testimony of Mackey the manager of the Gypsum Company told him that on May 4th or 5th formal notice declining to purchase would be sent, to which Mackey replied that whatever they decided to do should be sent to him care Mr. Cooper at Great Falls.

[2] It is contended that the letter of the 19th was sufficient notice. and that there could be no doubt of its meaning after the conferences between the officers of the Gypsum Company and Mackey held about April 28, 1916. But after a careful reading of the whole evidence we must uphold the finding of the District Court to the effect that there was nothing in the conference had about that time which could fairly be construed to be a notice by the Gypsum Company to Mackey that the option was not to be exercised. It is very plain that the letter of April 19th was not the notice required under the terms of the contract. When the Gypsum Company wrote that it expected to give formal notice on May 5th that it did not care to purchase the property, evidently the writer of the letter well understood the necessity for formal notice as required by the terms of the agreement, and was careful not to give such a notice, which, of course, would have been of binding force. The effect of the letter was to let the Gypsum Company hold on without decision and still notify Mackey that it might elect not to buy. Mackey's testimony was that by the letter "they had not said anything. and they were left in a position to do or not do as they might later on determine."

Was there a waiver of the need of further notice after the conference of April 28th, and did Mackey by his conduct estop himself from asserting that he was entitled to any further notice? It is true that in the conversations between Mackey and the agents of the Gypsum Company in Chicago there was talk of another extension of the lease, and Mackey spoke of personally examining the properties, and was given a letter by the Gypsum Company to its superintendent in Montana which would enable Mackey to inspect the property for himself: but no definite proposition of lease was made, and no agreement of any kind was entered into, and Mackey's evidence is that, when a proposition of continuing the lease was discussed, he told Mr. Knode of the Gypsum Company to put in writing whatever they had in mind and send it to Mr. Cooper. He said that when they were discussing a lease he had no means of knowing what they had in mind, and that when he left he was not aware that they had decided not to buy: nor did he visit the properties and present his letter of introduction.

It would extend this opinion too far to quote at length from the testimony. We have gone over it very carefully, and are unable to infer that Mackey had reason to believe that no formal notice would be sent, nor do we perceive that Mackey by his statements or conduct induced the Gypsum Company representatives to act upon the belief that he waived or would waive the notice to which his company was entitled.

It is said that equity would not specifically enforce the contract for lack of mutuality of remedy under the contract. This contention is based upon this ground: By the contract of June 15, 1909, the Mackey Company agreed to convey to the Gypsum Company a certain leasehold interest acquired by the Mackey Company from the Great Northern Railway Company in June, 1908. In the lease we find this provision:

"The lessee shall not and will not assign this indenture, nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the lessor, its successors or assigns, thereto."

Appellant's argument is that equity could not compel the Mackey Company to obtain the written consent of the Railway Company to the assignment of the lease of June, 1908, to the Gypsum Company; that inasmuch as the Railway Company was not a party to the contract of June, 1909, between the Mackey Company and the Gypsum Company, the court would have no jurisdiction to require the Railway Company to do anything concerning the leasehold in the action between the two companies here involved. The force of this contention is met by the fact that the Gypsum Company went into possession and continued to occupy the property affected by the lease from the Railway Company for a number of years before this suit was instituted, and throughout the period paid to the Railway Company the rentals as they became due under the lease, copy of which was attached to the agreement between the Gypsum Company and the Mackey Company; and furthermore by the evidence that just before the last two named companies made their agreement in June, 1909, counsel for the Gypsum Company prepared the consent of the Railway Company to the subleasing of the property and the subsequent assignment thereof and forwarded the written consent in duplicate to the general traffic manager of the Railway Company at St. Paul, with a letter asking immediate execution by the Railway Company and the mailing of the same to the president of the Gypsum Company and to the Mackey Company. It also appears that the traffic manager of the Railway Company, by letter to counsel at Great Falls dated June 12, 1909, returned a copy of the written consent, and stated that he had sent a copy to the president of the Gypsum Company at Chicago. Under the circumstances the proof was clear that consent was given by the Railway Company before the original contract was executed, and there was no want of mutuality of remedy.

It is said, however, that upon the trial of the case the Mackey Company made no showing that it had procured and delivered to the Gypsum Company the heretofore referred to written consent of the Railway Company to an assignment of the lease. This is a correct statement, and when the District Judge announced his opinion he held that specific performance of the contract would not be decreed without evidence of the written consent of the Railway Company, and he directed that if within 30 days the Mackey Company obtained the consent decree would be made in its favor; otherwise, decree would be for de-

fendant. But within the 30 days the consent heretofore referred to was deposited in court. Defendant then objected to the sufficiency of the consent, whereupon the Mackey Company was given 30 days to show that the consent was binding on the Railway Company. Depositions were taken and read, oral testimony was heard by the court, and decree for specific performance followed.

[3] We are of opinion that the court did not go beyond its power in requiring the Mackey Company to prove the fact of consent of the Railway Company as a condition to the making of the decree. Dresel v. Jordan, 104 Mass. 407; Van Riper v. Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25, Ann. Cas. 1912A, 319; Hepburn v. Dunlap, 1 Wheat. 179-194, 4 L. Ed. 65; Kentucky Distilleries & Warehouse Co. v. Blanton, 149 Fed. 31, 80 C. C. A. 343.

[4] The next point made by appellants is that the instrument of consent by the Railway Company was fatally defective, because it was not dated, had no corporate seal thereon, and was not shown to have been signed by authority on behalf of the company. To meet these points depositions were offered. Counsel for the Gypsum Company objected upon the ground that the depositions were not taken in compliance with rule 47, Equity Rules of the Supreme Court (198 Fed. xxxi, 115 C. C. A. xxxi), in that the court, after considering the affidavit. permitted the depositions to be taken upon 5 days' notice of the time and place of taking the same, whereas the rule cited contemplates for plaintiff's depositions 60 days from the time the cause is at issue. The rule, however, expressly provides that depositions taken under a statute or order of court shall be taken and filed as prescribed unless otherwise ordered by the court or judge for good cause shown.

The court acted upon cause shown which was satisfactory, and we find no substantial reason for disturbing its action in the matter. The depositions need not be set forth. Suffice it to say that they satisfactorily established the execution of the consent by one of the vice presidents of the Railway Company in June, 1909, prior to the execution of the agreement between the parties to the present litigation. The objection that it was not shown that the records of the Railway Company were properly kept is not well taken, considering the testimony of the secretary and treasurer, who was the custodian of the earlier, as well as the present, records of the corporation, and the by-laws which were put in evidence. Union Trust Co. v. Dickinson, 30 Cal. App. 91, 157 Pac. 615; Gold Glen Mining Co. v. Dennis, 21

Colo. App. 284, 121 Pac. 677.

We find no error in the record, and affirm the decree.

# LACKNER v. McKECHNEY et al. MILLER et al. v. LACKNER et al.

(Circuit Court of Appeals, Seventh Circuit, March 13, 1918.)

No. 2127.

1. Partnership \$\sim 341\top-Dissolution\top-Claims.

On proceedings to wind up partnership affairs, creditors will be permitted to intervene and file their claims against the partnership assets and against individual partners,

2. Partnership =344—Dissolution—Authority of Court of Equity.

Where creditors filed their claims in a proceeding to wind up a partnership, the court of equity, which necessarily determines the validity and extent of the claims for the purpose of devoting any partnership assets to the payment thereof before distribution, will not remit claimants to another tribunal for full relief, if the partnership assets are deficient, but will give personal judgment against the partners for the deficiency.

3. Partnership \$\sim 341-\text{Proceedings to Wind up.}

Where a bill by the executor of a deceased partner, seeking to wind up partnership affairs, alleged the existence of partnership assets, consisting of claims against a municipality, and creditors intervened, proving their claims, a court of equity may grant them relief against the surviving partners and the executor of the deceased partner, though the claims against the municipality proved worthless.

4. Courts \$\infty\$313—Federal Courts—Citizenship.

Where a citizen of Ohio, the executor of a deceased partner, filed in the federal court a bill against the surviving partners, residents of Illinois, to wind up the partnership affairs, which alleged the existence of partnership assets, and creditors intervened, held that, though the aleged assets proved worthless, the court had jurisdiction to enter decrees in favor of the claimants against the surviving partners and the executor as such, regardless of the citizenship of the claimants.

5. EXECUTORS AND ADMINISTRATORS 525—FOREIGN EXECUTORS—SUIT AGAINST—WAIVER OF PRIVILEGE.

Assuming that under the Illinois statutes a foreign executor is not subject to suit, that privilege may be waived, and a foreign executor of a deceased partner, by filing his bill for an accounting and inviting the adjudication of creditors' claims, waives his privilege, both as against the partners and creditors who may intervene.

6. EXECUTORS AND ADMINISTRATORS 525—FOREIGN EXECUTORS—SUIT AGAINST—WAIVER OF PRIVILEGE.

Where a foreign executor, who sued to wind up partnership affairs, filed a general demurrer for want of equity against the claim of firm creditors, he waived any personal privilege exempting him as a foreign executor from suit.

7. Partnership \$\sim 258(3)\$—Deceased Partners—Liabilities of.

Under Rev. St. Ohio, § 6102, establishing the separate liabilities of the surviving partners and of the estate of a deceased partner for joint firm obligations, a claim against a deceased partner's estate may be filed or sued upon without first exhausting the firm assets or establishing the surviving partners' insolvency.

8. Limitation of Actions \$\sim 50(3)\$—Acrual—Compensation of Attorney.

Where attorneys were generally employed for certain litigation, their cause of action for compensation does not accrue until the end of the service or their withdrawal from the litigation, and hence limitations do not begin to run until that time.

9. Partnership == 247—Contracts—Continuance.

Where a partnership engaged attorneys to prosecute litigation for the firm, and such litigation was unfinished at the time of the death of one of the partners, such death did not, the contract being joint, terminate the employment.

10. EQUITY €=350—ORDER OF RE-REFERENCE-LACHES.

Where proceedings were not dismissed because of failure to take testimony within three months, as required by old equity rule 69, an order of re-reference thereafter waived any possible laches.

11. Equity \$\infty 359-Right to Dismiss-Effect.

Where attorneys, who had performed services under a contract with a partnership, filed their claim in a proceeding brought by the executor of a deceased partner to wind up the partnership affairs, held, that they acquired an independent standing in the suit, and the court should not allow the original bill, etc., to be dismissed until the intervening petition was disposed of on the merits.

Appeal from the District Court of the United States for the Northern District of Illinois.

Bill by Levi C. Weir, as executor of the estate of Frederic C. Weir, against John McKechney and others, which, after the death of complainant, was revived in the name of Joseph L. Lackner, his administrator. John S. Miller and another filed an intervening petition, and from a decree dismissing the original bill, cross-bill, and intervening petition, petitioners appeal. Reversed and remanded, with directions.

On July 28, 1900, Levi C. Weir, a citizen of Ohio, and the executor of the estate of Frederic C. Weir, appointed as such by the courts of Ohio, of which Frederic was a resident, filed a bill as such executor against John Mc-Kechney and John McKechney, Jr., alleged to be the surviving copartners of Frederic, and citizens of Illinois. The bill charges that while the partnership was to continue until certain work with the city of Chicago and the drainage canal was completed, and during such time the defendants should superintend the work without pay, they had nevertheless wrongfully paid out funds of the partnership to one of them for such services. Other wrongful transactions were charged. The bill further alleged that in 1897 an action was brought against the city of Chicago; that on March 1, 1899, Frederic died; that the action was revived in the name of the defendants, as surviving partners, on March 10, 1899; that in August, 1899, a large judgment was recovered against the city of Chicago; that an appeal was then pending from the judgment, which judgment constituted the only remaining asset of any value; and that all of the business had been completed, except to collect the judgment and pay the debts of the firm and to distribute the surplus between plaintiff and the defendants. The bill then recited the firm indebtedness to sundry persons, including Levi C. Weir in his individual capacity as an accommodation indorser and for money loaned since the death of Frederic. Insolvency of the defendants, and the threat and danger of a settlement of the judgment and the disposition thereof, to the injury of the bona fide creditors of the partnership and of Frederic's estate, were charged, and an accounting of the partnership transactions and adjustment of the rights of the parties prayed for; the plaintiff offering to pay the defendants whatever might be due.

The defendants, answering, denied insolvency, as well as the allegations of wrongdoing, and charged that Levi was interested with his brother Frederic in the latter's share in the firm, and as such was liable for the firm's debts and should be made a party to the suit. They further filed a cross-bill for an accounting as to several joint enterprises. Levi was never served individually, and never in any manner appeared in the proceeding other than in his ca-

pacity as executor of Frederic's estate. Certain agreements, in the nature of an armistice, were subsequently made by the parties. In February, 1902, the wife of John McKechney, claiming an interest in the firm's assets under this agreement, filed a bill in the state court for the appointment of a receiver. Thereupon a supplemental bill was filed in the court below. The state court proceedings were restrained, and the order appointing a receiver for the firm in the court below was affirmed in this court. McKechney v. Weir, 118 Fed. 805, 55 C. C. A. 417.

In April, 1904, the defendants filed a petition, alleging that the receiver had no funds to conserve the estate; that they were unable to pay the attorney's fees of the present appellants, John S. Miller and Merritt Starr, who had represented the firm in the litigation with the city of Chicago; that these counsel had given notice of their intention to withdraw, whereupon they prayed authority to employ counsel to prosecute the claims. Levi C. Weir, as executor, in his answer to the petition, alleged that, since the death of Frederic and during the pendency of the action against the city of Chicago, he had advanced considerable sums for the benefit of the firm, and specifically had advanced the money necessary to pay Miller and Starr to file a petition for rehearing, after the Supreme Court had reversed the judgment against the city of Chicago; that by this action the opinion had been modified, so that a recovery against the city was deemed probable. He denied any liability to Messrs. Miller and Starr for their past services. McKechney's petition was subsequently withdrawn by leave of court.

In July, 1904, the firm of Peck, Miller & Starr withdrew their appearance as solicitors for the defendants in this cause, and thereupon the appellants, by leave of court, filed their intervening petition in the proceedings. This petition alleged that the firm of Weir, McKechney & Co., and its several members, about January 26, 1899, retained the petitioners in and about their business and in the prosecution of claims against the city of Chicago; that the original contract of employment was made by John McKechney, the managing partner, and was ratified by Frederic C. Weir; that, shortly after Frederic's death, the surviving partners renewed the request that the petitioners prosecute the claims, and that these requests and the promise to pay for the services were made at the instance or with the assent of Levi C. Weir, the executor; that, shortly after his appointment as executor, Levi, as executor, renewed the requests that the petitioners prosecute the suits; and that pursuant thereto they have rendered services to the firm since January 26, 1899. The petition further recites the recovery of the judgment against the city of Chicago in the sum of over half a million dollars in August, 1899, but its final reversal in the Supreme Court of Illinois; that the action was then still pending and undetermined. Petitioners charged that the balance due them, amounting to over \$65,000, was a lien upon the assets of the firm, to be paid therefrom before any division among the partners. It charged the insolvency of the defendants McKechney; further that Levi C. Weir is the principal legatee of Frederic, and that the estate of Frederic is solvent; that Levi, as executor, has large sums in excess of all individual and firm debts of Frederic. Levi, as executor and individually, as well as the McKechneys, were made parties respondent. Petitioners prayed for an order calling upon creditors to prove their claims and for an allowance of petitioners' claim, to be paid to them, as well as for general relief.

Levi C. Weir, as executor, demurred to the petition for want of equity. Appended to the demurrer was an affidavit of the attorney, stating that Levi was without the jurisdiction, and that the attorney did not represent Levi personally and had no authority to appear for him individually. The order overruling the demurrer of Levi C. Weir, as executor, and directing him to answer the petition, contained the following addition: "The question as to the right of said petitioners to recover as against Levi C. Weir, executor of the last will and testament of Frederic C. Weir, deceased, to be paid from or out of the assets coming to his hands as executor or received by him as devisee under the will of Frederic C. Weir, deceased, is reserved, and not passed upon, by the action taken in overruling said demurrer." Thereupon Levi C. Weir, as executor, filed a document, entitled "a demurrer in part and an

answer to the residue of the petition." As to so much of the petition as charged the receipt by Levi, as executor, of large sums of money, and as prayed that Levi, as executor, might be decreed to pay the petitioners the amount which might be found due and owing them, Levi, as executor, demurred generally for want of equity, and as to the residue of the petition answered that he neither admitted nor denied the original retainer of petitioners, the ratification by Frederic, the renewal of the contract after Frederic's death, by the surviving partners, but denied that the surviving partners' promises were made with his assent, or that he requested the petitioners to attend to the business of the firm. The petitioners replied to so much of this document as purported to answer the petition, and as to the remainder moved that it be stricken out.

The cause had been referred to a master in chancery in 1900. In March, 1905, prior to the disposition of the demurrers to Miller and Starr's petition, this order of reference was ordered to stand. No proceedings were taken thereunder, and on December 16, 1912, the order of reference was set aside, and the "cause" referred to another master. In the meantime, by the order of September, 1910, Joseph L. Lackner, as administrator de bonis non with the will annexed of Frederic C. Weir, deceased, was substituted as complainant, and it was ordered that all intervening petitions filed should stand

without prejudice by reason of the death of Levi C. Weir.

In February, 1913, testimony was begun to be taken before the master on the petition of Miller and Starr. In June, 1913, the hearing was stayed by order of court. In January, 1914, the proceedings before the master were again stayed, and discontinued until the determination in the state court of a bill of review of the former proceedings and the judgment in favor of the city of Chicago. On March 16, 1914, a decree was entered, denying the motion of Miller and Starr for the vacation of the stay orders and for permission to proceed with the taking of testimony, the decree reciting that the demurrer to the bill of review in the state court had been sustained, but that an appeal therefrom was pending. The decree further denied the motion of Miller and Starr for permission to the master to certify the evidence theretofore taken by him, and sustained the objection to any proof on the intervening petition, and thereupon, on motion of the complainant, dismissed the original bill, cross-bill, and all intervening petitions. From this decree, the present appeal was taken.

It is to be noted that the bill of review in the state court had been filed after the city of Chicago, under its plea of set-off, had been successful in the original litigation, and it may be added that, pending the present appeal, the bill

of review has been finally dismissed.

John S. Miller and Merritt Starr, both of Chicago, Ill., for appellants. Charles H. Aldrich, of Chicago, Ill., and Lawrence Maxwell, of Cincinnati, Ohio, for appellees.

Before MACK and ALSCHULER, Circuit Judges, and GEIGER, District Judge.

MACK, Circuit Judge (after stating the facts as above). [1, 2] 1. Concededly, on proceedings to wind up copartnership affairs, creditors will be permitted to intervene and file their claims against the copartnership assets and against the individual members of the firm. A court of equity, necessarily determining the validity and extent of their claims for the purpose of devoting any partnership assets to the payment thereof before any distribution as between the copartners, would not remit them to another tribunal for full relief, if the partnership assets proved deficient, but would give personal judgment against the copartners for the deficiency. Johnson v. Miller, 50 Ill. App. 60.

[3] But it is contended that this personal deficiency judgment will

be rendered only in a case in which there are actual firm assets that have been brought within the jurisdiction of the court. A bill might conceivably be brought after all firm assets had been dissipated, for an accounting as to the past transactions, and a settlement as between the copartners because of those transactions might be decreed, regardless of the existence of unpaid partnership debts, and therefore without a determination of the amount of such outstanding liabilities.

Such, however, is not the ordinary bill to wind up a partnership, and such was not the bill in this case. It was charged, and for many years believed by all the parties, that there were partnership assets of very great value, namely, the claim against the city of Chicago. In and by the bill itself creditors were expressly invited to come into the proceedings. One of the essential objects of the original litigation was to prevent the defendants from exercising their power over this claim or judgment to the detriment both of the complainant, as executor of the deceased's personal estate, and of the firm creditors

When the copartners themselves have asserted, and it may be assumed have honestly believed in, the existence and value of firm assets, and thus have invited and led their creditors to come into the dissolution litigation for satisfaction of their claims, instead of resorting to a direct action at law or in equity against the estate of the deceased partner or the surviving members of the firm, and to remain therein until their rights in such an original action would be barred by the statute of limitations, neither principle nor any authority cited or found compels or justifies a court of general chancery jurisdiction in refusing to exercise that jurisdiction, and to render personal judgment in favor of the firm creditors, merely because the supposed firm assets have finally proven to be valueless.

[4] 2. Although the claim against the city of Chicago was a chose in action, the federal court, through its receiver, obtained control thereof. Firm creditors were thereby prevented from seeking to realize payment of their claims out of this fund, as they might otherwise have done through attachment or garnishment proceedings in the state courts. Whether this claim should eventually turn out to be valuable or valueless, either because of a set-off or otherwise, it was deemed by the parties and was in fact an asset of the estate—an asset which at the time the original proceedings were begun had a very substantial value, and which, even at the time appellants' intervening petition was filed, was deemed by the parties to be of some value. Moreover, the partnership as such was alleged to have a claim against the defendants for moneys wrongfully taken from the firm property a claim which, if substantiated, would enable the partnership to share pro rata with individual creditors of the insolvent partner (Burdick, Partnership [3d Ed.] p. 313), and thus perhaps yield something for firm creditors. The relative rights of the copartners in and to the firm assets at the time that the original bill was filed could not be finally adjudicated until the rights of the creditors should have been determined; the determination, therefore, of the validity and amount of the creditors' claims against the firm was certainly proper and germane to the subject-matter of the principal proceedings.

But, even if there had been confessedly no partnership assets, a determination of the affairs of the copartnership and the mutual rights of the copartners would have made adjudication of the firm liabilities none the less germane or desirable. While creditors could not have been compelled to submit themselves to the jurisdiction of the court, they were very properly admitted, irrespective of citizenship, for this purpose. Only with them before it could the court properly and fully wind up the partnership affairs. Not merely in their own interest, therefore, but in the interest of the principal parties to the litigation and for the purpose of determining the latters' relative rights, are creditors permitted to intervene in such proceedings. It may be that a personal decree in their favor as against their debtors is not absolutely essential to the settlement of the main proceedings; but with the parties properly before it, not merely as claimants of the fund, but as parties, the extent and validity of whose entire claim must be found, the jurisdiction of the federal chancery court, in our judgment, justifies and requires that, upon the adjudication of the amount of the claim, payment thereof should in a proper case be decreed, irrespective of the citizenship of the intervening creditors. The decree, however, would be against the executor or administrator as such.

- [5, 6] 3. Assuming that under the Illinois statutes a foreign executor is not subject to suit, clearly this privilege may be waived. Weir, as executor, by filing his bill for an accounting, necessarily and expressly offered to pay what might be found due from him to the defendants; but, inasmuch as he invited the adjudication of creditors' claims, he must be held likewise to have waived any such privilege as against them. Decker v. Patton, 20 Ill. App. 210. Moreover, he filed a general demurrer for want of equity to appellants' claim. He thereby waived any personal privilege exempting him as a foreign executor from suit. Newark Savings Institution v. Jones' Executors, 35 N. J. Eq. 406; Palm's Adm'r v. Howard (Ky.) 102 S. W. 267. Cf. Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130.
- [7,8] 4. Weil v. Guerin, 42 Ohio St. 299 (and see, too, Gaines v. Therman, 8 Ohio N. P. [N. S.] 521, 20 Ohio Dec. 95), construing section 6102 of the Ohio statutes, establishes the separate liabilities of the surviving partner and of the estate of the deceased partner for joint firm obligations. The clear intimation therefrom is in accordance with the overwhelming weight of American authority that in Ohio such a claim against the deceased partner's estate may be filed in the probate court or sued upon without first exhausting firm assets or establishing the surviving partner's insolvency. The claim might therefore have been filed against the estate as soon as it accrued. But in our judgment it did not accrue until the withdrawal of appellants from the litigation after the final decision in the Supreme Court of Illinois, and this was within the Ohio statutory period of one year prior to the filing of the intervening petition.

[9] Appellants' claim is based upon a general employment for certain litigation, not for a fixed time on a fixed salary. The cause of action, therefore, does not accrue from day to day, but only at the

termination of the service. Walker v. Goodrich, 16 Ill. 341; 2 Mechem, Agency, § 2262. The death of Frederic did not necessarily terminate the contract. If only for the purpose of winding up the affairs, the firm continued thereafter, and the surviving partners remained, as they had theretofore been, the managing members of the firm. As such, it was their duty on behalf of the firm to continue the litigation, and in so doing they were fully authorized to permit the continuance of the contract of employment with the appellants, entered into in the lifetime and with the assent of Frederic. The obligation resulting therefrom is but a continuation of the original obligation incurred by all of the copartners. That appellants' performance was uncompleted at Frederic's death, and was only completed thereafter, does not absolve the estate of the deceased partner from direct liability therefor, in view of the nature of the services as incidental to the winding up of the partnership affairs. See Mason v. Tiffany, 45 Ill. 392; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375; 2 Mechem, Agency, § 1567; In re Kalbfell, 27 Pittsb. Leg. J. (N. S.) 210; Id., 30 Pittsb. Leg. J. (N. S.) 274. The situation is totally unlike that which arises when a surviving partner incurs new obligations, not incidental to the winding up, or gives negotiable paper for old obligations.

[10] 5. It is clear from the record that the present proceedings were not dismissed because of a failure under the old equity rule 69 to take testimony within three months. The order of re-reference in December, 1912, waived any possible laches of any of the parties in

this respect.

[11] 6. Appellants, as interveners, had obtained an independent standing in the cause. They were entitled to proceed to establish their claim. The original plaintiff and defendants might waive their mutual accounting, but they could not thereby destroy appellants' rights as a party litigant. The court should not permit the original bill to be dismissed until such an intervening petition is disposed of on the merits. C. & A. R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081.

The decree must therefore be reversed, and the cause remanded, with directions to permit appellants to proceed with the taking of evidence, and for further proceedings consonant with the views herein expressed.

# THE NORMAN B. REAM. THE SENATOR. WOLVERINE S. S. CO. v. PITTSBURGH S. S. CO.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1918.)

No. 2376.

1. Collision \$\iff \infty 98\$—Negligence—Disregarding Signals.

A ship which was proceeding down St. Mary's river at full speed, and which collided with another vessel attempting to turn in the river held.

which collided with another vessel attempting to turn in the river, held at fault, because disregarding refusal of the second vessel to consent to

passage; this being so, both without regard to the same and under rules 23 and 26 of the White Law, and pilot rules 1 to 4.

2. Collision = 92-Passing Vessel-Starboard Hand Rule

Where vessel leaving its berth in a river was proceeding directly across the course of one coming downstream for the purpose of turning down stream, *held* that, while the starboard hand rule was inapplicable, the rule for passing agreement by signal, or for checking or stopping in lieu thereof, is applicable.

3. Collision 5-102-Liability-Vessels at Fault.

Where a steamer coming down St. Mary's river and one which was turning after leaving its berth collided, *held* that, though the steamer coming down was at fault in disregarding the one turning, the vessel turning was also at fault in crossing the course of the other.

4. COLLISION \$\infty\$=20\to Liability\$-Last Clear Chance Rule.

The last clear chance rule is not applicable in collision cases.

5. Collision = 144 Damages Division.

Where both vessels which collided were at fault, the liability must be divided.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In Admiralty. Libel by the Wolverine Steamship Company against the steamer Norman B. Ream, together with cross-libel by the Pittsburgh Steamship Company against the steamer Senator. From a decree dismissing the libel, and awarding damages to the cross-libelant, the libelant appeals. Reversed and remanded for further proceedings.

Harvey D. Goulder and Frank S. Masten, both of Cleveland, Ohio, for appellant.

H. A. Kelley, of Cleveland, Ohio, for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. On libel and cross-libel for damages growing out of a collision, the District Court dismissed the libel, and, finding the Senator solely at fault, awarded \$10,238.81, with interest, as damages to cross-libelant, owner of the Norman B. Ream. The Senator claimed damages of \$110,000; the Ream, something over \$10,000.

The testimony, taken by deposition, established that the Senator, a steamer with a keel length of about 410 feet, laden with ore, was proceeding down St. Mary's river at full speed, about 113/4 miles an hour, on a clear summer morning, somewhat outside the sailing line marked on the government's charts between the American mainland on the westerly side and Pipe Island, about three-quarters of a mile out. The Ream, whose keel length is 580 feet, had left a coal dock (which is on the American mainland about 3,300 feet west of the sailing line), intending to wind about and also to proceed downstream. As the Senator was making a bend about Sweet's Point light, a little below the bend in the charted course, her master had observed the Ream lying at the dock. His view of her was obscured for a time by the trees on Sweet Island; when he next observed her, she appeared to him to be heading upstream in the direction of Sweet's Point light. At this time, when the Senator claims to have sounded her first two-blast signal, the vessels are testified by the Senator's captain to have been about

a mile apart; the distance, however, would seem to be nearer two miles.

The master of the Ream saw the Senator headed downstream before he left his anchorage at the dock. There she lay, bow upstream. To avoid a shoal above and to facilitate her turn, she backed, on leaving the dock, until she was abreast its southeast corner. Thereupon she went ahead under checked sped until her stern had cleared the northwest corner of the dock; then she proceeded full speed ahead under a hard aport helm. It was her intention to round to and go down the river, but when she had progressed about half the distance out to the sailing course, her master, discovering she was not swinging to starboard as she should, sent his mate, who was amidship, aft to see what was wrong with the steering gear. At the same time, and, as the Ream's captain and crew testify, before any signal from the Senator was heard, the engines were backed full speed astern for the twofold purpose of stopping her headway and of accelerating her turn, by throwing her stern to port and her bow to starboard. Her engines were kept rung up full sped until after the collision.

The first two-blast signal, which the Senator's captain and crew testify was sounded when the boats were a mile apart, was not heard by the Ream. A similar second signal, the first heard by the Ream, was sounded shortly after her engines were reversed. The distance between the two vessels at that time is variously estimated by the witnesses between a quarter of a mile to a mile or more; the testimony satisfies us that it was not less than three-quarters of a mile. The double blast was immediately answered by an alarm of several short, sharp blasts from the Ream. The Senator replied with another two blasts; the Ream rejoined with another warning alarm. By this time the vessels had approached within about a quarter of a mile of each other. The master of the Senator testified that, on hearing the first alarm of the Ream, the Senator immediately hard astarboarded, swinging, in his judgment, almost two points to port; that, when the bow of the Senator had cleared the Ream, the Senator hard aported, in order to cut her stern to port and away from the Ream; that he thus overcame in less than 250 feet the swing to port and swung a point to starboard. His attempt to dodge the Ream failed, however, and she struck his boat about 48 feet abaft amidships. He further testified that he knew from the danger signals that there was something wrong, and believed the signals to indicate that the Ream's captain considered his proposed crossing of her bow dangerous and wanted him to keep clear; that he kept on full speed for two or three minutes, though he had not obtained the requested passing agreement; that, under the rules, he knew he should have backed or checked.

According to the Ream's testimony, by the continuous backing of her engine at full speed, she had overcome her headway at the time of the collision, and, if moving at all, was going astern. On the one hand, it is contended that the Ream, by virtue of her own headway, ran into the side of the Senator; on the other, either that she was drawn in by the suction of the vessel crossing her bow full speed, or that, after the Senator's bow had cleared the Ream, her stern, still

under the influence of the hard astarboarding, continued to cut to starboard and swing towards and against the stern of the Ream.

Subsequent investigation disclosed that a leather in one of the cylinders of the telemotor had become spongy and tipped back, thus preventing the oil in the tube connecting the pilot house and the gear aft from being forced one way or another, with the result that the steering engine could exert no control over the rudder. The engineer, who had fitted the boat out that spring, inspected the telemotor very carefully, installed new leathers in the engine room, examined the leathers in the pilot house, charged the telemotor with oil, and tried it out thoroughly. The engineer in charge at the time of the accident testified that the ordinary life of leather is three to five years, and that the ordinary engineering practice is to examine the leathers and replace the defective or worn ones in the spring of each year; but it is not usual to inspect the leathers during the season. He had made on each trip the usual inspection of the chains, engine bearings, and packing. He had experienced no trouble with the steering gear since he had taken charge at the beginning of the year. The master of the Ream testified on cross-examination that he did suspect something wrong when he sent the mate aft to examine the steering, because it frequently acted that way; but he also said that he did not think anything was dead wrong, or he would not have left the dock.

[1, 2] The trial judge in his opinion states that:

"The facts—first, that the Senator understood the Ream's signals to be alarms in response to passing signals; secondly, that, in spite of such understanding, she continued at full speed—would seem to make out a case of negligence in navigation, no matter what formal express rules or regulations might be applicable to the situation. Her navigator concedes the possession of information from the Ream which showed her intention to call him to respect—for some cause—a situation of danger or helplessness, crippling her possible movements to avoid collision. That, in substance, is his own interpretation of the attendant circumstances. No matter what the rules may have been, prudence required him as master of the Senator to take the step of reducing speed as the obvious and primary requisite of control in the certain closer approach to the vessel which had sounded successive alarms."

He further held rules 23 and 26 of the White Law (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649 [Comp. St. 1916, §§ 7933, 7936]) and rules 1 to 4 of the Pilot Rules, promulgated by the Steamship Inspection Service applicable; that the Senator having signaled that he was directing his course to port, and the Ream having signaled her nonassent, or her view that it was injudicious, the Senator violated his duty to slow down or stop. He further held the special circumstance rules (27 and 28 of the White Law, 13 of the Pilot Rules) inapplicable. We quote from his opinion on this point:

"That is what it purports to be—a rule of exemption from obligation to observe the general rules, because of special circumstances. It does not authorize compliance or noncompliance to rest in choice. Nor can an inexcusable failure to observe the general rules convert the situation brought about by such failure into one of 'special circumstances.' Such interpretation would make observance of the general rules practically optional, and would turn the result of nonobservance into a circumstance which would absolve the navigator from fault. The terms of such rule permit departure, rendered

necessary by special circumstances, in order to avoid immediate danger; and they do not permit departure which, without the special circumstance, promotes danger."

## He adds:

"If, therefore, we give to these rules the force to which they are plainly entitled, there is nothing in the evidence that suggests that—initially—there was any extremity justifying the Senator's disregard of the obligation to check her speed when the Ream's alarm was sounded; nor is there any suggestion that, prior to the collision, any circumstance of extremity tending to produce a collision had developed, except such as was promoted by such disregard of the rules. On the contrary, a fair view of the evidence suggests but one explanation, viz. that the master of the Senator chose to take his chances to cross the Ream's bow, rather than to check or stop in obedience to the alarm signals. It seems like a plain case of 'indulging' a 'discretion in respect of obeying or departing from the rules.' Chase v. Belden, 150 U. S. 698 [14 Sup. Ct. 264, 37 L. Ed. 1218]."

We add only that, especially in view of the failure to establish a custom of steamers leaving this dock, to make the turn within the sailing line, the Senator, regardless of the rules, had no right to proceed full speed, in view of the danger signals, and in reliance upon the Ream making the turn within the inner waters. Moreover, in view of the angle of collision, which in our judgment, was not more than 45 degrees from astern of the Senator, it seems clear that, if the Senator had checked his speed even slightly, the Ream would have completed her turn without collision. Furthermore, it is immaterial that the Ream's captain did not expect the Senator to stop or check, but to go as he pleased, either to starboard or port, for he certainly expected him to keep far enough away to avoid collision. The danger signals gave the Senator due notice of his duty both under and irrespective of the rules; this he clearly disregarded.

The John Rugge, 234 Fed. 861, 148 C. C. A. 459, and cases therein cited are not applicable to the situation here presented. Concededly, the starboard hand rule does not apply where one of the vessels is not on a definite course; but neither reason nor authority makes the rule for passing agreement by signal or for checking or stopping in lieu thereof, inapplicable, when, as here, the Ream was leaving the dock in full view of the Senator, and was proceeding directly across the latter's course, though with the known purpose of turning downstream.

[3] We are, however, unable to concur in the conclusion of the trial judge that the Senator's faulty action was the sole proximate cause of the collision, and that the Ream's failure more promptly to stop her headway is not in any way in proximate culpable relation to it. Assuming that no negligence is to be attributed to the Ream, because of the failure to discover the condition of the telemotor; assuming, too, that if there were such negligence it did not contribute to the collision, because, by promptly backing the engines on discovering that the rudder would not work, the Ream swung even more quickly toward starboard than would have been possible under a hard aport wheel—nevertheless, in our judgment, the Ream was negligent in proceeding out as she did.

While, as before stated, there was no invariable custom to make the turn downstream the five-eighths of a mile of water between the dock and sailing line, this procedure was quite usual. The Ream, of course, was not bound to lie in dock until the route was absolutely clear; but, on the other hand, with the Senator in full view and another small steamer closely on his starboard, she was bound to exercise ordinary care in navigation so as to avoid crossing their course. Going straight forward full steam on a hard aport helm necessarily, however, gave her such headway that she was at least halfway out and probably still nearer the sailing line when she attempted to reverse. This headway, she ought to have known, could not be overcome until she had passed the sailing line; even there at the point of collision, she probably still had a slight headway. Her master clearly, but erroneously, believed and acted upon the assumption that, because of the starboard hand rule, or for some other undisclosed reason, his was the privileged vessel; he assumed that by the danger signal he had cast upon the Senator the sole responsibility so to act as to avoid danger.

[4, 5] In our judgment, this negligence of the Ream directly contributed to the collision; it was a proximate cause, the effect of which, a continuous headway, directly co-operated with the Senator's full speed to produce the damage; the liability to share therein cannot be escaped because the Senator, by checking after the first alarm, might have averted collision, whereas at that time it was too late for the Ream further to overcome her headway. This is not a case for the "last clear chance" rule; moreover, that rule, in mitigation of the common-law principle that makes even the slightest contributory negligence a bar to recovery, is not applicable in this country in admiralty, where contributory negligence effects only a division of liability. The Steam Dredge, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293. See, too, The Pocohuntas (D. C.) 217 Fed. 135; The Strathleven, 213 Fed. 975, 130 C. C. A. 381. See Marsden, Collision (6th Ed.) page 21.

Each captain displayed a reckless obstinacy and disregard of the other's rights. We express no opinion on the extent of the damages which must be divided equally between the parties. What part, if any, was occasioned by the alleged later negligence of the Senator, must first be determined in the district court.

The decree will be reversed, and the cause remanded, for further proceedings in accordance with the views herein expressed.

### VEEDER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 9, 1918.)
No. 2591.

Searches and Seizures \$\infty\$7—Search Warrants—Issuance.
 Under Const. Amend. 4, protecting citizens from unreasonable searches, one's premises cannot be forcibly searched by the suspicious and curious; nor can a disinterested officer of the law search premises, unless armed with a search warrant.

2. SEARCHES AND SEIZURES @==3-SEARCH WARRANTS-ISSUANCE.

No search warrant should be issued, unless the judge to whom application is made has been furnished with facts under oath tending to establish probable cause for issuance of the search warrant.

3. SEARCHES AND SEIZURES 3-ISSUANCE-PROBABLE CAUSE.

The finding of the probable cause for the issuance of a search warrant is one exclusively for the court, and not for the affiant or deponent seeking the issuance of the same.

4. SEARCHES AND SEIZURES €=3-ISSUANCE-PROBABLE CAUSE.

Act June 15, 1917, c. 30, contemplates the issuance of search warrants only when felonies have been committed that are presently prosecutable within the United States, and does not warrant the issuance of search warrants for the seizure of property, etc., used in felonies long since barred by limitations.

5. Searches and Seizures 3-Affidavits-Sufficiency.

Under Const. Amend. 4, prohibiting unreasonable searches, and Act June 15, 1917, c. 30, providing for search warrants, etc., an affidavit and deposition for search warrants to examine books, memorandums, etc., to discover a conspiracy between packing companies for the hoarding of food, etc., held insufficient to show probable cause, authorizing issuance of the warrant.

6. SEARCHES AND SEIZURES 3-DENIAL OF WARRANT-EFFECT.

The denial of a search warrant on the ground of the insufficiency of the affidavit and deposition is not a bar to further proceedings.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Proceeding by the United States of America for the issuance of a search warrant for the examination of books, etc., in the possession of Henry Veeder. The search warrant was issued, and Veeder brings error. Reversed, with direction to quash the search warrant.

Elwood G. Godman and John J. Healy, both of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Joseph B. Fleming, both of Chicago, Ill., for the United States.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

BAKER, Circuit Judge. This writ of error challenges the sufficiency of the affidavit and deposition on which a search warrant was issued under title 11 of the act of June 15, 1917 (40 Stat. 228, c. 30).

By the Fourth Amendment to the Constitution the people declared the limit beyond which Congress may not go in authorizing search warrants, namely:

"The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This limitation was clearly observed in the act in question.

Section 2 defines the property and papers that may be seized as follows:

(1) "When the property was stolen or embezzled in violation of a law of the United States."

(2) "When the property was used as the means of committing a felony; in which case it may be taken on a warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

(3) "When the property or any papers is possessed, controlled or used in violation of section 22 of this title."

Section 22, so referred to, reads thus:

"Whoever, in aid of any foreign government, shall knowingly and willfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than \$1,000 or imprisoned not more than two years, or both."

Sections 3 and 5 prescribe the character of application that must be made for search warrant:

Section 3: "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Section 5: "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

McIsaac, an examiner in the service of the Federal Trade Commission, made an affidavit:

"That he has good reason to believe, and does verily believe, that in and upon certain premises within said district and division, to wit, in suite 1200 in the building at 76 West Monroe street, in the city of Chicago, known as the Ft. Dearborn Bank Building, said suite being the offices occupied by one Henry Veeder, there has been and now is located and concealed certain property, to wit, books of account, minute books, letterpress copy books, ledgers, journals, cash books, day books, memorandum books, bank books, check books, receipt books and other documents, which other documents are more particularly enumerated, described and indexed by words, letters and figures, as follows, to wit: [Then follows a list of references to letter files, and document files, comprising about 2,000 items] which said property has been used as a means of committing certain felonies; that is to say, the felony on the part of Swift & Company, a corporation organized under the laws of the state of Illinois, of storing, acquiring and holding for the purpose of limiting the supply thereof to the public, and affecting the market price thereof in commerce, among the several states, of certain articles suitable for human food, to wit, meats, canned vegetables, canned fruit, canned fish, poultry, cheese, butter, eggs and oleomargarine; the felony on the part of said corporation of willfully making false entries and statements of fact in certain reports pertaining to the ownership and control of subsidiary corporations by said corporation, which the Federal Trade Commission required it to make under subdivision (B) of section 6 of the act approved September 26, 1914, entitled An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes; the felony on the part of said corporation of willfully making false entries in divers accounts, records, and memoranda kept by said corporation of all facts and transactions appertaining to the business of said corporation, it being a corporation subject to said act of Congress; the felony on the part of said corporation of willfully neglecting and failing to make or causing to be made full, true, and correct entries in said accounts, records, and memoranda of all facts and transactions appertaining to the business of said corporation; and the felony of engaging in a conspiracy with Armour & Company, Morris & Company, Wilson & Company, Inc., Cudahy & Company, and with divers other corporations, and divers individuals and partnerships to defraud the United States through and by means of collusive bidding upon contracts to be let to the lowest bidder to furnish to the United States large quantities of meats, hides, leather, canned goods, and other commodities for the use of the military and naval forces of the United States."

As illustrative of the wide scope of the list included in the affidavit and covered by the search warrant, the following items are noted:

Anthony, D. M., for memorial papers see In Memorian file	
Accidents Swift & Company	A− 2€
Attorney's Lien	<b>A–1</b> 35
British income tax	A-231
Cases, Ref. to pending and disposed of cases	A- 58
Chicago Daily Law Bulletin	A- 98
Chicago Law Institute	A–114
Law Books	A- 80
Lost Bonds	.A-103
Purchase of-Southeastern Reporter, Northwestern Reporter, South	1-
western Reporter	.A-190
Smoke violation, Chicago	.A- 52
Wide tire ordinance, Chicago	.A- 34
Adamson Law	. 644
Estate of Samuel W. Allerton	. 401
Cook County Employés' Benevolent Ass'n	. 590
Deep waterway, Ill	. 42
Estate of Theodore Newcomber	. 613
Inheritance tax laws of various states	. 658
Kenwood Evangelical Church	
Lake Forest University	. 146
Office keys	. 400
U. S. Supreme Court	
West Point Academy	. 638
West Skokie drainage district	146

## McIsaac's deposition is as follows:

"Q. State, if you know, whether there are certain papers and documents there in the office of Mr. Veeder, relating to Swift & Company.

"A. Yes, sir; there are.

"Q. Just state, if you will, what those papers and documents are.

"A. There are a large number of papers.

"Q. Also state the occasion of your going and seeing them there.

"A. I made a partial examination of the papers of Henry Veeder, and he has a large quantity of files, among the papers showing that they have been used in the commission of various felonies, one of them being in connection with the alteration of the books of Swift & Company, and other companies; some of them concerning violations of law that would make them guilty at this time of hourding not only beef, but of storing food products with the ultimate purpose of enhancing the prices thereof.

"Q. What food?

"A. Canned goods, canned fish, poultry, cheese, butter, eggs, all kinds of canned vegetables, and other foods. There are also papers there which show the false entry or various false entries, made in books, account books, and papers required under the Federal Trade Commission Act.

"Q. Books of whom?

"A. Books of Swift & Company in the possession of Henry Veeder.

"Q. What else?

"A. There are other records which have been used in the furtherance of a conspiracy, between Swift & Company, Armour & Company, Morris & Company, Cudahy & Company and Wilson & Company, for the purpose of de-

frauding the United States government in bidding upon contracts for the supply of hides, foods, leather, etc., for the government.

"Q. What else did you see there?

"Judge Landis: You say you have seen these papers?

"A. I have seen some and have had a glance at others, which I was not permitted to inspect in detail, and apparently there are a great number of files there which relate to all these matters."

[1-5] A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the instinctive sense of natural justice, that no elaboration of the grounds therefor is needed.

One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant.

No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.

The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.

No search warrant should be broader than the justifying basis of facts. For example, if a murder has been committed by means of a shot from a gun and by no other means, the search warrant should not direct the officer to enter the accused's home and seize the family register of births and deaths. And as the serving officer has no discretion in executing the search warrant in its entirety, the householder is entitled to have the search warrant quashed.

It is not every kind of property that may be seized under a search warrant. Limited by McIsaac's accusation, the statute applies only to property that "was used as the means of committing a felony." By exclusion, therefore, papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure.

Applying these principles to McIsaac's affidavit, we observe that not a single statement of fact is verified by his oath. All he swears to is that "he has good reason to believe and does verily believe" so and so. He does not swear that so and so are true. He does not say why he believes. He gives no facts or circumstances to which the judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts. And under our system of government the accuser is not permitted to be also the judge.

Assuming that the "other documents," which are listed under reference letters and figures, are described with the particularity required by the statute, we observe that the precedingly mentioned "books of account, minute books, letter press copy books, ledgers, journals, cash books, day books, memorandum books, bank books, check books, and

receipt books," are only generically described.

We observe, too, that McIsaac states his belief that "said property was used as a means of committing certain felonies," without stating the basis of his belief that the various items were so used. If the facts were disclosed, they might or they might not afford probable cause for believing that Veeder's In Memoriam file, his lists of law books, his copies of the smoke and the wide tire ordinances of Chicago, his office keys, etc., were the means used in committing the packers'

assumed crime of controlling the price of beef.

Further we notice that neither time nor place is laid for the unnamed acts that are supposed to constitute felonies. We take it as unquestionable that the statute contemplates the issuance of search warrants only when felonies have been committed that are presently prosecutable within the United States. We assume that no judge would issue a search warrant directing the officer to break into a museum and seize and carry away the dagger Brutus used in assassinating Caesar. The district attorney suggests that we must take judicial notice of the fact that some of the criminal statutes which are believed to have been violated were enacted within the past three years. True, but there is nothing in the record to show that McIsaac did not believe that such statutes could be used retroactively to punish acts done generations ago.

Turning to McIsaac's deposition, we note his statement of fact that there are in Veeder's office many papers and documents relating to Swift & Company, and that he has seen some and had a glance at others. But he utterly fails to state what he saw. He gives a mixed legal and fact opinion that the undisclosed things he saw establish that many papers and documents were used in the commission of various felonies, including conspiracy, false entries, and hoarding food. Neither with respect to the authorization of a search warrant nor the particularity with which instruments of crime must be described is the depo-

sition any better than the affidavit.

We thoroughly agree with the learned District Judge that the shield of the Constitution does not protect property that has been used in the commission of a felony, and that such outlaw property is subject to seizure by search warrant under this statute. But we find that the Constitution and this statute forbid a search warrant unless the issuing magistrate shall first properly draw the necessary legal conclusion from facts duly presented to him under the oath of the accuser. And in the record now before us we find no such presentation of facts.

[6] Needless to say, the present judgment is not a bar to further pro-

ceedings.

Reversed, with direction to quash the search warrant.

#### MIDKIFF v. COLTON et al.

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

# No. 1421.

1. Lost Instruments \$\iff 3\)—Establishment—Jurisdiction of Equity.

Court of equity may be invoked by claimant of minerals to establish deed, on which his title depends, lost or destroyed by adversary, to the end that by preserving and recording he may protect himself against bona fide purchaser and show good marketable title.

2. ESTOPPEL \$\infty 29(1)\to BY DEED-GRANTEE.

Though deed was executed, under power of attorney authorizing it in compromise of pending action, after judgment for principals, the grantees accepting and holding under it are estopped to allege its consequent invalidity, against the grantors ratifying it and claiming under reservation therein.

- 3. Mines and Minerals \$\iffsightarrow\$55(1)\top-Conveyance\top-Acceptance\top-Presumption.

  There is a strong presumption that deed of land, reserving minerals, executed after grantees had been adjudged to have no interest in land, was accepted; it having conferred benefits on them and been found in the possession of one of them.
- 4. MINES AND MINERALS ⇐⇒55(1)—CONVEYANCE—ACCEPTANCE—EVIDENCE.

  Acceptance of deed, reserving minerals, by grantee having no title, held shown against his claim of adverse possession, notwithstanding his testimony of its receipt with understanding that if accepted it was to be returned to grantor.
- 5. Adverse Possession &=31—Possession After Adverse Judgment.

  After judgment against defendants in ejectment, they could not assert subsequent adverse possession against the plaintiff till notice to him that they were so holding.
- Vendor and Purchaser \$\iftharpoonup 244\top-Bona Fide Purchaser\top-Notice\top-Evidence.

Claimant of land, as purchaser without notice, free of reservation of minerals in deed to his grantor, *held* shown put on notice of deed's contents, by testimony of his witness, his grantor and father, that he talked with him about such deed when he purchased.

7. MINES AND MINERALS \$= 49-SEVERANCE-ADVERSE Possession.

A purchaser of land, with notice of severance of minerals and surface by deed of land with reservation of minerals, could not claim them by adverse possession of surface, but could start adverse possession of them only by working them, or other act of dominion showing assertion of title and use in accordance therewith.

Pritchard, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Jud ve.

On rehearing Affirmed.

For former opinion, see 242 Fed. 373, 155 C. C. A. 149.

Maynard F. Stiles, of Charleston, W. Va., for appellant.

W. R. Thompson, of Huntington, W. Va. (J. S. Clark and H. A. McCarthy, both of Philadelphia, Pa., and W. C. W. Renshaw, J. H. Meek, and Z. T. Vinson, all of Huntington, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The material allegations of the bill are: The recovery in August, 1880, in an action of ejectment by Abiel A. Low and others, complainants' predecessors in title, of a large body of land including the tract of 194 acres claimed by defendants Abraham Midkiff and Newton Midkiff; the execution on September 15, 1882, of a deed by Low and others, plaintiffs in the action of ejectment, by J. I. Kuhn, their attorney in fact, to Abraham H. Midkiff, Solomon R. Midkiff, and Harriett Adkins, defendants in that action, conveying the land in dispute, with the reservation to the grantors of the minerals and easements necessary for their development; acceptance of the deed by the grantees and their agreement to have it recorded; the loss or destruction of the deed without recording, in some way unknown to complainants (if the deed was lost, the loss from inadvertence, if destroyed, the destruction with the fraudulent intent on the part of the grantees or those claiming under them to remove by destruction the muniment of the complainants' title to the minerals); complainants' failure to find the deed after diligent search; preservation by Kuhn of the copy of the deed attached as an exhibit to the bill: recent execution of a lease by S. R. Midkiff and Newton Midkiff for oil and gas purposes; possession of the surface but not of the minerals by A. H. Midkiff, S. R. Midkiff, Harriett Adkins, and those claiming under them since the execution of the deed by Kuhn, attorney in fact; possession by the complainants and their predecessors in title of the minerals and payment of the taxes on the entire land embraced in the recovery of 1880 since 1890, when they began to drill for oil and gas, without any claim of possession or title to the minerals on the land in dispute by the defendants or their predecessors in title after the execution of the deed by Kuhn, attorney in fact, until the recent discovery of oil and gas in the vicinity; purchase by Newton Midkiff of a portion of the land with notice of the deed of Kuhn.

The relief asked was that the alleged lost deed be established; that the title and possession of the complainants to the minerals and mining rights be quieted; that all deeds and leases under which any of the defendants claim title to the minerals be canceled; that the defendants be enjoined from asserting title to the minerals by lease, conveyance, or any other manner, and from hindering and delaying complainants

in the enjoyment and development of their mineral rights.

The defendants by their answer objected to the jurisdiction of the court of equity on the ground that the complainants had a plain and adequate legal remedy; and they denied the recovery of the judgment in the ejectment against them or their predecessors in title, the possession of the complainants or their predecessors in title, and the execution of the deed by Kuhn. As to the deed they averred:

"These defendants further deny that any such deed was ever received or accepted by the said Solomon R. Midkiff, Abraham Midkiff, and the said Harriett Adkins, and they aver that no such deed within the knowledge of these defendants was ever executed or placed upon the records of Lincoln county, W. Va."

The District Court overruled the objections to the jurisdiction, and on the testimony made a decree granting the relief asked by the com-

plainants.

[1] The jurisdiction of the court of equity cannot be doubted. there is authority for the statement that, where nothing more appears than that a claimant to land wishes to assert title under a lost deed, equity will not aid him to establish it, because he may at once bring his action of ejectment and avail himself of the lost deed by proving its execution and contents as effectually at law as in equity. Whitfield v. Taussat, 1 Ves. 392, 1 Story, Eq. 84. With the correctness of this view we are not concerned, for the bill sets out other grounds for equitable relief in alleging that by the Kuhn deed the surface and minerals were severed, that since its execution the defendants have not been in possession of the minerals, that the deed was left in the custody of the grantees and accepted by them, that they have either inadvertently lost it or fraudulently destroyed it, that it has not been recorded, and that in contravention of it defendants have recently asserted title to the minerals. The deed not being recorded, there is danger to the complainants of a conveyance by the defendants to a bona fide purchaser without notice of the severance of the surface from the minerals and of the complainants' ownership of the minerals, relying on the defendants' occupancy of the surface as conferring title by adverse possession of both surface and minerals. Moreover, the market value of complainants' property is affected by their inability to show by a record of the Kuhn deed that defendants' occupancy of the surface was not adverse holding of the minerals.

Equity will aid a claimant to land in establishing a deed upon which his title depends, lost or destroyed by an adverse claimant, to the end that he may by preserving and recording protect himself against a bona fide purchaser for value and that he may be able to show a good marketable title. The right to invoke the protection of the court of equity under such circumstances is established by authority from which there is no dissent. Simmons Co. v. Doran, 142 U. S. 449, 12 Sup. Ct. 239, 35 L. Ed. 1063; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532; Cartright v. Cartright, 70 W. Va. 507, 74 S. E. 655,

Ann. Cas. 1914A, 578; 17 R. C. L. 1170.

[2] On the merits it is first contended by appellants that the suit must fail and the judgment must be reversed because the deed executed by Kuhn, under power of attorney, which complainants seek to es-

tablish, was not embraced in the authority conferred on him. It is true that the power of attorney on its face gives authority only to execute such deeds "as may be proper and necessary to execute in order to settle and compromise certain actions of ejectment now pending," and the deed here in question was not executed until the suit had culminated in a judgment in favor of the plaintiffs. But if the grantees accepted the deed and held the land under it, they would be estopped from alleging its invalidity against Kuhn's principals ratifying it and claiming under it. They could not accept the benefit of it by remaining in possession and using the land, and afterwards repudiate it in the effort to escape its limitations and reservations.

[3, 4] The next defense is that the deed conveying the surface to the Midkiffs and reserving the mineral rights was never accepted. At the time the deed was made, the grantees had been adjudged to have no interest whatever in the land. Since the deed from the owners conferred benefits on them and was found in the possession of Abraham Midkiff, one of the grantees, there is strong presumption of its acceptance. Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874;

12 R. C. L. 999–1000.

This presumption is re-enforced by conduct of the grantees proving its acceptance. Abraham Midkiff testified that he could not remember whether Solomon and his sister, Harriett Adkins, the other grantees named in the deed, were present when the deed was given to him or not; but he testified that he had talked to Solomon about it. It was retained and carefully preserved by Solomon and Abraham Midkiff, two of the grantees. Abraham, the grantee who originally received the deed, afterwards acquired the interests of the others. After that acquisition he was still presumptively, and under the proof, holding under the deed when he sold to his son, Newton, in 1899. The evidence shows beyond doubt that the existence and terms of the deed were well known and much discussed in the entire family, and that it was accepted and carefully preserved as a muniment of title.

The only evidence tending to show that the deed was not accepted is that of Abraham Midkiff that it was brought to him by Kuhn as a proposition to compromise the judgment in ejectment and was received by him with the understanding that if it was accepted as a compromise he was to return it to Kuhn; that he concluded not to accept it, and said nothing more to Kuhn about the matter. statement that the grantees were to return to the grantors the deed, which was their only protection, if accepted, even if it were not disproved by their conduct, is intrinsically improbable, if not incredible. The danger of its acceptance by the court is emphasized by the fact that Kuhn, the attorney in fact who made the deed, is dead. When its improbability is considered in connection with the other circumstances showing acceptance of the deed, the defendant's case appears to have no substantial foundation. If a grantee who has no title to land receives a deed of conveyance from the true owners at the time it was made, carefully preserves it, and produces it from his possession, be allowed to defeat it by testifying that he never accepted it and that he has been holding adversely to it, the result would be unfortunate insecurity of land titles.

[5] After the recovery in ejectment, the defendants in that suit could not assert title by adverse possession against the plaintiffs adjudged to be the true owners, until they gave notice that their holding was adverse and in the assertion of actual ownership in themselves. No such notice was ever given. As to the defense of adverse possession set up by a party in the same position, the Supreme Court, in Root v. Woolworth, 150 U. S. 401, 415, 14 Sup. Ct. 136, 140 (37 L. Ed. 1123), says:

"In his position he could not have asserted adverse possession after the decree against him, without bringing express notice to Morton or his vendees that he was claiming adversely. Without such notice the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed, and his holding possession would, under the authorities, be treated as in subordination to the title of the real owner. This is a well-established rule."

- [6] Equally untenable is the position that Newton Midkiff was a purchaser for value without notice. It is true he denied that he had any notice of the deed until the commencement of this suit; but Abraham Midkiff, his father, a witness introduced by him, testified that he talked with him about the deed at the time he purchased. Thus he was put upon notice of its contents.
- [7] Nor is Newton Midkiff in a position to claim the minerals by adverse possession. At the time he purchased from Solomon, the minerals and the surface had been severed by a conveyance of the true owners of the land with a reservation of the minerals. He bought with notice of this severance, and therefore could not claim the minerals by adverse possession of the surface. Adverse possession of the minerals could have been started only by actual working of them or some other act of dominion over them showing assertion of title and use in accordance therewith. Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140; Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; Kiser v. McLean, 67 W. Va. 294, 67 S. E. 725, 140 Am. St. Rep. 948; Steinman v. Jessee, 108 Va. 567, 62 S. E. 275.

The decree of the District Court is supported by the clear preponderance of the evidence.

Affirmed.

PRITCHARD, Circuit Judge (dissenting). I cannot concur in the opinion of the majority of the court in this instance, and in the main my reasons for not doing so will be found in the opinion of this court when this suit was here at the former hearing. In addition to what the court said on that occasion as respects what is known as the Kuhn deed, in a suit like this I think it is well to consider the parties—their station in life and their capacity for properly determining as to what one would do when situated as Abraham Midkiff was at the time Kuhn approached him with the compromise deed.

The appellees are a corporation owning large tracts of land, and exploiting the same for gas, oil, coal, and other minerals, and having ample means for the prosecution of that work from the time of the purchase of the land until the products are taken from the soil. It

must be assumed from what appears in the record that this corporation was able to employ counsel learned in the law, and therefore well prepared to guard its interests of the corporation at every turn, in a

legal sense, at the time of this transaction.

On the other hand, it appears that the appellant and those under whom he claims are plain mountain people with small means, and owing to their lack of early training were in no sense a match for the able and adroit representative of the corporation. It is true that the appellees insist that they have shown that Abraham Midkiff was represented by counsel in the suit wherein appellees obtained a judgment for the recovery of this land; but Midkiff testified positively that he never employed counsel for that purpose, and that, after he was told by Kuhn that a judgment had been entered against him declaring the title to be in appellees, he immediately took such steps as he in his humble way thought proper in order to protect his interests, but that he failed to ascertain any information calculated to put him upon notice of the existence of such judgment. That Abraham Midkiff recognized his inability to cope with Kuhn is made apparent by his refusal to sign the deed at the time it was presented to him, and the further fact that he laid it aside in order that he might make an investigation as to the truthfulness of the statements made to him by Kuhn. Under these circumstances, to bind Abraham Midkiff by a technical construction of the law would, in my judgment, be giving an undue advantage to the strong as against the weak.

The conduct of the corporation and its agents since the pretended delivery of the deed clearly shows that they have not used that diligence which one must show when he invokes the aid of a court of equity. For 31 years appellees and their agents could have had access at any day to the records of Lincoln county, where they could have ascertained as to whether the deed had been signed by Midkiff and placed upon record. This they failed to do. Neither does it appear that the corporation or its agents ever made any further request of Midkiff to sign the deed in question. They knew full well that unless the deed was signed and accepted and placed upon record

it would not avail them.

In interpreting the conduct of these people, which means taking into account what they did and said as respects this matter, it is highly important that all these facts should be given due weight. What might be sufficient to bind a well-educated business man, trained in the conduct of his business, ought not in a court of equity prevail against the weak and uneducated. Under these circumstances, I cannot escape the conclusion that the appellees are guilty of laches, and therefore should not be permitted to maintain this suit for that reason if for no other.

While the question of jurisdiction was raised by the assignments of error when the cause was here in the first instance, that question was not formally disposed of, and therefore remains open. Upon a further and more mature consideration of this matter, I think the question of jurisdiction demands our careful consideration.

It cannot be reasonably insisted that the court below had jurisdiction of this suit to remove a cloud from or to quiet title, inasmuch as

the proof clearly shows that the appellant was and had been in possession of this property for about 31 years at the time of the institution of this suit. It also appears from the bill that the lands in question had been leased to certain parties for oil and gas purposes, and we must assume that the lessees were at the time of the institution of this suit in the adverse possession of the minerals, holding under appellant.

In the thirteenth paragraph of the bill, among other things, it is alleged:

"That the recent discovery of oil and gas in the vicinity of the said land had caused the same to become of considerable value, and your orators are informed, and now allege upon such information and belief, that the said defendants and each of them are now asserting some claim or title to the said minerals."

As we have stated, the evidence clearly shows that the appellant and those under whom he claims have been in the open, notorious, and adverse possession of these lands for more than 31 years. appellees denied that the appellant was in possession, and pleaded sole seisin, which clearly raised the issue as to who possessed the legal title and had the effect of depriving the court below of jurisdiction. Baylis v. Travelers' Ins. Co., 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989; Gilbert et al. v. Hopkins et al. (C. C.) 171 Fed. 704; Id., 204 Fed. 196, 122 C. C. A. 432. Notwithstanding this, the jurisdiction of the court below was invoked for the sole purpose of establishing the existence, contents, and loss of the alleged deed from Low and others to A. H. Midkiff and others, as evidence of title to the minerals which appellees allege they reserved, and upon which the court was asked to declare appellees the legal owners of the same, and therefore entitled to possession. It is well settled that in an ejectment suit one may sue for the possession of the property of another in an action of ejectment notwithstanding his recovery is dependent upon the establishment of lost instruments.

In the case of Donaldson v. Williams, 50 Mo. 407, the court, among other things, said:

"Plaintiff may sue directly in ejectment for the possession of property, although his suit is based upon lost instruments. He need not in the first instance resort to a bill in equity to prove the making and loss of the deeds."

Therefore appellees had a plain and adequate remedy against the appellant for the establishment of the alleged lost deed in an action of ejectment. The burden was upon the appellees to show by a preponderance of evidence the existence, contents, and loss of the deed, which involved mixed questions of law and fact entitling appellant to have the same tried by a jury. Smith v. Moore, 149 N. C. 185, 62 S. E. 892.

United States Revised Statutes, § 723 (Comp. St. 1916, § 1244), is in the following language:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This statute is not only declaratory of the principle to which I have just referred, but it was intended to impress the importance of the

same upon those charged with the administration of justice. I cannot understand upon what theory this rule should not apply where it is sought to prove or establish deeds, as well as in any other action, wherein it appears that the appellee has a plain and adequate remedy at law. I do not mean to say that a court of equity would not have jurisdiction to prove, restore, and establish a lost deed or other muniment of title where it is the main relief sought to be established. However, in this instance the main relief which appellees seek is not cognizable in a court of equity involving as it does legal title and possession of the lands in question, and therefore that which is merely incidental to the right upon which appellees base their action for relief is not sufficient to extend jurisdiction of a court of equity over the legal rights and questions which must necessarily be determined in order that appellees may prevail.

"To enable a party to come into equity for relief in case of a lost deed, he must establish, either that there is no remedy at all at law, or no remedy that is adequate to the circumstances of the case." 13 Am. & Eng. Enc. of Law, 1073; 1 Story's Eq. Jur. (13th Ed.) § 84; Dormer v. Fortescue, 3 Atk. 132; Dalton v. Coatsworth, 1 P. Wms. 731; Worthy v. Tate, 44 Ga. 152.

"The bill must always lay some ground besides the mere loss of title deeds or other instruments to satisfy a prayer for relief; as that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of his rights." 1 Story's Eq. Jur. § 84; Mitf. Eq. Pl. 113, 114.

It was said by Lord Hardwick, in Whitfield v. Faussat, 1 Ves. 392:

"The loss of a deed is not always a ground to come into courts of equity for relief: for, if there was no more in the case, although the plaintiff is entitled to have a discovery of that, whether lost or not, courts of law may afford just relief since they will admit evidence of the loss of a deed, proving the existence of it, and the contents, just as a court of equity does."

We think that the case of Lockwood v. Carter Oil Co., 73 W. Va. 175, 80 S. E. 814, 52 L. R. A. (N. S.) 765, is very much in point and tends to strengthen what I conceive to be the proper rule. In that case the court in its opinion, among other things, said:

"It is settled law that, if the main purpose of the suit is to settle title or boundary to land and no other grounds of equity exist, accounting and discovery of profits are merely incidents to the right of title, and equity has no jurisdiction of the controversy."

It not infrequently occurs where an action of ejectment is tried that an injunction or receivership or some other relief is granted. Incidentally relief of this character where a proper showing is made is always granted as a matter of course, and by granting the same the plaintiff or defendant, as the case may be, is not denied his right to have his contention settled by a jury. Indeed, I think the Supreme Court of West Virginia does not favor the use of a court of equity for the purpose of trying actions at law, however skillfully the real purpose of the suit may be concealed. The Supreme Court of that state, in the case of Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, where the plaintiff sought to invoke the jurisdiction of a court of equity in order to restrain a trespass, said:

"There is but one general proposition laid down in the books upon which it can be contended that, in a case like this, a court of equity may try and

determine the question of title. That is the familiar maxim that, when a court of equity has taken jurisdiction for one purpose, it will go on and do complete justice between the parties, even to the extent of determining legal rights. But this principle is not of universal application, even if it be conceded that jurisdiction, as here used, includes jurisdiction by injunction to restrain a trespass, which is doubtful, to say the least, inasmuch as the law-writers term it mere ancillary jurisdiction. \* \*

"To [further] justify a court of equity in granting relief, as consequent upon discovery, in cases of this sort, it seems necessary that the relief should be of such a nature as a court of equity may properly grant in the ordinary exercise of its authority. If therefore the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials. And, in many other cases where a question arises, purely a matter of fact, fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined; or, at all events, that if the bill is retained, a trial at law should be directed by the court and relief

granted, or withheld, according to the final issue of the trial.'

"From this it is apparent that, even when equity jurisdiction attaches for the purpose of discovery, there are exceptions to the rule that the court will go on and determine all questions in the cause, without regard to whether they be legal or equitable. And the decisive test seems to be the necessity of a trial by jury of disputed questions of fact necessary to the ascertainment of the legal right involved. As discovery belongs to the general jurisdiction of equity, and the jurisdiction by injunction is rather special in its nature and scope, it would be unreasonable to say that, while the presentation of the necessity of a trial by jury will stop the progress of the cause when jurisdiction rests upon discovery, it will not do so when jurisdiction attaches because of the necessity of interference by injunction to prevent irreparable injury, pending a determination of the primary right involved. There are cases in which it is said that, although the only equitable ground of jurisdiction was the necessity of the exercise of the restraining power of the court by injunction, equity went on and passed upon the legal rights of the litigants; but in every instance the case was one of accident, fraud, mistake, or account, belonging to the general concurrent jurisdiction of equity, and in no case has any court proceeded so far as to hold that having taken jurisdiction to restrain a trespass to real estate, it would go on and determine the legal title to the land, when that was in dispute and a trial by jury was necessary by reason of controverted matters of fact, such as possession, boundary, and location. On the other hand, there is an abundance of authority holding the contrary doctrine."

For the reasons stated, I am clearly of the opinion that the former decree of this court should not be disturbed.

#### ATLANTIC COAST LINE R. CO. v. WOODS.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1918.)

No. 1567.

1. Commerce \$\infty 27(8)\$—Federal Employers' Liability Act—Sufficiency of Evidence.

In a railroad employé's action for injuries under the Employers' Liability Act, evidence *held to* show that the bolt upon which plaintiff was working when injured was put on a particular engine, engaged in interstate commerce.

2. Commerce \$\insigm 27(8)\$—Federal Employers' Liability Act—Injury in "Interstate Commerce."

An engine regularly hauling interstate passenger trains was used in interstate commerce when taken out of a train in order that a bolt might be repaired, being placed in the shop and sent out upon the same day on its regular run, and the railroad's employé, injured in doing the work, was injured while employed in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action at law by Robert A. Woods, by his guardian ad litem, against the Atlantic Coast Line Railroad Company. To review judgment for plaintiff, defendant brings error. Reversed.

See, also, 238 Fed. 917, 151 C. C. A. 651.

Lucien W. McLemore, of Sumter, S. C. (Douglas McKay, of Columbia, S. C., and P. A. Willcox, of Florence, S. C., on the brief), for plaintiff in error.

W. Boyd Evans and W. W. Hawes, both of Columbia, S. C., for de-

fendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case comes here on writ of error from the District Court of the United States for the Eastern District of South Carolina. The plaintiff in error will be referred to as defendant, and the defendant in error as plaintiff; such being the rel-

ative positions of the parties in the court below.

Plaintiff, while in the employ of the defendant company at its machine shops at Florence, S. C., operating a machine used to cut threads or bolts, sustained an injury resulting in a broken wrist. This action was brought to recover damages for defendant's alleged negligence as the proximate cause of such injury. It was tried at the March term of the Florence court, 1916, resulting in a judgment for plaintiff in the sum of \$2,000, and was heard on a writ of error by this court at the November term, 1916. The judgment of the court below was reversed, and the case remanded for a new trial, on account of the refusal of the District Court to admit evidence in support of defendant's contention that the parties were engaged in interstate commerce at the time of the injury, and hence that the action should be controlled by what is known as the "Employers' Liability Act." Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657–8665). The second trial resulted in a verdict for plaintiff of \$800, upon which a judgment was entered.

It is insisted that the court below erred in refusing to direct a verdict for defendant at the close of all the evidence upon the ground that the action is controlled by act of Congress known as the "Employers' Liability Act," and, not having been brought within two years,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was barred by section 6 of the act (section 8662). Two questions were submitted to the jury in the court below, to wit: (1) Was the U-bolt which was being prepared by plaintiff at the time he was injured put on engine No. 88? and (2) was this engine engaged in interstate commerce?

Defendant introduced several witnesses, who testified as to this transaction. However, we think the testimony of the witness Carter, defendant's assistant roundhouse foreman at Florence, is more to the point than that of the others. He testified in part as follows:

"Q. Did you or not know that there was a U-bolt to be threaded that morning? A. Yes, sir; by my orders there was one sent in there for 88. Q. Who was to thread it? A. The Woods boy; the man running the bolt cutter. Q. Robert Woods? A. Yes, sir. Q. What engine was that bolt to be used for? A. Engine 88. Q. How do you know it was for engine 88? A. Because I had it taken off engine 88 myself that morning. Q. When did you first know it was necessary to make a U-bolt for engine 88? A. Three days previous to this day. \* \* \* Q. How did you happen to know, three days before this boy was hurt, that the U-bolt was needed on engine 88? A. Engine inspector report to me— Q. Don't state what the engine inspector said; did you see it that day? A. I saw it the morning it came in. Q. Morning of what day with reference to Wood's injury? A. That was the day he was injured. Q. When did you see it coming in? A. I saw it when it pulled in from Columbia. Q. What train? A. Ed. Q. What is 54? A. Passenger train. Q. Running between what points? A. Wilmington and Columbia. Q. Was the engine taken off of that train that morning? A. Yes, sir; engine went out that night on 55. Q. What train is that? A. That is a train from Wilmington to Columbia."

# Cross-examination:

"Q. You say you knew three days beforehand that this yoke had to be fixed? A. Yes, sir. Q. How did you say you knew it? A. Our engine inspector reported to me late in the afternoon. \* \* \* \* Q. What was it he reported to you? A. The yoke broke, the rest here, and there is a key holding it up, and this was broken off flush with this. (Witness was illustrating with yoke used on trial.) Q. Do you know what time young Woods got hurt? A. No; I was not in there at the time. Bultman came to me about 11 or 11:30, and told me that the boy cutting that yoke for engine 88 had broke his arm. Q. Were you present and saw this yoke put on? A. I saw him finishing up the job. Q. Were you present and saw this yoke put on the engine? A. I saw him finishing up the job; I can swear he put that on 88. Q. You were there while he was putting it on? A. Yes, sir; while he was finishing it up."

Also witness Koopman was introduced by defendant and testified as follows:

"After yoke was repaired by Mr. Wade I threaded it. Accident was about 9 o'clock in the morning; am not sure, it was some time in the morning. The yoke threaded by me was the same one taken out of the machine after the accident to plaintiff and repaired by J. J. Wade. After Robert Woods was injured, I took charge of bolt cutting machine. I threaded the one Woods was working on. No other yoke was threaded that day. I was employed on the bolt cutter from time plaintiff was injured until he came back to work,"

[1, 2] The court below submitted the question to the jury as to whether the engine on which this U-bolt was used was engaged in interstate commerce. Upon this point the defendant's evidence clearly establishes the fact that the bolt in question was put on engine

88. Indeed, plaintiff offered no evidence to the contrary. Therefore the next question is as to whether this particular engine was being used in interstate commerce. This point has been passed upon in

many instances.

In the case of Norfolk & Western Railway Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, it appears that an employé was injured while piloting a locomotive (by walking ahead of it) through the railroad yard to a point where the locomotive was to be attached to an interstate train to assist in moving it up a grade to the next station. The court in that case held that the employé was engaged in interstate commerce. However, in this instance it cannot be said that the employé was directly engaged in interstate commerce. Nevertheless he was performing work which was necessary to the preparation of the engine which had been and was to be used in such commerce.

In the case of Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, the plaintiff was injured while a dining car was standing on the siding between the time when it was taken out of an interstate train and placed there and the time when it was removed by another interstate train on the return trip. The third syllabus in that case is in the following language:

"A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip."

Also in the case of Northern Pacific Railway Company v. Maerkl, 198 Fed. 1, 117 C. C. A. 237, the Circuit Court of Appeals for the Ninth Circuit passed upon a question analogous to the one here presented. The first syllabus in that case reads as follows:

"Where an employé of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce as occasion required, defendant was at the time 'engaged in interstate commerce,' and the employé was employed by defendant in such commerce, within the meaning of Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322 [Comp. St. 1916, § 8657]), and an action for his injury or death may be maintained against defendant thereunder."

The following cases are very much in point: Bower v. Chicago, etc., R. Co., 96 Neb. 419, 148 N. W. 145; Lloyd v. Southern Ry. Co., 166 N. C. 24, 81 S. E. 1003; Law v. Illinois Central Railway Co., 208 Fed. 869, 126 C. C. A. 27, L. R. A. 1915C, 17; Southern Pacific Railroad Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916; Baltimore & Ohio Railroad Co. v. Darr, 204 Fed. 751, 124 C. C. A. 565, 47 L. R. A. (N. S.) 4.

It is true there are cases in which it has been held that where more than one inference may be drawn from the evidence, or where the facts are in dispute as to whether the parties are engaged in interstate commerce the same should be submitted to the jury. These cases are not analogous to the case at bar. As we have already stated, it is established by uncontroverted evidence that the U-bolt which was

being prepared by plaintiff at the time he was injured was to be put on engine 88, which was engaged in interstate commerce. This fact is not controverted by any of the witnesses who testified at the trial.

It is insisted by counsel for plaintiff that the case of Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, clearly sustains the contention of plaintiff. While the railroad company in that case was engaged in both interstate and intrastate commerce, it maintained a repair shop where locomotives engaged in such commerce were repaired. Shanks sustained the injury of which he complained while employed in the shop. It appears that his usual work consisted in repairing parts of locomotives, "but on the day of the injury he was employed solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work." The Supreme Court in passing upon that case propounded the following question:

"Was the employe at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The court there held that the plaintiff was not engaged in interstate commerce, and, among other things, said:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis Case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

We think the case at bar is easily distinguished from the Shanks Case. In the case of Delaware, Lackawanna & Western Railroad Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, it appears that the plaintiff was employed in a coal mine, where the coal mined was to be used in hauling interstate commerce. The Supreme Court held in that case that the plaintiff was not engaged in interstate commerce. Also in the case of Minneapolis & St. Louis Railroad Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, the Supreme Court held that the plaintiff was not engaged in interstate commerce at the time of his injury. There the engine had been employed both in intrastate and interstate commerce. The court in disposing of the case among other things, said:

"\* \* It does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen."

The case at bar, as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken

out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of interstate commerce. In other words, it is easily distinguished from the Winters Case because the character of the work in which the engine in this instance was employed did not depend "upon remote possibilities or upon accidental later events." It appears from the evidence that engine 88 was regularly engaged in hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appears that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run, hauling what is known as the Columbia-Wilmington train.

There being no conflict of evidence as to whether the plaintiff at the time of his injury was engaged in repairing an instrumentality destined for use in interstate commerce, and it appearing that more than two years had elapsed from the date of plaintiff's injury before the commencement of this action that the same is barred by section 6 of the Employers' Liability Act, the court below erred in refusing to

direct a verdict in favor of defendant.

For the reasons stated, the judgment of the lower court is reversed.

WOODS, Circuit Judge (dissenting). The plaintiff, Robert A. Woods, an employé, recovered judgment for personal injuries against Atlantic Coast Line Railroad Company for \$800, on July 30, 1917. The District Judge overruled a motion made on behalf of the defendant to direct a verdict on the ground that the plaintiff was engaged in interstate commerce at the time of the injury, that more than two years had elapsed after the injury before the action was brought, and that therefore the action was barred by the statute. After refusing the motion, the District Judge submitted to the jury the question whether the injury was received while the plaintiff was employed in interstate commerce, and gave the instruction that if he was, the verdict should be for the defendant.

The sole question before us is whether the only reasonable inference to be drawn from the evidence was that the plaintiff was engaged in interstate commerce. I think it clear that the question should be answered in the negative. The plaintiff was operating a machine to thread bolts used on eccentric yokes or straps. The bolts when cut were thrown into a pile and used indiscriminately for engines drawing intrastate and interstate trains. The evidence tends so strongly to show infliction of the injuries while cutting a bolt for engine 88 that I assume that it was. This engine, on the morning of the day of the accident, January 25, 1913, had drawn the train running from Columbia, S. C., to Wilmington, N. C. In accordance with the usual custom, it was laid off at Florence, S. C., a junctional point which was the end of its run; the bolt was taken from it, repaired, and restored to the engine, which, after remaining in Florence all day, was at that place attached to a train the same evening, running from Wilmington to Columbia.

The evidence makes it clear that at the time of the accident, the engine was not actually engaged in drawing an interstate train, was not on its way to be attached to such train, and was in no way appropriated or designated as an engine used especially for interstate commerce. J. J. Wade, blacksmith in the railroad shops at Florence, testified that:

"Engine 88 was a passenger engine, running either between Florence and Wilmington, or Florence and Columbia."

The following questions and answers appear in the testimony of T. ]. Carter, assistant roundhouse foreman:

"O. What sort of service was 88 in at that time? A. Passenger service. between Florence or Charleston, Columbia, and Wilmington. Q. And where did it come from that morning? A. Came from Columbia. Q. And stopped at Florence? A. No. sir: went to Wilmington: the engine stopped at Florence, that engine; the train went on to Wilmington 20 minutes after arriving at Florence. Q. But I am talking about the engine that this new bolt went on. A. That engine stopped at Florence. Q. That was the end of that engine's run? A. Yes, sir; end of the engine's run. Q. That engine ran between Columbia and Florence? A. Columbia, Florence and Charleston. Q. And the balance of the train was pulled on by another engine to another place? A. Yes, sir. Q. But this particular engine ran between Columbia, S. C., and Florence, S. C.? A. Yes, sir. Q. And that was the end of the engine's run when it got to Florence? A. Yes, sir. Q. Upon which this bolt you are talking about was put on? A. Yes, sir. Q. And then that engine lay there all day, did it not? A. Lay there from 8:45, about 9 o'clock, when it came into the shop, until about 5:30 in the evening, when we sent the engine out. Q. And then came back to Columbia? A. Yes, sir. Court: Q. Those are interchangeable for engines of the same class? A. Yes, sir. Q. You say the terminal points of this engine were Columbia and Florence? A. Between Charleston, Columbia, and Florence, and sometimes we used it to Wilmington; it was not any special terminal, but that is where she is supposed to run."

There was not a particle of evidence to show that when the engine was detached from the Columbia-Wilmington train, the railroad authorities had any formed intention as to the next use to be made of it. The engine was not interrupted in an interstate haul, to be repaired and continued on its trip. At the time of the repairs, it was not engaged in any business, either state or interstate. After being detached for repairs, its next work, so far as the evidence shows, might have been between Columbia and Charleston, or Wilmington and Columbia, with the probabilities in favor of the Columbia and Charleston trip, rather than the Wilmington and Columbia trip, for the testimony was that it was more often used on the intrastate trip. It was one of a class of engines interchangeable for other engines of the same class for any of these trips. In short, at the time of the accident its office as an instrumentality of interstate commerce had ceased, and it was entirely uncertain, at the time of the accident and the repair of the bolt, whether it would be next used in interstate commerce or intrastate commerce.

It is unnecessary to enter into an analysis of the many cases on the subject, and the refined distinctions necessarily made between interstate and intrastate commerce. The facts of this case bring it clearly under Minn. & St. L. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54. In that case the court says:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of

freight trains over defendant's line, \* \* \* which freight trains hauled both intrastate and interstate commerce, and \* \* \* it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The utmost that the defendant could claim was submission to the jury of the question whether the plaintiff was employed in repairing part of an engine engaged in interstate commerce. The conclusion of the jury that it was not so engaged was well supported by the evidence above quoted.

I think the judgment should be affirmed.

#### WIERSE et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1918.)

# No. 1586.

- 1. Conspiracy \$\iff 48\$—Prosecution—Evidence—Question for Jury.

  In a prosecution under Criminal Code, \{ 37, for a conspiracy to sink a German merchant vessel in the navigable waters of the United States, etc., evidence held sufficient to carry the case to the jury.
- 2. CRIMINAL LAW \$\infty\$789(2)—Instructions—Sufficiency
  In a prosecution against a naturalized citizen of German origin and another a subject of the German Empire for conspiracy to sink a vessel in navigable waters, etc., the charge held to sufficiently safeguard the rights of the naturalized citizen as to the question of reasonable doubt and the treatment he should receive at the hands of the jury, notwithstanding alienage of his coconspirator.
- 3. Conspiracy \$\iffsim 45\$—To \$\text{Sink Vessel}\$—Evidence—Admissibility.

  In a prosecution under Criminal Code, \$ 37, for conspiracy to sink a German vessel in navigable waters of the United States, etc., evidence as to the condition of the ship, and that the valves were open, etc., held admissible; the injury to the equipment of ship contributing to the sinking.
- 4. CRIMINAL LAW ← 178—FORMER JEOPARDY—DISMISSAL.

  That a defendant had previously been indicted with others who were acquitted, will not support a plea of former jeopardy, where such defendant was not tried on account of his illness, and after trial the case against him was dismissed without prejudice to any charge that might be made against him.
- 5. Criminal Law \$\iff 38(7)\$—Prejudice of Judge—Evidence.

  A defendant, who complains that he cannot obtain a fair trial on account of prejudice or bias of the judge, must apply for a transfer in ac-

cordance with Judicial Code, § 21, and where no such application has been made, a defendant cannot introduce evidence of an otherwise collateral matter for the purpose of discrediting the judge and attempting to show his animus.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith,

Tudge.

Paul Wierse and Johann Klattenhoff were convicted, under Criminal Code, § 37, of a conspiracy to sink a German merchant ship in the navigable channel of a river leading from the port of Charleston, etc., and they bring error. Affirmed.

John P. Grace, of Charleston, S. C., for plaintiffs in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C. and J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a criminal action, instituted in the District Court of the United States for the Eastern District of South Carolina, wherein the United States is plaintiff against Paul Wierse, Johann Klattenhoff, and W. Mueller, charging the defendants with a conspiracy to sink, or to cause to be sunk, or to permit to be sunk, a German merchant ship, and the actual sinking of the ship in pursuance of such conspiracy in the channel of Cooper river, leading from the harbor of Charleston, which is a navigable channel of the United States, in violation of section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]). The case was tried on the 10th day of October, 1917. The defendant Mueller has never been arrested and is reported to have left the United States. The defendants Wierse and Klattenhoff were tried and convicted and sentenced. The case now comes here on writ of error.

The facts may be epitomized as follows:

On January 30, 1917, a telegram was sent by W. Mueller, the then German consul at Atlanta, Ga., to E. H. Jahnz, who was at that time German consul at Charleston, S. C., in German, the translation of which is as follows:

"Please wire whether Wierse has received my letter of last Saturday."

On January 31st a telegram was sent by E. H. Jahnz to W. Mueller, in English, as follows:

"Wierse claims letter has been sent must be in Atlanta by now."

That night at 8:45 Wierse telegraphed to Mueller: "Congratulations,"

Johann Klattenhoff was the master or captain of the German merchant steamship Liebenfels which was then lying in the harbor of Charleston. He had been absent from his ship for some days on a visit to a friend of his, William Andel, who resides on John's Island, about 35 miles by automobile road from the city of Charleston. Klattenhoff was not expected to return to the ship until the end of the

week, or perhaps later. On receipt of the telegram from Mueller, Wierse engaged an automobile to take him to Andel's place, and also obtained leave of absence from his work, requesting that some one else take care of it that day and evening, as he might not be back. During the automobile trip he mentioned to the driver of the car that the captain (Klattenhoff) might come back with him. He did not, however, disclose the reason for his trip, but did urge haste. Upon his arrival at Andel's, Wierse conferred with Klattenhoff, and the two returned together to Charleston in the automobile. They came by a bridge across the Ashley river to the city of Charleston, and, after they had traveled about two blocks. Wierse had the automobile stopped and got out of it, stating that he would take a street car. The automobile had been engaged by Wierse, and the cost for its use was charged to him. The place where he got out was about a mile from his residence, where he stated he was going. Klattenhoff remained in the automobile, and was taken directly to the wharf used as a landing place by the crew of the Liebenfels. The automobile driver then returned to his garage, which is about three blocks from Wierse's residence.

Wierse appears to have gone to his residence, and from there directly to his office at the Charleston American, a newspaper, where he was employed as state editor and editorial writer. He there wrote a telegram, addressed to Mueller, the German consul in Atlanta, and, taking it to the nearest telegraph office, which was situated in the Argyle Hotel, about two city blocks from the newspaper office, had it sent. This telegram consisted of the single word, "Congratulations." It was sent to the German consul at Atlanta, collect.

Klattenhoff, after leaving the automobile went on the wharf and was carried over to the Liebenfels. Upon his arrival on board ship he ordered the crew to damage and sink her; but they at first did not comply with this order, demanding some more tangible form of orders. Later Klattenhoff left the ship and went ashore, going to Wierse's office, where he conferred with him. From there on his way back to the ship he met a member of the crew and informed the latter that he had been back for "more information." He then went aboard the Liebenfels, and, upon further orders being issued, the crew carried out his instructions, and thereupon demolished the machinery and other operative parts of the ship, and opened the sea valves, which admitted water into the vessel. The ship then sank. She was lying in the navigable channel of the Cooper river, used by most of the shipping coming into the port of Charleston, and the channel which leads up the river to the United States Navy Yard.

[1] The first assignment of error raises the question as to whether the court below erred in refusing to direct a verdict in favor of the defendants "on the ground that it was not shown that the defendant Wierse knew that the vessel was to be sunk in the navigable waters, even though it be admitted that he knew it was to be sunk." This assignment fairly presents the most important question at issue in this controversy. It rarely ever occurs, where parties are charged with conspiracy, that the prosecution is able to establish their guilt

by positive and direct testimony. From the very nature of things, conspiracy is a crime that is entered into secretly, and as a general rule, in the prosecution of cases of this character, the government must rely upon inferences to be drawn from the facts and circumstances surrounding the transaction. This is especially true in cases like the one at bar, where individuals are plotting against the government. The only possible hope they have of succeeding is in keeping their motives and actions concealed from the public. Therefore, in order to determine as to whether a conspiracy was entered into as alleged, we must consider all the facts and circumstances surrounding this transaction, and base our conclusion upon such reasonable inference or inferences as may be drawn from the evidence.

It should be borne in mind that Wierse, a naturalized citizen of German birth, had been connected with a German newspaper; that he had been an intimate friend of the German consul at Charleston, S. C., and also with the German consul at Atlanta, Ga., and that he was well acquainted with Capt. Klattenhoff, the master of the Liebenfels. According to his own admission he had handled business and correspondence for Capt. Klattenhoff. It further appears from the evidence that he had been corresponding with Mueller, and that Mueller had telegraphed to Wierse that he was in accord with his proposition. It further appears that, upon receipt of the telegram, the defendant Wierse on his own account hired an automobile and went some distance in the country to see Capt. Klattenhoff, and after consulting with him brought him back to the city. It also appears that, as soon as Klattenhoff went on board the ship, the order was given to sink her. However, this order was not obeyed. Thereupon Klattenhoff left the ship and went directly to the office of the defendant Wierse. The fact that the German consul at Atlanta was so anxious to have the message which he transmitted to Capt. Klattenhoff delivered was within itself sufficient to have put the defendant Wierse upon inquiry as to the nature of the errand that he was called upon to make. The participation of Wierse up to and including the time that he made the visit to Klattenhoff, the cordial relations existing between the two and that which transpired after their return to Charleston, leads us to the conclusion that Wierse and Klattenhoff must have had some conversation as to the motive which prompted Wierse to visit Klattenhoff, and as to what Klattenhoff was expected to do when he returned to the ship.

It is insisted by counsel for defendant that, while Wierse admitted he hired the automobile at his own expense, he was to be reimbursed by the official representative of the Imperial German government. His willingness to incur this personal liability on behalf of that government tends to show that he was ready and willing to serve it. It is also significant that, when Wierse and Klattenhoff reached the city, Wierse, when about a mile distant from his home, got out of the machine and took a street car. Why did he deem it necessary to take a car at that point? Under normal conditions Wierse would have remained in the car until he reached his home. His conduct in this respect, when considered in connection with the other facts, was, we

think, sufficient to have warranted the jury in inferring that Wierse, knowing the purpose of Klattenhoff, was not willing to be seen with him, and also that leaving the automobile at that point would enable Klattenhoff to more speedily consummate the purpose for which the conspiracy was formed. It should also be borne in mind that the crew of the Liebenfels at first refused to obey the order of Capt. Klattenhoff to sink the vessel, whereupon Capt. Klattenhoff went to the office of Wierse and had a conference with him, after which he returned to the ship and the orders were promptly obeyed and the vessel sunk. If Wierse knew nothing about the purpose of Klattenhoff, and was not connected with the transaction, why was it necessary for Klattenhoff, before giving the final orders to sink the ship, to go to Wierse's office for another conference?

The fact that after Wierse reached his office he wrote a telegram containing the word, "Congratulations," which was immediately dispatched to the German consul at Atlanta, is very material. The defendant, through his counsel, insists that this telegram referred to the fact that some time before that date he had received a letter from the consul at Atlanta informing him that he was engaged to be married. There are two remarkable facts about this explanation, when considered in connection with the telegram. One is that he should have delayed sending his congratulations until that particular time, and the second is that he should have sent the telegram "collect." This, to our mind, is a most extraordinary circumstance. The evidence shows that letters had been passing between the two, and, knowing the consul as intimately as he did, one would naturally suppose that he would have written or telegraphed his congratulations immediately upon receipt of the information that his friend was to be married. It is also very significant that he should have sent this telegram "collect." To say the least of it, the sending of a telegram of congratulations "collect" was unusual, and not at all in harmony with what one would be expected to do under similar circumstances. We think the explanation as respects the sending of this telegram, instead of aiding the defendant in his contention, rather tends to strengthen that of the government.

Any one of these circumstances, taken alone, would not be sufficient to warrant a conviction of the defendant; but, as we have stated, in cases of this kind it is the duty of the jury to consider all the facts and circumstances together, in order that they may draw the proper inference. Therefore, in view of all the facts and circumstances of this case, we think the jury was amply warranted in reaching the conclusion that the defendant was a party to the conspiracy. Any inference other than this would not be in accord with our everyday observation and experience.

[2] The second assignment of error is in the following language:

"Because it appears that all the testimony was not sufficient to prove the guilt of the defendants beyond a reasonable doubt, and his honor, therefore, erred in not directing a verdict of 'not guilty'; the error being that 'beyond a reasonable doubt' means the exclusion of any other reasonable hypothesis of innocence, and the defendant Wierse was by no testimony or inference deducible from the testimony proven beyond a reasonable doubt to have intend-

ed to have conspired, or intended to conspire, in sinking the vessel in a navigable stream, the intention to sink in a navigable stream being one of the essential elements of the crime."

This assignment in the main is directed to the refusal of the court below to instruct the jury to return a verdict in favor of the defendant. However, it is also insisted that the court failed to instruct the jury that they could not convict the defendant, unless they were satisfied of his guilt beyond a reasonable doubt. A reference to the charge clearly shows that the latter part of the assignment is not borne out by the record; it, among other things, containing the following:

"\* \* Then, gentlemen, I desire to charge you that in this case, as, in all other cases, the rule of law is that \* \* \* every one comes into court with the presumption that he is innocent; that is the presumption in favor of a free citizen, whether man, woman, or child, charged with crime, when he comes into court he is presumed to be innocent (although he is put on trial) until his guilt is established by competent testimony, and established according to the meaning of the law beyond a reasonable doubt. Now, on that question of a reasonable doubt, I charge you that it does not mean that your conclusions must be free from all doubt. There is some doubt intermixed in all human conclusions, whether it is the verdict of a jury or the decree of a judge; nothing human is absolutely sure, or absolutely perfect, so that you can find a verdict of guilty although you have still some doubt, but it must not be a reasonable doubt. At the same time you must not be deterred by caprice, or a capricious doubt, or a whimsical doubt, or an unreasonable doubt, or a doubt for which you can assign to yourselves no reason. It must be a reasonable doubt existing, and in that case the defendant is entitled to the benefit of it. Again, as in this case, I will charge you now, these two parties who are before you are, one of them a subject of a foreign state, but he came here in free commerce on the invitation of this country for the purpose of commerce, and the other, although a foreign-born subject, under the laws and license of this country has been admitted to associate himself with the other citizens of this free commonwealth as a member of it, and therefore stands with the same rights and same privileges, although having the burden of the same duties as a native-born citizen of this country, but both of them in their trial in courts of justice in this country are entitled, upon the question of the establishment of their guilt, to the enforcement of the same rules which would be enforced against native-born citizens. The yardstick of justice has neither increase nor diminution in measuring what should be allotted to them than it would be in allotting to the highest and most patriotic citizen of this country. \* \*

Thus it will be seen that the court carefully safeguarded the rights of the defendant, both as to the question of a reasonable doubt and as to the treatment that he should receive at the hands of the jury, notwithstanding the fact that his coconspirator, Klattenhoff, is a sub-

ject of the German Empire.

[3] By the third assignment of error it is insisted that the court below erred in permitting the government to introduce testimony showing the general condition of the ship, and, among other things, that the machinery and gear were broken at the time the valves were opened. Counsel for defendant insisted that this testimony was irrelevant and had no relation to the sinking of the vessel. It is a matter of common knowledge that the machinery of other German merchantmen in ports of the United States had been damaged, but so far as we know the Liebenfels was the only ship that was actually sunk. The ship being anchored in the channel which was being used for private and

governmental shipping clearly indicates the intent of the parties, and shows most conclusively that those engaged in the conspiracy were well acquainted with the local situation, and knew where to strike the most vital blow in order to effectively hinder and delay the government

in its operations.

It is a fact of which this court will take judicial notice that at that time it was the policy of the Imperial German government to disable all the ships that she had in our ports, by dismantling the machinery and doing those things that were calculated to render such ships practically worthless. The defendant Wierse being a man of intelligence, it is but fair to assume that he well understood the importance of this move on the part of the controlling power of his native land. Undoubtedly the destruction of the engine, including the valves and other appliances for the control of water in the engine room, contributed to the sinking of the vessel. Likewise the destruction of the steering gear and wireless and engine room telegraphic systems prevented signals being sent out for help, and also rendered the ship incapable of being steered out of the channel. The defendants being charged with conspiring to sink the vessel in a navigable channel, this evidence bore directly upon the question of intent, and therefore became very material in the trial of the case. This rule is of long standing and well established by the courts.

In the case of Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420, the Circuit Court of Appeals for the Eighth Circuit, in referring

to this question, said:

"If intent, motive, knowledge, or design be one of the elements of the crime charged, and especially if it is claimed that the crime was committed in accordance with a system, plan, or scheme, evidence of other like conduct by the defendant at or near the time charged is admissible. Brown v. United States, 142 Fed. 1, 73 C. C. A. 187; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; Walsh v. United States, 174 Fed. 615, 98 C. C. A. 461; Exparte Glaser, 176 Fed. 702, 100 C. C. A. 254; Thompson v. United States, 144 Fed. 14, 75 C. C. A. 172, 7 Ann. Cas. 62."

There are numerous other cases to the same effect, notably among them being Wood v. United States, 16 Pet. 342, 10 L. Ed. 987. There-

fore we think that this assignment is without merit.

[4] The fourth assignment of error relates to the refusal of the court below to permit the introduction of records of another case in which Klattenhoff had been the defendant. It is insisted that this evidence was offered for the purpose of showing that Klattenhoff had once been in jeopardy for this offense. This, we think, should have been taken advantage of by a plea of former jeopardy, which was not entered. While it is true that upon a former trial Klattenhoff and eight other members of the crew of the Liebenfels were indicted for a conspiracy to sink the ship, the members of the crew being acquitted, Klattenhoff was not tried at the time on account of illness, and after the trial the case against Klattenhoff was dismissed without prejudice to any charge that might be made against him. The fact that he was indicted with other defendants, who are not defendants in this action, and where the case as to him was dismissed, would not avail him on a plea of former jeopardy.

[5] The fifth assignment of error is in the following language:

"Because his honor, the presiding judge, erred in not allowing defendant's counsel, over objection duly and properly made to ask the following question: 'Q. The success of the Charleston American had been very remarkable, had it not? A. Absolutely so'—the error being that such testimony would have cleared up in the minds of the jury the animus of the prosecution by showing the connection between the district attorney's office and the Evening Post, a rival and contemporary of the Charleston American, the success of which had touched a very sensitive cord."

We cannot understand upon what theory evidence as to the success or failure of the Charleston American would be relevant or material in this instance. Assuming it could have been shown that the American as a paper had been very successful, that fact could throw no light upon the guilt or innocence of the defendant. The introduction of such testimony could only have tended to confuse the minds of the jury, without affording them any information upon the question which they were called upon to decide. For instance, if it had been shown that the success of this paper had been phenomenal such fact could in no wise have justified the defendants in entering into this conspiracy. It is apparent from the record that this evidence was offered as an entering wedge for the purpose of dragging the name of the trial judge into this case in a personal way, a practice which is reprehensible in the highest degree and should never be resorted to by any reputable attorney. The references of this character to the trial judge contained in the brief are irrelevant, scandalous, and impertinent, and the court orders that the same be stricken therefrom. Section 21 of the new Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [Comp. St. 1916, § 988]) provides that, where a defendant feels that he cannot secure a fair and impartial trial on account of prejudice or bias, it shall be the duty of the judge, upon proper showing, to transfer the case to another judge for trial. The section in question is in the following language:

"Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal blas or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

This section was enacted for the purpose of enabling one who might in good faith feel that he could not obtain a fair and impartial trial before a particular judge to have his case transferred to another. If counsel for the defense thought at the time his client was called upon to plead to this indictment, he would not be treated fairly and impartially, it was not only his privilege, but his bounden duty to his client, to have availed himself of the provisions of this statute. This court will not permit one of the high character and standing of the learned judge who tried this case in the court below to be assailed in one of its records in such an unjust and unwarranted manner, and this is especially true in a case like the one at bar, where counsel for defendant knew of the statute which we have quoted, and failed to avail himself of the opportunity to make any objections to the trial of his client before he was called upon to answer the charge.

A careful examination of the record shows that the trial judge gave no indication of any feeling, bias, or prejudice against the defendant Wierse. His conduct throughout the trial, including the charge, was absolutely fair, and, as we have already stated, safeguarded the rights of the defendant in every particular. It must be understood, once and for all, that where lawyers fail to exercise the right conferred upon them by the statute to object to the trial of their client by the presiding judge, they will not be permitted to come into this court and by innuendo or otherwise assail the character of the trial judge as to matters that have no relation whatever to anything that may have transpired during the trial. The rulings of the trial court are always subject to the most critical analysis, in order that we may ascertain as to whether any error of law or fact, as the case may be, has been committed, or whether the judge in the trial of the case has done or said anything to prejudice the rights of the defendant. Thus far lawyers may go, but no farther.

The personal references to the assistant district attorney in the brief for the plaintiff in error have no basis whatever in the record and are

ordered to be stricken therefrom.

While there are 20 assignments of error, a careful consideration of those that we have not disposed of leads us to the conclusion that they are without merit. Therefore we do not deem it necessary to enter into a discussion of the same, feeling as we do that the defendants have had a fair and impartial trial and the ends of justice have been fully met.

Therefore the judgment of the lower court is affirmed.

## GENERAL FILM CO. v. SAMPLINER,

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.) No. 3141.

1. Champerty and Maintenance  $\Leftrightarrow 6(5)$ —Availability of Champerty as Defense—Action at Law.

The champertous character of an action at law is available as a defense to that action, though not pleaded.

2. Assignments \$\iff 126\top Availability of Nonassignment as Defense.

Nonassignability of cause of action is as available as defense in action at law based on such cause of action as it is available as ground in support of suit in equity to restrain prosecution of such action.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. JUDGMENT \$\infty\$551, 627—Conclusiveness—Champertous Assignment—Privity

The effect of a previous adjudication that the assignment was champertous, made in favor of a party with whom defendant was in privity, at the suit of the same plaintiff, is as available in suit at law as in equity, although defendant therein was not a party to, nor does his privity appear of record in, the previous suit.

4. Courts \$\infty 342\$—Equitable Defense in Action at Law.

Defense that judgment for defendant, on its defense of champerty in assignment to plaintiff, was equitable estoppel in subsequent action at law against a defendant, who was not a party to the former action, but was in privity with defendant therein, is as available in federal courts in the subsequent action, as in new suit in equity.

5. Injunction \$\infty 26(5)\$—Vexatious Action.

Suit on assigned cause of action will not be enjoined on the ground it is in bad faith, vexatious, and an abuse of court's process, because of judgment for defendants in former action on same assignment, to which action defendant was not a party, unless such judgment clearly and conclusively estopped subsequent action; so held in a case where time for seeking review of such judgment had not expired.

6. CANCELLATION OF INSTRUMENTS \$\infty 4\to Right to Cancellation-Equity-Jurisdiction.

Equity has jurisdiction to cancel an instrument which is clearly illegal, but which on its face is valid, and so is capable of a wrongful and vexatious use, where such cancellation is necessary to protection to parties otherwise liable to injury, actual or threatened, from the fact that the instrument is outstanding.

7. Injunction \$\isplies 26(6)\$—Defense to Action—Irreparable Damage.

Where a party has a good defense at law to a purely legal demand, he must be left to that means of defense, unless he alleges and proves special circumstances showing that he may suffer irreparable damage, if he is denied a preventive remedy.

8. Injunction \$\infty 26(4)\$—Multiplicity of Suits—Equity.

Generally, in order to make multiplicity of suits a ground for interposition of equity, more than one suit must have been commenced, or at least about to be begun, and such interposition must be necessary as protection from continued and vexatious litigation.

Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by the General Film Company against Joseph H. Sampliner. From decree of dismissal, complainant appeals. Affirmed.

Bulkley, Hauxhurst, Saeger & Jamison, of Cleveland, Ohio (H. Austin Hauxhurst, of Cleveland, Ohio, and Wm. M. Seabury, of New York City, of counsel), for appellant.

John G. White, J. H. Sampliner, Thomas L. Johnson, A. V. Cannon, C. A. Neff, and Lawrence C. Spieth, all of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On July 30, 1913, appellee, claiming to be the assignee of the Lake Shore Film & Supply Company, brought suit at law against appellant in the court below for treble damages (\$303,000), alleged to have accrued to the Lake Shore Company under

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, §§ 8820–8823, 8827–8830]) by reason of an alleged conspiracy to monopolize the motion picture business of the United States and to restrict interstate trade and commerce therein. Appellant thereafter filed its bill on the equity side of the court below, for discovery in aid of two asserted defenses to the action at law: (a) That plaintiff therein is not the real party in interest; and (b) that the alleged assignment is champertous. On appellee's motion, Judge (now Mr. Justice) Clarke dismissed the bill. This court affirmed the decree of dismissal April 4, 1916. General Film Co. v. Sampliner, 232 Fed. 95, 146 C. C. A. 287.

October 1, 1917, appellant filed a second bill in equity in the court below to permanently enjoin the prosecution of the pending suit at law, as well as the institution and maintenance of further suits for the same cause of action. The grounds on which the right to relief is based are: (1) That the suit at law is champertous, in that the sole consideration for the assignment from the Lake Shore Company to appellee was the discharge of the latter's claim for legal services to the assignor of the alleged value of \$5,000, and his agreement to render further legal services to his assignor if the same should be deemed necessary, the assignment being taken (as alleged) with knowledge that the assignor was unable to and would not pay or advance any of the costs and expenses of the proposed suit, that appellee would be obliged to make large advances of that nature, and in the belief that at least \$75,000 damages could be proven in the action, that appellee's acts were in violation of both the statutes and common law of Ohio, forbidding the purchase of a claim by an attorney at law for the purpose of suit thereon, and that the claim in suit was thus not assignable to plaintiff; (2) the later institution by appellee (in January, 1917) of an action at law in the District Court of the United States for the Southern District of New York against the Motion Picture Patents Company and others (not including appellant) to recover \$750,000 as treble damages for the same alleged violation of the Anti-Trust Act as involved in the suit at law pending in the court below, and the trial of the cause in the District Court in New York under the defense of champerty there presented, resulting in verdict and judgment (June 14, 1917) in favor of defendants therein and against appellee (243 Fed. 277), this judgment being alleged (through an asserted privity between appellant and the defendants in the New York suit) to work an equitable estoppel against the further prosecution of the action at law below; (3) that the further prosecution of the suit at law in the court below (since the judgment in the New York court) is in bad faith, vexatious, and an abuse of the court's process, and that a multiplicity of vexatious and unconscionable suits. is threatened against each and all of the parties defendant in the New

¹ The alleged cause of action assigned to appellee ran against eleven corporations and individuals besides appellant. The New York suit was in form against all these parties except appellant. Among the defendants were included certain individuals alleged to be owners, officers, directors, or representatives of the parties, as well as of appellant. Not all seem to have been served with process.

York suit, who are asserted to have an interest as stockholders and otherwise in appellant, which is alleged to be herein acting in their behalf as well as its own. On appellee's motion Judge Westenhaver dismissed the bill, upon grounds which may be summarized as two: First, that the defenses that the contract of assignment from the Lake Shore Company to appellee is champertous and speculative, that the claim for damages under the Anti-Trust Act is not assignable, and that the proceedings and judgment in the New York suit have worked the claimed estoppel and adjudication, are each and all available as defenses to the suit at law pending below; second, that the asserted speculative and unprofessional nature of appellee's conduct in obtaining the assignment and prosecuting action thereon, and the alleged abuse thereby of the process of the court, furnish no ground for enjoining the prosecution of the action at law.

From this latter decree of dismissal this appeal is taken. We think the District Court clearly right in dismissing the bill as against the

grounds of jurisdiction specifically relied upon below.

[1] 1. Assuming, but without so deciding, that appellee's suit at law against appellant is champertous, we yet have no doubt that such defense is as available in that action at law as in this suit in equity. The bill for discovery passed upon in General Film Co. v. Sampliner, supra, 232 Fed. 95, 146 C. C. A. 287, was framed upon the express theory that the defense of champerty was, or was desired to be, presented in the suit at law. Whether there actually pleaded or not is immaterial, in view of what was said by us in affirming the dismissal of that bill. The cases cited (page 99) amply sustain the admissibility of the defense at law.

[2] 2. If, in spite of cases like United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 146 C. C. A. 532 (C. C. A. 2), and Imperial Film Exchange v. General Film Co. (D. C.) 244 Fed. 985, a cause of action for treble damages under the Sherman Anti-Trust Act is not assignable, or even if otherwise assignable, yet if appellee's relations towards its assignor, and the consideration, circumstances, and purposes of his acquisition of its claim against appellant makes it nonassignable, it is equally clear that such defenses are as

available at law as in equity.

3. The asserted effect of the New York judgment as an adjudication in favor of appellant here rests, in part, at least, upon an alleged privity between appellant and the Motion Picture Patents Company, the defendant in the New York suit, resulting from the alleged fact that appellant was "organized and controlled by said Patents Company and said licensed manufacturers," who appeared in the New York action as parties defendant. Counsel say in brief that under these circumstances the right to plead the New York judgment as a defense to the Ohio action at law is doubtful. The bill in terms asserts that the New York judgment is not "a strict bar" to the suit at law below, but that

<sup>&</sup>lt;sup>2</sup> The bill in the New York suit includes in the term "licensed manufacturers" all those against whom the alleged cause of action ran except appellant and the Motion Picture Patents Company.

it constitutes an equitable bar, adjudication, and estoppel against "again

asserting" the issues involved in the New York action.

We are referred to no pertinent authorities which, to our minds, recognize any distinction in this regard between law and equity. The general principle that a question distinctly put in issue as a ground of recovery cannot be disputed in a subsequent suit between the same parties, or their privies—elaborately discussed in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355, and following—is equally applicable to suits at law and in equity. The fact that one against whom an adjudication is urged was not a party to, or that his privity does not appear of record in, the previous suit does not prevent the application of the doctrine of res judicata or es-

toppel.

In Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148, the principle of res judicata was applied in the case of two patent infringement suits, the defendant in one of which was a corporation which manufactured the alleged infringing articles, the other a second corporation whose shares were owned and whose conduct was controlled by the first corporation. In Penfield v. Potts, 126 Fed. 475, 61 C. C. A. 371, this court applied the same principle against defendants in a number of separate suits for infringement of the same patent who, with plaintiff's knowledge, had joined in and contributed to the defense in each suit. In Greenwich Ins. Co. v. Friedman, which was a suit at law, this court applied the doctrine of Penfield v. Potts to the case of insurance companies which had united in making a common defense to actions upon the policies brought severally against them (142 Fed. 944, 74 C. C. A. 114), certiorari denied by the Supreme Court (200 U. S. 621, 26 Sup. Ct. 758, 50 L. Ed. 624).

In Galion Iron Co. v. Ohio, etc., Culvert Co., 244 Fed. 427, 157 C. C. A. 53, an Ohio case in which a bill in equity was filed by a defendant in five actions at law by different licensees for infringement of the same patent, praying that all be stayed except one to be selected and tried as a test case, this court, in affirming the decree dismissing the

bill, said (244 Fed. 428, 157 C. C. A. 53):

"If it be true that all the licensees had a common interest in all the cases, in that each suit is in fact prosecuted for the benefit of all—as is now claimed—this fact can be developed without difficulty as other facts are proved in cases at law, and a judgment in one case would become an adjudication in the others."

- [3, 4] We see no reason why the principle of these cases is not equally applicable to the instant case, provided privity between appellee here and the defendants in the New York suit shall be established. Appellee disputes such legal or equitable privity. Without intimating an opinion upon this question, we content ourselves with holding that the effect upon appellee of the New York judgment, whatever it may be, is as available in the defense of the pending suit at law as in the instant suit in equity.
- [5] 4. Unless the judgment in the New York suit clearly and conclusively constitutes an adjudication or works an estoppel against appellee, the charge that the further prosecution of his pending suit at law

(begun in advance of the New York action) is in bad faith, vexatious, and an abuse of the court's process, is without merit so apparent as to justify a restraining of that suit. The same is true as respects the avoidance of a multiplicity of suits. So far as appears, no obstacle exists to an early trial of the pending suit at law in the court below, if desired by appellant. The judgment of the District Court in the New York suit is not final, and when the bill in this cause was filed the statutory time for seeking its review had not expired. We have no reason to think it is not in process of review. Our understanding is otherwise. We express no opinion as to the correctness of the New

York judgment.

[6, 7] 5. It is, however, contended in this court—and this seems to be appellant's most prominently urged ground of relief—that its only adequate and complete remedy is a cancellation of the assignment from the Lake Shore Company to appellee. It is the undoubted general rule that a court of equity has jurisdiction to cancel an instrument which is clearly illegal, but which on its face is valid, and so is capable of a wrongful and vexatious use, and that it will exercise such jurisdiction when necessary to afford complete protection to parties otherwise liable to injury, actual or threatened, from the fact that it is outstanding. Such jurisdiction has been frequently exercised in canceling deeds or other evidences of title to real estate, recorded or susceptible of record, which, until canceled, constitute a cloud on title (as in Ingersoll v. Crocker [C. C. A. 6] 228 Fed. 844, 852, 143 C. C. A. 242); deeds which are prima facie evidence of the regularity of proceedings connected with tax assessments and sales (as in Rich v. Braxton, 158 U. S. 375, 407, 15 Sup. Ct. 1006, 39 L. Ed. 1022); or negotiable bills and notes. or a guaranty upon negotiable bonds, fair on their face, which might otherwise pass into the hands of bona fide purchasers (see Insurance Co. v. Bailey, 13 Wall. 616, 622, 20 L. Ed. 501; L. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081). Yet, whatever may be the rule in certain state jurisdictions, it is well established in the courts of the United States that where a party, assuming his theory of the controversy to be correct, has a good defense at law to a "purely legal demand," he must be left to that means of defense, unless he is prepared to allege and prove special circumstances showing that he may suffer irreparable injury if he is denied a preventive remedy. Insurance Co. v. Bailey, supra, 13 Wall. 623, 20 L. Ed. 501; Cable v. Insurance Co., 191 U. S. 288, 305, 306, 24 Sup. Ct. 74, 48 L. Ed. 188, in each of which cases the right of an insurance company to maintain bill in equity for cancellation of an insurance policy claimed to have been fraudulently procured was denied.

So far as appellant's rights on its own account are concerned it clearly will be protected by a judgment in its favor in the pending action at law in the court below. The case as to these rights is ruled by Insurance Co. v. Bailey and Cable v. Insurance Co., supra. Appellant urges, however, that so long as the assignment from the Lake Shore Company to appellee of the former's right of action against appellant and its associates is outstanding, it will constitute a well-founded source of anticipated danger to all of appellant's associates in the as-

serted violation of appellee's rights, whose direct relations to appellant have already been stated. Counsel frankly state that:

"A careful examination of the authorities has failed to disclose any case similar in its facts to the case at bar, and to that extent this application is novel."

[8] We agree with counsel to this extent, but we do not agree that the right invoked is supported by recognized equitable principles. It is to be noted that throughout this contention appellant, in various forms of expression, lays undue stress upon the proposition that appellee has had his day in court, and that his rights have been conclusively adjudicated against him—a proposition as to which we need add nothing to what has already been said. It is the general rule that, in order to make the fear of multiplicity of suits a ground for interposition of a court of equity, more than one suit must have been commenced (or at least about to be begun), and the court should not interfere unless it is clearly necessary to protect from continued and vexatious litigation. Boise Water Co. v. Boise City, 213 U. S. 276, 285–287, 29 Sup. Ct. 426, 53 L. Ed. 796.

It is enough to say that, in the present juncture, the rights of appellant's associates, and the danger that such rights will be wrongfully invaded, do not appear such as to demand for their protection the cancellation of the assignment in question. We think it will be time enough to consider their rights when, if ever, the New York judgment becomes a final adjudication against appellant, and when, if ever, that judgment shall be held, in the pending suit at law in the court below, to be an adjudication against appellee's rights asserted therein, or when, if ever, new circumstances may arise requiring the cancellation of the assignment for the protection of innocent parties.

The decree of the District Court is accordingly affirmed with costs, but without prejudice to the future filing of new bill in equity in case it shall be justified by the contingencies just referred to.

# MALVIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 24, 1918.)

#### No. 194.

1. Criminal Law \$\infty\$1159(1)—Review—Evidence—Sentence.

The evidence, being for the jury and they having believed it, will not be reviewed in detail; and the sentence imposed by trial court must be carried into effect, unless some errors of law have been committed.

In view of Bankruptcy Act July 1, 1898, § 70 (Comp. St. 1916, § 9654), where partner appropriated firm assets with concurrence of copartners, the assets so withdrawn, upon his bankruptcy individually and as member of the firm, was "property belonging to his estate in bankruptcy,"

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within section 29b (section 9613), making concealment of such property from trustee a crime.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Property Belonging to Estate in Bankruptcy.]

Conspiracy \$\infty 28\$—Violation of Bankruptcy Act—Concealment of Assets.

Where bankruptcy of partnership was inevitable, a plan agreed upon by the partners and their attorney, pursuant to which proceeds of customer's checks were converted by a partner, and upon his bankruptcy individually and as a member of the firm were withheld from trustee, was a conspiracy to commit offense against United States, under Criminal Code, § 37 (Comp. St. 1916, § 10201); the concealment of check proceeds from trustee being in violation of Bankruptcy Act July 1, 1898, § 29b (Comp. St. 1916, § 9613).

 Indictment and Information \$\iff 73(1)\$—Repugnancy—Concealment of Assets in Bankruptcy.

In indictment for conspiracy to conceal assets from trustee in bank-ruptcy, averments that the property which was to belong to bankrupt estate consisted of proceeds of sale of firm merchandise, and that property to be concealed belonged to partners individually and as members of firm, held not repugnant, when considered with other averments.

5. Conspiracy \$\infty\$ 43(6)—Concealment of Assets—Indictment.

Indictment for conspiracy to conceal assets from trustee in bankruptcy held not subject to motion to quash.

In Error to the District Court of the United States for the Southern District of New York.

Louis Malvin and others were convicted of conspiracy to violate the provisions of Bankruptcy Act July 1, 1898, relating to the concealment of assets by bankrupts, and they bring error. Affirmed.

Walter C. Noyes, of New York City, for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (James W. Osborne, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. The defendants have been convicted of the crime of conspiring to violate the provisions of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, relating to the concealment of assets by bankrupts. The act (section 29b [Comp. St. 1916, § 9613]), provides that:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy."

And the United States Criminal Code (Act March 4, 1909, c. 321, § 37, 35 Stat. 1096 [Comp. St. 1916, § 10201]) provides that:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

The jury returned a verdict of guilty against each of the defendants, Kuntz and Louis and Samuel Malvin. One Isaias A. Lehman, who was jointly indicted with the others was acquitted by the jury.

The defendant Henry Kuntz had been the attorney for the bankrupts in their bankruptcy proceedings, and the charge is that he had instigated the bankruptcy with a view of personal profit, and had aided the bankrupts to conceal assets from the trustee. At the time of the trial Kuntz testified that he was a member of the New York bar, having been admitted in 1898, and that he had from that time continuously practiced in New York City, and that his practice had been very extensive; his specialty being the trying of jury cases. The court sentenced him to imprisonment in the federal penitentiary at Atlanta, Ga., for a term of two years, and to pay a fine of \$5,000. In imposing sentence the court said in part:

"I believe that the defendant Henry Kuntz is guilty of this crime charged beyond any doubt. I think the verdict of the jury is a wholesome one and thoroughly right. I think that most of the testimony which he gave in his own behalf was untrue. I am also thoroughly satisfied that he did not advise his clients honestly—that he did not exercise good faith towards them in the matters in which he was employed by them."

Louis Malvin was the executive head of the firm, and it is said that in fact he was the partnership. He was sentenced to imprisonment at Atlanta for a term of two years. In imposing sentence upon him the court stated that he believed the verdict as to him was thoroughly right. Samuel Malvin was a younger brother, whose relation to the partnership will be stated below. He was sentenced to imprisonment at the same place for a term of one year and one day. In imposing sentence upon him the court said that he believed the verdict as to him was thoroughly right, and that much of the testimony he gave on his own behalf was false. In imposing the sentences the court also stated that he did not take into account the false testimony which the defendants had given, as they were not before the court for giving

false testimony.

[1] The theory of the government is that the firm of Louis Malvin & Co. early in January, 1914, found that it was fast approaching insolvency, and consulted Kuntz, its attorney, in reference thereto. The conclusion was reached that bankruptcy was inevitable and a plan was agreed upon to cause a petition in bankruptcy to be filed at an early day, and that in the meantime Louis Malvin should convert the proceeds of as many checks as possible sent in to the firm by its customers in payment of its accounts receivable and withhold them from the creditors of the firm. It is claimed that as a result of this plan at least \$7,423.82 was fraudulently withheld from the estate. A socalled agreement was planned by Kuntz, which was falsely dated back as of December 20, 1913, which was signed by the members of the firm, and which purported to permit Samuel Malvin to withdraw from the partnership and transfer to himself accounts receivable in the sum of \$17,350, and that this was done for the purpose of enabling Louis Malvin to withhold such sum from the trustee in bankruptcy. It is also claimed that Kuntz then obtained one Archibald Palmer to file an involuntary petition in bankruptcy against Louis Malvin and Charles Malawista individually and as copartners, and that the petition was filed at the request of Kuntz. The evidence in detail we shall not review. It was for the jury and they have believed it, and unless some errors of law have been committed the sentences which the court has imposed must be carried into effect.

The indictment alleged that three persons, Louis Malvin, Samuel Malvin, and Charles Malawista, composed a partnership doing business under the firm name of Louis Malvin & Co. There are no allegations in the indictment that the said partnership was ever dissolved, or that the name Louis Malvin & Co. ever became applicable to any other partnership. The firm was engaged in the business of manufacturing wearing apparel from furs. The indictment, among other things, alleges:

"That on the 1st day of December, 1913, in the county of New York, Southern district of New York, and within the jurisdiction of this court, under the circumstances aforesaid, the said Louis Malvin and the said Samuel Malvin and said Henry Kuntz and one Isaias A. Lehnau, late of the Southern district of New York, then and there anticipated, contemplated, and planned that a petition in bankruptcy should thereafter be filed to have said Louis Malvin and the said Charles Malawista, individually and as members of the firm of Louis Malvin & Co., adjudicated bankrupts under the bankruptcy laws of the United States, and that thereafter, in the due course of said bankruptcy proceedings, the said Louis Malvin and the said Charles Malawista, individually and as members of the firm of Louis Malvin & Co., would be duly adjudicated bankrupts, and that thereafter in the due course of the said bankruptcy proceedings a trustee in bankruptcy of the estate of said Louis Malvin and the said Charles Malawista, individually and as members of the firm of Louis Malvin & Co., would be duly appointed."

The defendants attach importance to the fact that according to the averments of the indictment the defendants did not contemplate or plan that the entire firm of Louis Malvin & Co., described as composed of three persons, Louis Malvin, Samuel Malvin, and Charles Malawista, should be declared bankrupt, and that a trustee of the entire firm should be appointed, but that such proceedings should be had only with respect to two of such persons, Louis Malvin and Charles Malawista described as members of the firm.

It is said by the defense that property cannot be concealed in a criminal sense from a trustee who is not entitled to receive it, and that you cannot conceal partnership assets from any trustee in bankruptcy, except a trustee of the partnership as he alone is entitled to receive them; that the partnership is a distinct entity, separate in estate and obligations from each of the partners and from the individual estates and obligations of each partner; that the partnership property belongs to that entity, or to a trustee of that entity, as distinguished from the individuals or from a trustee of the individuals who compose it; that the concealment of partnership property does not constitute the concealment of individual assets; that the indictment in this case charged defendants with conspiring to conceal from the trustee in bankruptcy of two individual members of the firm of Louis Malvin & Co. accounts and property belonging to the entire partnership, and should have been dismissed upon the ground that to consti-

tute a crime the property sought to be concealed must belong to the trustee of the bankrupts.

We may concede that the crime of conspiracy to conceal assets cannot be committed, unless the assets to be concealed are such as the trustee of the bankrupt is entitled to receive. The indictment upon which the defendants have been convicted charges them with having conspired to conceal a large number of outstanding accounts which belonged to the partnership of Louis Malvin & Co., and it also charges that that partnership was composed of Louis Malvin, Charles Malawista, and Samuel Malvin; but it appears that Samuel Malvin was not adjudged a bankrupt, that the partnership was not adjudged a bankrupt, and that no proceedings were instituted to have either adjudged a bankrupt, and the accounts which the defendants are charged with having conspired to conceal are accounts which are alleged to have been transferred by the firm of Louis Malvin & Co. to Samuel Malvin, and moneys represented by the check of the firm of Louis Malvin & Co. to the defendant Lehman, who has been acquitted, as already stated. So that one question is whether the accounts and the money so transferred constituted assets which would belong to the trustee of Louis Malvin and Charles Malawista "adjudged bankrupts individually and as members of the firm of Louis Malvin & Co. We think this question must be answered in the affirmative.

[2] If a member of a partnership, with the knowledge and consent of his associates in the firm, withdraws assets belonging to it, intending to make the assets so withdrawn a part of his individual estate. the assets so withdrawn become so far a part of that individual's estate that upon his bankruptcy the trustee appointed to administer the estate would be entitled to take possession of such property and the proceeds thereof as property belonging to his estate in bankruptcy. In a jurisdiction in which firm creditors have no lien, except through the equities of the partners, the trustee under the circumstances stated would take free from liens; and in a jurisdiction in which firm creditors have a lien not dependent upon the equities of the partners the trustee would take subject to the lien, but in any event the trustee would be entitled to take. The testimony shows that Louis Malvin withdrew from the partnership various customers' checks which passed through the hands of defendant Kuntz who turned over the proceeds to Louis Malvin, and that the latter did not turn them in to the partnership nor turn them over to his trustee in bankruptcy; and the claim of the government is that this action of Louis Malvin's in thus appropriating these assets was with the concurrence of his copartners and in furtherance of the conspiracy to conceal. In withdrawing the assets thus appropriated Louis Malvin made them a part of his individual estate, and it follows that in witholding them from his trustee in bankruptcy he withheld assets belonging to his estate in bankruptcy. The court cannot see how it can be seriously contended that a conspiracy on the part of the defendants that Louis Malvin should withdraw this property from the firm and appropriate it to his own use thereby making it a part of his individual estate, and that he should then conceal it from his trustee, does not amount

to a concealment of property within the provision of section 29b of the Bankruptcy Act, or that a conspiracy that Louis Malvin should conceal such property is not to be regarded as a violation of section 37 of the United States Criminal Code heretofore quoted.

The concealment which section 29b punishes is by the language of the provision a concealment from the trustee of "any of the property belonging to his estate in bankruptcy," and section 70 of the Bankruptcy Act declares that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt (subject to an exception not necessary now to notice) "to all property which prior to the filing of the petition against him he could by any means have transferred or which might be levied upon and sold under judicial process against him." The theory of the prosecution is that the word "property belonging to his estate in bankruptcy" includes any and all property in the bankrupt's possession which he could by any means have transferred, without respect to the fact that the bankrupt's title may be defeasible. The defense certainly cannot claim and does not claim that the statute refers to such property only as the trustee has an absolute and indefeasible title to, or that it does not include property which the bankrupt has taken into his possession as his own. That of course cannot be the law, and because it is not the law it cannot be successfully maintained that the moneys of the firm which in accordance with the understanding of the conspirators found their way into the individual estate of Louis Malvin, never being entered on the books of the partnership, were not assets to which Louis Malvin's trustee was entitled. It does not matter whether or not in the end he could retain them in his possession in case Samuel Malvin could claim the right to liquidate the firm's business and the trustee of the partnership should seek to recover these moneys from the trustee of Louis.

[3] Counsel for defendants assert that a charge to conceal assets belonging to A. from the trustee in bankruptcy of B. states no offense. That may be conceded, but that is not what the indictment charges. The language of the indictment is that the defendants—

"under the circumstances aforesaid, and anticipating, contemplating, and planning as aforesaid, willfully, knowingly, and unlawfully conspire to commit an offense against the United States; that is to say: That the said Louis Malvin and the said Samuel Malvin and the said Henry Kuntz and the said Isaias A. Lehman did willfully, knowingly, and unlawfully conspire and corruptly and fraudulently agree among themselves that they would knowingly and fraudulently, while the said Louis Malvin and the said Charles Malawista should be bankrupts, as aforesaid, conceal from the trustee of the assets and effects of the estate in bankruptcy of the said Louis Malvin and the safd Charles Malawista, individually and as members of the firm of Louis Malvin & Co., certain properties which would, in the due course of the administration of the said estate in bankruptcy, belong to the said estate in bankruptcy, to wit, a large amount of moneys realized from the sale of merchandise belonging to the said firm of Louis Malvin & Co., amounting to not less than \$2,000, the exact amount being to the grand jurors unknown, and other property, consisting of raw, dressed, and manufactured furs and skins, the kind, amount, and particular description of which are now to the grand jurors unknown.'

We also agree that it is essential that the acts which the defendants conspired to commit would, if committed, have constituted a crime; and there is no doubt that the acts the defendants conspired to commit, and which in the opinion of the jury they did commit, constituted a crime. When Louis Malvin, with the knowledge and consent of his partners, appropriated to himself and made a part of his estate certain assets of the partnership which were concealed from his trustee, he concealed assets which had become rightly or wrongly assets of his estate; and it is evident that the charge was not that defendants had conspired to conceal assets belonging to A. from the trustee in bankruptcy of B. A., being a party to the conspiracy and consenting to what was done, had no right thereafter to the assets which he had relinquished to B., whatever the right of his creditors may or may not have been.

The court thinks that no error was committed at the trial in refusing to quash the indictment. The averment of the indictment is, as has already been indicated, that the defendants should conceal from the trustee "certain property which would in due course of the administration of the estate in bankruptcy, to wit, a large amount of moneys realized from the sale of merchandise belonging to the firm of Louis Malvin & Company." The averment is in the language of the statute. The property to be concealed is property which would belong to the said estate in bankruptcy. It does not describe the manner in which the property to be concealed would become the property of the estate in bankruptcy and no such averment is necessary. The words "belonging to the estate in bankruptcy" have a definite signification, and there is no doubt as to their meaning. United States v. Comstock (C. C.) 161 Fed. 644.

14.51 But the indictment averred that the property which was to belong to the said estate in bankruptcy consisted of a large amount of moneys realized from a sale of merchandise "belonging to the firm of Louis Malvin & Co.," and it is said that this averment is inconsistent with the averment that the property to be concealed was property belonging to the estate in bankruptcy of Louis Malvin and Charles Malawista individually and as members of the firm of Louis Malvin & Co. It does not, however, follow that moneys realized from the sale of merchandise belonging to a particular person necessa<del>xi</del>ly belong to that person; and there is no averment that the moneys to be concealed belonged at the time of concealment to Louis Malvin & Co. We therefore do not think that the two averments are necessarily repugnant, or that they tended to the prejudice of the defendants when considered with the other averments of the indictment. There are cases, no doubt, in which indictments have been quashed for defects of no greater importance, and even of less importance. But, as Judge Lacombe said in Bromberger v. United States, 128 Fed. 346, 63 C. C. A. 76, courts have gone to the extremest verge of casuistry in finding technicalities to reverse criminal convictions. And in the same connection mention may once more be made of the often quoted remark of Lord Hale's:

"More offenders escape by the over-easy ear given exception in indictments than by their own innocence, and many heinous and crying offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, to the encouragement of villainy and to the dishonor of God." 2 Hale, P. C. 193.

There are 97 assignments of error in this case. Most of them were apparently abandoned upon the argument of the cause. We find it unnecessary in this opinion to refer specifically to any one of them not already noticed. We are unable to see that any prejudicial error occurred, and the majority of the court is convinced that the judgment of conviction should be affirmed.

# GRASELLI CHEMICAL CO. v. ÆTNA EXPLOSIVES CO., Inc. Appeal of FAY et al.

(Circuit Court of Appeals, Second Circuit. May 24, 1918.) No. 253.

1. Corporations 559(1)—Receivers—Appointment—Effect.

An order appointing receivers places a corporation in the custody and control of the court, and the court, in addition to restraining the corporation and its officers from exercising any privileges or franchises, may restrain the stockholders from meeting and electing new directors, when such action is for the best interests of all concerned.

2. Equity \$\sim 55\to Jurisdiction-Scope.

A court of equity's modes of relief are not fixed and rigid, and, having jurisdiction in the whole domain of conscience, limited only by legislative enactment it can mold its remedies to meet conditions with which it has to deal.

3. Corporations \$₹\$560(2)—Receivers—Duties.

A receiver of a corporation is appointed on behalf of all parties interested, and he represents the stockholders, as well as the creditors.

4. Corporations 574—Reorganization Plans—Fairness.

Where receivership for a corporation in difficulties resulted in increased profits, so that indebtedness could be paid and dividends paid on preferred stock, *held*, that proposed reorganization plan which would enable preferred stockholders, not entitled to vote except when dividends were in arrears to take advantage of the temporary condition and control the corporation was unfair, so it was proper for the court to stay action at a proposed stockholders' meeting.

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York,

Bill by the Graselli Chemical Company against the Ætna Explosives Company, Incorporated, on which a receiver was appointed. From an order staying any action at a stockholders' meeting, except adjournment, Addison G. Fay and another appeal. Affirmed.

The complainant, a general creditor of the defendant, filed a bill in equity on April 19, 1917, praying for the appointment of receivers of the defendant. The bill alleged: That the defendant was furnishing large quantities of explosives to the Allied Powers in the prosecution of the war. That interrup-

tion of this business would be injurious to the defendant and its creditors, as well as to the success of the United States and the Allied Powers in the Certain extravagant and obnoxious contracts were assumed by the defendant, through its officers, for the payment of millions of dollars as commission to one Bassick for services alleged to have been performed by him in effecting the making of certain contracts between the defendant and the French government. Further, that there are outstanding bonds of the defendant amounting to \$2,188,050 under a trust mortgage, and that the defendfendant had a large indebtedness for merchandise. It was alleged that the defendant's property, at a fair valuation, is more than sufficient to pay all its debts; that, because of these large claims, its credit has been impaired, and it was unable to obtain money with which to meet its obligations as they matured in the ordinary course, or to conduct its business in an efficient manner; and that an attempt by the complainant to enforce at law its claims as a general creditor would precipitate some action on the part of other creditors, and that this in turn would lead to wasteful strife and controversy, which could be avoided by a receivership. All this was admitted by the answer of the defendant. Thereupon the District Judge appointed Hon. George C. Holt, a former judge of the District Court, and Hon. Benjamin B. Odell, a former Governor of New York state, receivers. This order provided that the receivers have complete and exclusive control, possession, and custody of all the assets and property of the defendant, and directed those in possession or in charge of the property of the defendant to turn over the same to the receivers, who were authorized to continue in business with full authority for its management and operation, and to employ necessary servants to carry on, manage, and conduct the business.

The receivers have so conducted the business that all parties to this controversy are enthusiastic about the success achieved. The report of the receivers, filed February 7, 1918, indicates that the Bassick claims have been settled and disposed of at a very materially reduced sum, and the receivers have contracts for approximately \$54,000,000 with the allied governments. The profits for the year ending December 31, 1917, have been so large that the surplus of assets over liabilities shown by the receivers' consolidated balance sheet of the defendant and its subsidiary companies on December 31, 1917, is \$538,647. The creditors, other than those represented by the bonded indebtedness, have been paid 50 per cent, of their claims, and it is now said that the receivers have approximately \$3,000,000. The excellent condition of the business conducted by the receivers indicates that in the near future the balance of all valid claims against the defendant will be paid; the bonded indebtedness may be paid, and the property returned to the stockholders free of debt, with unimpaired credit, and with ample working capital. The contracts with the Allied Powers are very profitable and fully warrant this claim. pending an unfinished litigation in which bondholders claim that the bonded indebtedness is now due because of the appointment of the receivership, although the interest has been paid on the bonds. Even though this should be resolved in favor of the bondholders, the receivers are now amply able to meet this obligation in full.

At the time of the appointment of the receivers, the capital stock of the defendant consisted of 55,000 shares, 7 per cent. preferred stock, par value \$100 per share, and 18,100,000 shares of common stock, of no par value. When first organized, the authorized capitalization was \$7,000,000 common stock and \$5,500,000 preferred stock; but in February, 1916, the certificate of incorporation was amended so as to provide that the common stock should consist of 18,100,000 shares, the preferred stock remaining the same. The preferred stock was not entitled to any vote, 'except upon the question of placing a mortgage upon the company's property; but, when the common stock was increased, it was provided that, in the event there should be default in the payment of the dividends of the preferred stock for a period of eight months or more, then each share of preferred stock was entitled to nine votes. The dividends on the preferred stock were paid with regularity until the appointment of the receivers. During the period of receivership, the dividends have not been paid, and more than eight months have elapsed and therefore the

right of the preferred stockholders to vote has accrued. The annual meeting fixed by the by-laws was to be held on Tuesday, March 19, 1918. For some days prior thereto, considerable activity among groups of the stockholders indicated a contest to be waged on that day for control of the company, by the election of a board of directors and the submission of a plan of readjustment. The District Judge, on the day of the meeting, granting an order to show cause, containing a stay, preventing any action at the meeting except the adjournment of the meeting until 30 days after the determination of the receivership, subject to modification by the court. On the same day, the order was modified, upon application, so as to adjourn the annual meeting until March 26, 1918, pending a hearing upon the motion brought on by the order to show cause. The District Court then granted the order appealed from, directing that there be no action of any kind by the board of directors, except by order of the District Court permitting the same after a hearing upon an application made to the court on 5 days' notice to counsel for the interests supporting the readjustment plan, and the order enjoined the stockholders from taking any action except to adjourn the meeting from month to month until a date not less than 30 days prior to the termination of the receivership and the discharge of the receivers of the defendant, when the election might take place and the new board of directors elected. Provision was made for modification of the order upon 5 days' notice.

Stockholders Fay and Howard, feeling aggrieved thereby, have appealed.

Royall Victor, Severo Mallet-Prevost, and William H. Button, all of New York City (George W. Wickersham, Edwin P. Grosvenor, and C. Westley Abbott, all of New York City, of counsel), for appellants.

Stanchfield & Levy, of New York City (John B. Stanchfield, William M. Parke, George W. Schurman, and Henry Wollman, all of New York City, of counsel), for appellees Price and Taylor.

Hughes, Rounds, Schurman & Dwight, of New York City (George W. Schurman, of New York City, of counsel), for appellees Erb and Rogers.

Wollman & Wollman, of New York City (Henry Wollman, of New

York City, of counsel), for appellees Lovell & Co.

Rosenberg & Ball, of New York City (James N. Rosenberg and Wilbur L. Ball, both of New York City, of counsel), for appellee committee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). The petition upon which the order appealed from was granted, after reciting that Prince & Company, the petitioners, are the owners of common stock, alleges that the receivership has been a successful one, and substantially the facts stated above, and, further, that the plan of readjustment hereinafter referred to is sought to be adopted by certain preferred stockholders exercising their claim of voting rights by reason of the default in the payment of dividends. Copy of the readjustment plan is made a part of the petition, and it is alleged that, if approved and adopted, it would be in violation of the rights of the common stockholders. It points out, further, that no new capital is to be paid in or provided for by the readjustment agency, and that, for the services of the so-called readjustment, they are to be paid \$750,000. The effect of this, it is said, will give the bondholders and preferred stockholders the privileges and rights to which they are not

entitled under the contractual obligations of the defendant, and will place in control a board of directors who would be unfavorable and unjust to the interests of the common stockholders, and who will assist in the adoption of the readjustment plan, with the result that great and irreparable injury will be done the petitioner and a great majority of the common stockholders. The appellants assert that the District Judge had no power to interfere with the stockholders of the defendant in the election of the directors at the annual meeting of the company, and it is said that the injunction granted by the District Court is entirely outside of the scope of the bill of complaint and of

the receivership thereunder.

[1] The order appointing the receivers placed the corporation in the custody and control of the court. It placed the receivers under the admonition, direction, and guidance of the court. The court possesses jurisdiction over the corporation, as well as over the property of the corporation, and it has complete power to deal with either, and it is essential that it should have, for it could not control the property without the power to control the corporation. The appointment of the receiver supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation, its books, its records, and assets. Indeed, it is often the custom for courts of equity, in an order appointing the receiver, to expressly restrain the corporation and its officers from exercising any of the privileges or franchises of the corporation until the further order of the court. The court's power to take from the directors their right to direct can also, while in control, restrain action by the stockholders, when it deems it for the best interests of all concerned to do so.

[2] A court of equity's modes of relief are not fixed and rigid. It can mold it remedies to meet the conditions with which it has to deal. The jurisdiction of equity is the whole domain of conscience, limited only by legislative enactment. The faculty of equity must be energetic, productive, and progressive. But to exercise this right of the court of equity there must be some show of an injustice attempted or about to be perpetrated upon the petitioners. Judge Ward, writing in Davidson v. American Blower Co., 243 Fed. 167, 156 C. C. A. 33, announced that the court of equity had the power in the proper case "to deprive stockholders holding a majority of the stock from voting it, and to turn over the control of a corporation to the minority stockholders." In Lehigh Coal & Navigation Co. v. Central R. R. Co., 35 N. J. Eq. 349, an insolvent corporation in the hands of the court, with its railroad operated by a receiver, refused to hold a meeting of the stockholders. A petition was addressed to the court to direct such a meeting, which the court denied in the following language:

"The affairs of the company had for many years been in the hands of this court. There had been no election of directors by the stockholders since the insolvency was declared. The existing board disputed the power of the stockholders to hold the election. The proceeding was under a provision of the law, the applicability of which to an insolvent company, whose affairs were under the management of the court, was denied. It was quite evident that

the election, if held under the circumstances, would be subject to imputations of surprise and unfairness, and to questions as to its validity, which would lead to litigation or induce this court to refuse to recognize it as a just and proper expression of the choice of the stockholders. Hence it was not permitted to take place."

[3] A mistaken notion seems to exist with the appellants that the receivers are appointed for the sole benefit of creditors and are not interested in the benefits to accrue to all other parties interested, such as stockholders. In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155, the court said that a receiver—

"is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

In Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 137 C. C. A. 113, Sanborn, J., said:

"The property of an insolvent railroad corporation in the custody of a court in a suit to foreclose a mortgage upon it is charged with a trust for the benefit, first, of the holders of preferential claims superior in equity to the lien of the mortgage; second, of the holders of the lien of the mortgage and of other such liens in their order of priority; third, of the unsecured or general creditors of the mortgagor; and, fourth, of its stockholders."

In Hayes v. Pierson, 65 N. J. Eq. 353, 45 Atl. 1091, 58 Atl. 728, Vice Chancellor Stevens said:

"The receiver is, it is true, the representative of the creditors, but he is also the representative of the corporation and of its stockholders."

The possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately judge to be entitled to it. Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815. The District Judge stated that he did not pass upon the merits or demerits of the readjustment plan. He said in effect that the election at the present time would not be in the interest of the success and welfare of the receivership or of the corporation and the stockholders, but that it should be adjourned and held at a later date well in advance of the time when the receivership was about to come to an end, subject to the right of modifications reserved.

In this court, the appellees, large common stockholders, have attacked the merits of the readjustment plan, and, we believe, with just cause. In the absence of power created by legislation in this country, the federal judges, sitting in courts of equity, have endeavored to secure to the rights of those interested, including the stockholders at the time of readjustment of large corporations a protection to meet the needs of the occasion. Changing times, with change in economic needs, require the courts of equity to mold remedies to meet the conditions with which they have to deal. In railroad foreclosure suits, where plans of reorganization were proposed, the federal courts have exercised the right of approval or disapproval. Fearon v. Bankers' Trust Co., 238 Fed. 83, 151 C. C. A. 159; Guaranty Trust

Co. v. Missouri Pacific Ry. Co. (D.C.) 238 Fed. 812. In the latter case, Judge Hook said:

"It has sometimes been claimed that plans of reorganization formulated by bondholders and stockholders of a railroad in the hands of receivers are exclusively of private concern, free from judicial action or interference. But for various reasons the view cannot be sustained in principle. After all that can be said from the standpoint of theory and strict right, the fact remains that many railroad receiverships, and the one here is typical of them, are the instruments for consummating plans of reorganization, and courts have come to realize that such use of their jurisdiction and processes entails a correlative duty to those affected by the result. \* \* \* The relation between the receivership \* \* \* and the plan of reorganization agreed upon is close and intimate. So far as properly can be, the judicial proceeding is conducted in harmony with the plan, and the success of the agreed readjustment is promoted by the orders of the court and the acts of its receivers. Generally the judicial course would not be different if the court were carrying out a plan of reorganization of its own making or one affirmatively adopted by judicial order or decree. \* \* \* while it is the settled doctrine that reorganizations will be encouraged, yet, on the other hand, a court of equity will not lend its aid to one that is inequitable or oppressive. \* \* The conclusion is manifest that the general duty of a court in a railroad foreclosure suit to take cognizance of a plan of reorganization by the bondholders and stockholders which is to be aided by its decree, and to protect the equitable rights of all, becomes specific and imperative upon the complaint of an interested party."

So long as the suit continues, the corporation and the res are in the possession of the District Court; the court having the power as an incident thereto, and as ancillary to its proceedings, to determine when and under what circumstances an election may be held which will determine what persons will receive the property from the corporation and control the property upon the discharge of the receivers.

[4] Was there justification therefor under the circumstances disclosed here? It is claimed that at the meeting a board of directors was to be elected, which would permit the control of the corporation to pass into the hands of the preferred stockholders. It is said that they represent the same group of men who so mismanaged the property as to result in a receivership. At this time there appears to be no requirement for new capital, nor is any offered by the plan of readjustment. The property is being successfully managed by the receivers; it has very profitable contracts, and is, or will very shortly, be able to pay all its indebtedness, including the bonded indebtedness. if need be. It can pay the arrears of dividends on the preferred stock, and may retire the preferred stock. If the dividends are paid, the right of the preferred stock to vote on the basis of nine for one is eliminated, and, when a meeting is held, the business policy of the corporation can be determined by the will of the majority of common stockholders. Therefore, the right of the preferred stockholders to vote being but temporary, with every prospect of the common stock-holders regaining control of the corporation, the court should not lend its aid nor permit a group of preferred stockholders electing a board of directors who would permit this plan of readjustment to be adopted. Although it is not admitted by the appellants that it is the intention to vote upon the readjustment plan at this meeting, the fact is evident that such is the plain intention.

On their face, the bonds do not mature until 1945. The plan of readjustment provides for their payment at an earlier period. bonds are largely held by the owners of the preferred stock, both of which securities were obtained as part of the purchase price for plants which were sold to or consolidated with the defendant corporation at the time of the consolidation. The plan further creates a retirement provision for the preferred stock, which is not only a deprivation of the common stockholders' rights, but it would seem is injurious to the preferred stockholders as well. It creates a voting trust of the common stock, and therefore deprives the common stockholders of control of their company. It leaves the future of the corporation to a new company, and, without apparent limitation, places it in the hands of readjustment managers, with unrestricted power given to issue and dispose of new securities, and grants them an allowance of \$750,000 for their services. The entire plan means a large and unnecessary expense, and reduces the cash assets of the company, which might again result in another period of financial embarrassment. In our opinion, the complaint of the common stockholders is fully justified. The court below, in the exercise of its obligation to the common stockholders and all others interested, might well, in its equitable protection, have inquired into the merits of the plan of readjustment, and have granted the order appealed from upon its disapproval of the same. The course pursued by the court below was well within its power. The original intention of the corporation and the stockholders, as evidenced by its charter, giving no right to vote to the preferred stockholders, except as above indicated, indicates the right of the common stockholders to exercise control and management of the corporation.

From the above indications, when the deferred dividends are paid out of the surplus profits, which are very rapidly accumulating, the property of the corporation and the control thereof will pass to the common stockholders, where it was when the court took possession of the property, and with this course no injustice will be visited upon any of the interested parties.

Order affirmed.

ROGERS, Circuit Judge (concurring). I concur in the result reached, but do not find it necessary to consider the reorganization plan. The sole question is whether a court which has taken over the management of the affairs of a corporation, having appointed receivers who are administering its business, has the right, while still in control, to prevent by injunction a meeting of the stockholders. I am satisfied that it possesses that power, and that its jurisdiction extends, not only over the property of the corporation, but over the corporation itself, so that during the time its possession continues it has authority to restrain the action of both directors and stockholders. Its right to restrain the action of the directors seems to be unchallenged. But why it should be supposed that stockholders, either preferred or common, cannot be restrained, while directors may be, I am unable to comprehend. It is the duty of a court managing, for the time being, through its receivers, the affairs of a corporation, to protect, so far as it can

while in possession, the rights of all parties in interest, both creditors and stockholders common and preferred. As neither directors nor stockholders have any right to take effective action which will embarrass the court in its management of the property so long as the receivership continues, or which will, when the receivership ends, prevent the court from restoring the property to the hands of those from whom it received it, I think Judge Mayer was quite within his discretion in the action which he took.

At the time he assumed control of the corporation the preferred stockholders did not possess the right to vote, under the terms of their contract with the corporation. Whatever right to vote they now possess has vested in them during the period of the receivership. court has the right to pay all the liabilities of the corporation including the liabilities to the preferred stockholders. The fast accumulating surplus in the hands of the receivers indicates that the court will soon be able to terminate the receivership and restore the property to the common stockholders, who will be entitled to the management of its affairs when the unpaid and cumulative dividends due to the preferred stockholders are paid. The preferred stockholders, with a thorough knowledge of that probability, therefore desire, before the liabilities are paid and their right to vote is by the terms of their contract gone, to hold a stockholders' meeting at which they may cast nine votes for each share of stock they hold, and thus put through a plan of reorganization, the merits of which are not involved, but which will alter in a very substantial manner the relations of these two classes of stockholders. It seems to me impossible to hold that any body of stockholders has an absolute right to a stockholders' meeting while a court is in control of the corporation. If there is no such absolute right, then it must be within the court's discretion to say whether it will allow and when a meeting to be held; and in this case I discover, as I have stated, no abuse of that discretion.

It is doubtful whether, in the whole history of receiverships, either in the Southern district of New York or in any other district in the United States, there can be found another receivership which has been conducted with such phenomenal success as has attended the receivership over the defendant corporation. This success is due in part to the business acumen of the receivers, Hon. George C. Holt and Hon. Benjamin B. Odell, and in part to the phenomenal conditions which now prevail in this country and in Europe. At the beginning of the receivership, April 20, 1917, the outstanding liabilities exceeded in amount \$4,608,475.58, and on December 31, 1917, they were \$1,448,-420.26, showing a reduction of \$3,160,055.32; and on February 7, 1918. the receivers reported a cash balance of \$1,369,170.33. The enormous profits being realized upon the contracts now being carried out by the receivers give every assurance that the preferred stockholders will soon be paid every dividend claim they have against the company. Indeed, in view of the prosperous conditions which now prevail in the affairs of the corporation, with earnings at the current rate understood to be from \$400,000 to \$700,000 a month, it is quite probable that the assets of the company will be so large that soon the outstanding preferred stock can be paid off, if it be thought wise to take such action.

It seems to me it would be a great injustice to permit the preferred stockholders to meet as proposed, and thus take advantage of a situation which is temporary to put through a revolutionary plan, which, whatever its merits or demerits would alter radically the relations of the parties. If the court had permitted the meeting to be held, it might be a serious question whether the court had not abused its discretion. The only fair and proper course was the one which was adopted, and which in the end will restore the corporation, with its debts paid, including those of the preferred stockholders, to the common stockholders, from whose control it was originally taken; and with that the result it cannot be successfully maintained that wrong has been done to any one.

WARD, Circuit Judge (dissenting). When a court is selling the whole property of a corporation under a decree of foreclosure, with a view to distributing the proceeds of sale among the parties entitled, it may properly look into the fairness of any plan of reorganization under which the property has been purchased or is proposed to be purchased. In other words, the court will affirm the sale if the terms of the reorganization agreement are fair, and will refuse to do so if they are not. Such decisions are relied on to support the order of the District Court. Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 137 C. C. A. 113; Fearon v. Trust Co., 238 Fed. 83, 151 C. C. A. 159; Guaranty Trust Co. v. Missouri & Pacific Railway Co. (D. C.) 238 Fed. 812.

The present case is entirely different. There is no intention, and never has been any intention, that the receivers shall sell the property and distribute the proceeds. On the contrary, from the beginning the corporation has been treated as solvent. Temporary receivers were appointed to protect it by continuing its business and paying its current liabilities, until suits upon certain unjust claims which had impaired its credit and threatened to destroy it should be defeated. The holding of the annual meeting for the election of directors will not in any way affect or interfere with this purpose. The title, possession, and control of the company's property in the hands of the receivers will continue, whatever may be the result of such an election. The District Court will manage the company's business, control its assets, and protect them from interference until the purpose of the receivership is accomplished and its property returned to the corporation.

Judge Mayer expressly stated in his order that he "refrained from passing upon the merits of the proposed readjustment plan." He seems to have assumed the present right of the preferred stockholders to vote nine votes for each share as provided in the charter, and to have been moved by the feeling that they should not exercise this right because it was likely that the receivers would soon be able to terminate it by paying up all arrears of dividends on the preferred stock. But the event has happened which gives the preferred stockholders this right, and they should not be deprived of it until it has been judicially determined that they are not entitled to exercise it. The receivers have no interest whatever in a dispute between two classes of stockholders as to their respective rights under the charter.

Nor can I see how the election of directors would affect the adoption of the readjustment plan in any way. It is not proposed to carry it out by a sale under a decree of foreclosure, no such decree being contemplated. It can only be accomplished by a dissolution of the corporation without judicial proceedings under sections 9 and 10 of article 2 of the Stock Corporation Law (Consol. Laws, c. 59), which require that a majority of the whole board of directors shall first adopt a resolution that a dissolution is advisable, and shall then call a meeting of the stockholders to consider the subject, not less than 30 nor more than 60 days after the resolution; notice to be given by advertisement or by mail or personal service on each stockholder. If twothirds in amount of the outstanding stock consent, the corporation shall file the consent in the office of the secretary of state. Then the corporate assets shall be sold to pay its debts, and with the consent of two-thirds in amount of the stockholders any remaining assets may be transferred to a new corporation; but the sale shall not be valid against any objecting stockholder who is not paid the value of his stock as appraised under an order of the Supreme Court of the state of New York. It is not suggested that these steps were proposed to be taken, or could be taken, at the annual meeting to elect directors; and, if they could be and were to be taken in accordance with the law, then the readjustment plan would be legally adopted, and no court could disturb it as being unfair.

This court sustains the order of the District Court because it thinks that the proposed readjustment plan, which is capable of being legally adopted, is unfair. I think this is inconsistent with our decision in Davidson v. American Blower Co., 243 Fed. 167, 156 C. C. A. 33.

#### TAYLOR v. FRAM et al.

(Circuit Court of Appeals, Second Circuit. June 7, 1918.)

No. 142.

1. FACTORS @== 18-TITLE TO GOODS-"SALE."

Ordinarily, where a person receives property which he is not bound to return in the identical form, but may account therefor in money or other property, the transaction amounts to a "sale"; but this rule is not applicable to consignments to sell, where the owner of a chattel denitiver it to an agent to sell, in which case the title remains in the principal or bailor, though possession is transferred to the agent or bailee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

- 2. Bankruptcy \$\insigmathrightarrow 140(3)\$—Consignment for Sale—Advertising Relation. Though the bankrupt did not advertise himself as an agent, or in any way indicate that he was selling goods on consignment, that fact does not affect the rights of the owner, who consigned goods to the bankrupt for sale.
- 3. BANKRUPTCY === 140(3)—RIGHTS OF TRUSTEE—SALE OF GOODS ON CONSIGNMENT.

Though by written agreement of the parties goods were consigned to the bankrupt for sale, yet, where the parties treated the transaction as

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one of actual sale, and the bankrupt was not required to account for the proceeds as provided in the contract, *held*, that the consignors were liable for goods which they retook on the eve of bankruptcy, for the written agreement could not be invoked as against the trustee in bankruptcy.

Appeal from the District Court of the United States for the Eastern District of New York.
Suit by Louis M. Taylor, as trustee in bankruptcy of Charles Ep-

Suit by Louis M. Taylor, as trustee in bankruptcy of Charles Epstein, bankrupt, against Isidor Fram, and others. From a decree for plaintiff (243 Fed. 733), defendants appeal. Affirmed.

This suit is brought by the trustee of the bankrupt to have a certain agreement made between the bankrupt and defendants declared fraudulent and void as against creditors, and that defendants be adjudged to hold in trust certain merchandise delivered to them by the bankrupt, and that they be required to make delivery thereof to the trustee or pay him the value thereof. The defendants were copartners conducting a number of retail shoe stores in the borough of Brooklyn, New York City. They traded under the name of the Boston Shoe Market. They were accustomed to purchase stocks from persons who desired to retire from business, and they were continuously buying and selling shoe stores. They would buy a store and hold a special sale therein, and then close the store and remove the goods which remained to what they called their main store, which was in Brooklyn. They also purchased merchandise from various manufacturers and jobbers.

The bankrupt, Charles Epstein, is a brother of the defendant Epstein, and a brother-in-law of the defendants Snitzer and Fram. In December, 1914, Charles Epstein opened a retail shoe store in Brooklyn. In the beginning he purchased part of his stock from time to time from the defendants; defendants having limited him at the time to \$100 credit. In May, 1915, he owed defendants \$330.11, and they then refused to extend any further credit to him. Thereupon he asked them to consent to give him an agency and allow him to sell on their account. They consulted their attorneys, and inquired whether they could do so and secure themselves in that manner, without jeopardizing themselves or without giving the bankrupt any credit, as they were unwilling to extend any credit to him. An agreement was drawn by the attorneys, which in substance provided that, from and commencing with the date, all merchandise thereafter shipped to Charles Epstein was to be the property of the defendants; that the merchandise which he should sell should be sold as agent of the defendants only; that such merchandise was to be designated when shipped to the said Charles Epstein on memorandum statements, or bills; that Charles Epstein was not to sell any of the merchandise for less than the price stipulated on the statement, which sum he was to refund or pay over to the defendants on Monday of each and every week for all merchandise sold during the week; that he was to render an account or a statement whenever requested; that upon demand he was to return and deliver to defendants all the merchandise, delivered to him under the agreement, in his possession; that in no sense was the agreement to be so construed as to vest any interest in Charles Epstein as to the merchandise delivered to him, but that the title was at all times to remain in the defendants; that none of the provisions of said agreement were to be changed or altered unless it be expressed in writing; and that all future business relations between the defendants and Charles Epstein were to be governed exclusively by the provisions in the agreement.

This agreement, dated May 27, 1915, was signed by Charles Epstein as party of the first part and by the Boston Shoe Market, Isadore Snitzer, Isador Fram, Albert Epstein, parties of the second part, by Isadore Snitzer. It is this agreement which the trustee alleges to be part and parcel of a device to hinder, delay, and defraud creditors. He alleges that in fact and in truth no agency was created between the bankrupt and the defendants, but that the merchandise mentioned in the agreement was actually sold by defendants to the bankrupt, and that the latter was indebted to defendants

therefor. After this agreement was made the bankrupt was in the habit of going to defendants for shoes when needed. Bills were delivered with the merchandise, which did not indicate that the goods were on consignment. Under the agreement the invoices were to contain a memorandum of the price for the merchandise, and they were not to be sold at less than that price. This price was not the selling price, because that was fixed by the bankrupt, but was the cost price to the bankrupt. No stock record was ever kept by either the bankrupt or the defendants. The bankrupt, however, testified that he had a record, which showed the number of pairs of shoes that he received from the defendants, and that he had "a separate little book, fivecent copy book," in which he had an account of every pair that was sold. There was contradictory evidence as to whether defendants shipped their goods to the bankrupt, marked so that they should be distinguished from his own stock. The bankrupt testified before the commissioner that the goods were shipped to him unmarked, and that he always marked them B. S. M. (which stood for Boston Shoe Market). In the court below he testified that when he received the goods they came with B. S. M. on them and the cost mark, and that defendants put them on. When his attention was called to his contradictory statement before the commissioner, he said some came marked and some unmarked, and that he himself then but the marks on the corners of the boxes which were unmarked, and that he marked them in letters too small for anybody else to see. The defendants claimed they put the marks on by their bookkeeper, and that individual was not produced at

The bankrupt, instead of paying on the Monday of each week and every week as the agreement provided, kept the moneys realized from the sale of the property consigned and mingled them with his own funds, and only made remittances when requested to do so; and when remittances were made they were made on account, and they were all in even amounts, as \$25. \$25, or \$50. When payments were made by check no receipt was given, and at no time were the remittances accompanied by any list of the goods sold. The bankrupt dealt with and represented the goods as his own. The photographic copy of the defendants' ledger shows that the relation was regarded as that of debtor and creditor. On the day before the assignment for the benefit of creditors the bankrupt and the defendants had a meeting, at which the bankrupt's financial condition was discussed, and at which the defendants were informed that the bankrupt was insolvent. This condition was ascertained by an inventory taken six days prior to the assignment. At that time the bankrupt had goods worth \$1,600 or \$1,700. On the day prior to the assignment the goods were shipped back by the bankrupt, who himself packed the goods and hired the truck. A moving van load of goods was sent to defendants, including the cash register. The goods left in the bankrupt's store consisted of mismated and unpacked stock, which at cost was worth only \$543.21. The trustee claimed in the court below that the defendants received nærchandise to an amount in excess of \$1,000. The defendants failed to enter in their books the credit for the goods returned. The books were produced at the trial one year after the goods were returned and they contained no credit for the merchandise returned.

The District Judge has found that the agreement of May 27, 1915, was fraudulent and void as against the complainant and the creditors of the bankrupt, and was intended to hinder, delay, and defraud the creditors, and no agency was created between the bankrupt and defendants, and the legal title to the merchandise was vested in the bankrupt, and that the latter was on January 18, 1916, when he was adjudicated a bankrupt, indebted to defendants in the sum of \$429.73. He has accordingly decreed that the complainant recover that sum from defendants, with interest from January 18, 1916, besides the costs and disbursements of the action.

L. & M. Blumberg, of Brooklyn, N. Y. (Leopold Blumberg, of Brooklyn, N. Y., of counsel), for appellants.

Samuel J. Rawak, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which this appeal presents makes it necessary for this court to determine what the exact relationship was that existed between the bankrupt and the defendants at the time Charles Epstein was adjudicated a bankrupt. If Epstein was the agent of the defendants, he was a bailee of the goods of the defendants, and the latter had a right to receive them back from him, in the manner they did. In that event we should be obliged to hold that the court below committed reversible error. If, on the other hand, the real relationship was that of vendor and vendee, the bankrupt being in reality a vendee, and not a bailee of defendants, no error was committed, and the decree must be affirmed.

[1] The general rule, of course, is that where a person receives property which he is not bound to return in the identical form in which he receives it, but may account therefor in money or other property or thing of value, the transaction amounts to a sale, and not to a bailment. But this rule is not applicable to consignments for sale; the law being that the owner of a chattel may consign it or deliver it to an agent for sale without creating the relation of vendor and vendee between the parties. In re Smith (D. C.) 192 Fed. 574; 6 C. J. 1091. In a sale title passes to the buyer, while in an agency or bailment title remains in the principal or bailor, although possession is transferred to the agent or bailee.

[2, 3] The defendants insist that they were bailors, and not vendors, and they rely upon Ludvigh v. American Woolen Co. of New York, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345. That case holds that a contract under which goods are delivered by one party to another, to be sold by the latter and proceeds paid to the former, less an agreed discount, the unsold goods to be returned to the consignor, is a contract of bailment only, and the consignor can, in the absence of fraud, take them back in case of the consignee's bankruptcy. That case was an affirmance of the decision which this court made in the same case. 188 Fed. 30, 110 C. C. A. 180.

If the agreement into which the bankrupt and defendants in the case at bar entered on May 27, 1915, and upon which they rely, was made in good faith, and if the business was carried on in accordance with it, there is, of course, no doubt that this case would be governed by the rule announced in Ludvigh v. American Woolen Co., supra, and the decree entered below would have to be reversed. The agreement of May 27th seems to have been drawn skillfully and with the terms of the agreement in the Ludvigh v. American Woolen Co. Case in mind. It provides (1) that all merchandise delivered to the bankrupt shall, at all times, be the property of the defendant; (2) that he shall sell the merchandise at retail as their agent, and in that capacity only; (3) that the price for the merchandise shall be designated on certain signed statements and memorandum bills; (4) that the bankrupt shall not sell for less than the amount therein stipulated; (5) that any excess retained shall not be retained by the bankrupt for his services; (6) that the bankrupt shall account for all the moneys received by him weekly and pay over same to the defendants; (7) that the defendants

shall be at liberty at all times to demand the return of the merchandise on hand; (8) that nothing in said agreement shall be construed as vesting any title in the bankrupt; (9) that nothing in said agreement shall be changed or altered unless it be in writing; (10) that all business relations between the bankrupt and the defendants shall be governed absolutely and entirely by the provisions in said agreement contained.

There are numerous cases which may be cited to show that such an agreement creates a bailment, and not a sale, and that the bailor is at liberty at any time to retake his merchandise, irrespective of whether bankruptcy proceedings intervene or whether the debtor is solvent or not. All this we concede, and no citation of authorities is necessary. But the above doctrine only applies where the agreement is entered into in good faith, and without intent to hinder, delay, or defraud creditors. In the Ludvigh Case all the courts agreed that there was no actual fraud in the transaction. In the case at bar the District Judge was convinced that there was a lack of good faith in the making of the original contract. He also found that the business was not carried on in accordance with the agreement, and that the consignor had so acted upon the breach as to show, with respect to future consignments, that title passed in the transactions and that they were sales and not bailments.

The District Judge in his opinion attached importance to the fact that the bankrupt did not advertise himself as an agent, nor have any sign to show that he was selling goods on consignment. We know of no rule of law which makes it incumbent upon one who receives goods upon consignment to sell that he should advertise the fact of his agency to his customers; and we do not attach any importance to the nondisclosure by the bankrupt that he received the goods in his capacity as an agent. We nevertheless concur in the conclusion which the District Judge reached that the bankrupt held the title to these goods, and was indebted for the same to the defendants, that he had no right to return the goods to them, and that they must pay to the complainant their value as decreed.

If the bankrupt had given the defendants a mortgage upon the stock in his store, and had been permitted to sell the stock covered by it and to deposit the moneys received in his general account, and use them to meet his liabilities as if no mortgage existed, instead of paying them over to the mortgagee, we should be obliged to hold that the mortgage was fraudulent as against the trustee in bankruptcy. Southard v. Benner, 72 N. Y. 424, 429; Hangen v. Hachemeister, 114 N. Y. 566, 570, 571, 21 N. E. 1046, 5 L. R. A. 137, 11 Am. St. Rep. 691. If that be so as to a mortgage of record, and of which creditors have constructive notice, it should follow a fortiori that an agreement of which creditors have no constructive notice, which reserves title to the consignor, who nevertheless and contrary to its terms permits the consignee to make sales, and deposit the proceeds of sales in his general bank account, and use them for his own purposes, is equally fraudulent as against the trustee.

The nature of the transaction in which these parties engaged is not to be determined from the written agreement which they made, for they did not keep it. It is more important to know what they did than it is to know what they agreed they would do, for the purpose of the writing may well have been to conceal from creditors the real nature of the transaction. We do not need to concern ourselves about the writing, for we are forced to conclude that it was not made to be kept. No attempt was made to keep it. The bankrupt, who was to make returns each Monday, testifies that he never made a return showing what consigned goods he had sold, or how much of the consignment he still had on hand, and defendants never demanded any such statement from him. He failed to live up to his contract of agency from the very beginning, and has acted throughout as a purchaser of the goods consigned to him. This he has done with the full acquiescence of the de-Prior to the so-called agreement it is admitted that the bankrupt and defendants dealt with each other as vendors and vendee. After the agreement the bankrupt admits that he fixed the price of the shoes sold. He testifies that he sold them at any price he wanted to, although the paper agreement provided that he was not to sell for less than the price fixed by the defendants. When he sent defendants any money, he did not accompany it with any statement as to the goods which he had sold, but paid in so much on account. It was his habit to take the daily receipts of all sales made at his store and deposit them in his bank account, which contained the moneys realized from his general sales of defendants' stock and everybody else's stock. The bankrupt's testimony that the cartons received had been marked either by himself or the defendants is contradicted flatly by a dealer, who was selling him goods and carefully examined the boxes, and testified that there were no initials on the front of any of the cartons in any part of the store.

If it be said that what was done was contrary to the agreement, the answer is that the defendants by their conduct permitted the agreement to be ignored. They knew that the bankrupt was not accounting to them on the Monday of each and every week for the moneys he had received from the sale of their merchandise. They knew that he was paying them by checks drawn on his general account, and, if they did not know, they certainly took no pains to find out, whether he was using their moneys, which they knew had gone into his general account, in the payment of other claims than theirs. Under the circumstances, we do not think the defendants are in a position to invoke the written agreement as against the trustee. They cannot now come into court to set up that agreement to shield them in the retention of the property which was surrendered into their possession by the bankrupt who took practically everything of value which the store contained, not overlooking the cash register. The law has no sanction for such a proceeding.

Judgment affirmed.

#### SAFFORD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

No. 192.

1. Perjury \$\igsigma 9(2)\$—Authority to Administer Oath—United States Commissioners—"Process."

Relative to commission of perjury under Criminal Code, § 125 (Comp. St. 1916, § 10295), a United States commissioner, under Rev. St. § 1014 (Comp. St. 1916, § 1674), wherein "process" is used with the meaning of "procedure," has authority to conduct a preliminary hearing (recognized by section 981 [Comp. St. 1916, § 1622], and called for by Comp. St. 1916, § 1678), and therein to administer oaths.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Process.]

2. CRIMINAL LAW \$\ightharpoonup 1169(1)\top Harmless Error\top Evidence of Identity\top Letters\top Hearsay,

Identity of a person, whether O. or W., who under the name of O., with T., registered at a hotel, being in issue, on prosecution for perjury, admission of letters previously written in the name of O. to T., only to show similarity of character, habits, expressions, and chirography of writer with those of W., as proved by witnesses and letters concededly written by him, objected to as hearsay, was immaterial.

- 3. Criminal Law ←⇒815(1)—One-Sided Charge—Discussion of Testimony. Charge fully informing jury of presumption of innocence, necessity of proof beyond reasonable doubt, and that they were the absolute judges of the facts, held not one-sided, though its contrasting of the evidence necessarily showed the government's case far the more probable.
- 4. CRIMINAL LAW \$\iff 689\$—Reopening Case for Evidence—Discretion.

  Denying defendant's application, made after conclusion of government's summing up, to explain an exhibit or offer further evidence respecting it, was within the judge's discretion.
- 5. Witnesses \$\iff 48(1)\$—Federal Courts—Competency of Witness.

  Previous convictions do not make a witness incompetent in a federal court
- 6. WITNESSES 245—EXTENT OF EXAMINATION.

The trial court may exclude questions previously answered.

7. Witnesses \$\infty 225-Extent of Examination.

The trial court may prevent unnecessary and prolix examination.

In Error to the District Court of the United States for the Southern District of New York.

Frank D. Safford was convicted of perjury, and brings error. Affirmed.

Slade & Slade, of New York City (B. Slade, of New Haven, Conn., of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (H. Harper and Samuel Hershenstein, both of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is one of a series of litigations arising out of a charge made by Rae Tanzer that she had been seduced under a

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

promise of marriage by James W. Osborne. March 16, 1915, she began a civil suit against him for breach of promise of marriage for damages in the sum of \$50,000. March 19, James W. Osborne caused a warrant to be issued against Rae Tanzer, charging her, under section 215, United States Criminal Code (Act March 4, 1909, c. 321, § 215, 35 Stat. 1130 [Comp. St. 1916, § 10385]), with using the United States mails to execute a scheme to defraud.

Two sisters of Rae Tanzer testified at the hearing before the commissioner that James W. Osborne called at her home October 17, 1914, and the defendant testified that he was clerk of the Kensington Hotel. Plainfield, N. J., and he identified James W. Osborne and Rae Tanzer as registering as Oliver Osborne and Mrs. Oliver Osborne and taking a room for the afternoon, October 18, 1914. The commissioner held Rae Tanzer for the grand jury. Subsequently the sisters and the defendant Safford were indicted for perjury under section 125 of the United States Criminal Code (Comp. St. 1916, § 10295), and Maxwell and David Slade, Rae Tanzer's attorneys, with one McCullough, a detective, were indicted for the crime of conspiracy. The defendant Safford was convicted of perjury, the judgment being reversed in this court (233 Fed. 495, 147 C. C. A. 381), and this is a writ of error to a judgment of conviction upon the new trial, which occupied 15 court days and developed a good deal of heat between counsel; Learned Hand, District Judge, presiding.

It was conceded in all these proceedings that a man calling himself Oliver Osborne had entered into illicit relations with Rae Tanzer, and had brought her to the Hotel Kensington October 18, 1914, but the vital question was whether this man was James W. Osborne, as Rae Tanzer alleged, or was one Charles H. Wax, as James W. Osborne alleged. There was, of course, the additional question whether, if Wax was the man, the defendant had falsely and knowingly identified James W. Osborne before the United States commissioner, or had made an honest mistake. The record consists of 2,719 typewritten pages, and there are 515 assignments of error. It will be readily understood that the court can do no more than dispose of most of them

generally.

[1] At the outset and throughout the case the defendant's attorneys objected that the United States commissioner had no authority to conduct a hearing or administer an oath to the defendant, or to do more than issue a warrant of arrest and either imprison or admit him to bail. If this is so, the defendant would not be guilty of perjury under the statute, even if he had knowingly testified falsely, because the crime can only be committed if the officer has authority under the laws of the United States to administer the oath. Section 125, U. S. Criminal Code.

Ever since circuit court commissioners, now called United States commissioners (Act May 28, 1896, c. 252, § 19, 29 Stat. 184), were appointed (Act Aug. 23, 1842, c. 188, 5 Stat. 517; Act March 2, 1867, c. 180, 14 Stat. 543 [Comp. St. 1916, §§ 1636, 1637]), it has been the practice for them to conduct judicial hearings for the purpose of inquir-

ing whether any crime has been committed, and, if so, whether there

is reasonable ground for connecting the prisoner with it, and thereupon either discharging him, imprisoning him, or admitting him to bail. It would be a scandal to arrest and imprison citizens without giving them a hearing, and we would not interfere with this uniform and wholesome practice, except under absolute necessity.

Section 1014, Rev. Stat. U. S. (Comp. St. 1916, § 1674), provides:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The defendant contends that the language "agreeably to the usual mode of process against offenders in such states" means only "the process itself, such as warrants, commitments, etc., as distinguished from procedure, which may embrace hearings." We think it means procedure, and the Code of Criminal Procedure of the state of New York (sections 188–220) provides for just such examinations. United States v. Dunbar, 83 Fed. 151, 27 C. C. A. 488; Cohen v. United States, 214 Fed. 23, 130 C. C. A. 417; United States v. Greene (D. C.) 100 Fed. 941.

Section 981, Rev. Stat. U. S. (Comp. St. 1916, § 1622) incorporating the law enacted August 16, 1856, recognized such hearings by restricting the number of witnesses to four, whose fees shall be taxed against the United States "in the examination of any criminal case before a commissioner of the Circuit Court." Section 1 of the act of August 18, 1894, plainly calls for a preliminary hearing before the commissioner. It is as follows:

"It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof." U. S. Comp. Stat. § 1678.

[2] The principal fact to be established in the case was one of identity. The District Judge, over the objection of the defendant that it was hearsay, admitted evidence that Wax had assumed the name of Oliver Osborne, had been known to, corresponded with, and asked for under that name by several persons, was in the habit of picking

acquaintance with shop girls, sending notes to them, and inviting them to dinner and to the theater. Further it is said that under our former decision in this case (233 Fed. 497, 147 C, C. A. 381), the letters written to Rae Tanzer either by Wax or by James W. Osborne, and the letters concededly written by Wax under the name of Maize Mason Nye to Ethel Brooks, should have been excluded as hearsay. The conversation with and letter written by Wax, which we held should have been excluded as hearsay on the former trial, were flat statements by Wax that he was the Oliver Osborne who had made love to Rae Tanzer. That was establishing by hearsay the precise point in issue. But the letters to Rae Tanzer were admitted in this case only to show the similarity of character, habits, expressions, and chirography of the writer with those of Wax, as proved by witnesses and by letters concededly written by him. The contents of the letters objected to were mere love trash and quite immaterial. Upon this subject see Hardy v. Harbin, 154 U. S. 598, 14 Sup. Ct. 1172, 22 L. Ed. 378; Wigmore on Evidence, 410-416.

[3] Next, there are a number of exceptions to the charge, the principal complaint being that it was so one-sided as to constitute a summing up for the government, omitting to remind the jury of the defense. We cannot accept this view. The jury were informed fully and clearly as to the presumption of the defendant's innocence, the necessity of proving his guilt beyond a reasonable doubt, and that they were the absolute judges of the facts. When the court came to contrast the government's theory and the defendant's theory with the evidence, what he said seemed very persuasive in favor of the government; but this, we think, was in the nature of things. The defense was that James W. Osborne had employed Wax to impersonate him and assume his guilt, and had suborned him and other witnesses for the government. This was plainly set forth to the jury. No doubt, in hearing the charge, the jury perceived, as we do in reading it, that the government's case was far the more probable. It would be difficult to discuss the testimony at all without this result.

[4] The defendant vigorously insists that it was error, after the government had concluded its summing up, to deny his application either to explain Exhibit 8 or offer further evidence in respect to it. The contention is that this exhibit was only marked for identification, and that the attorney for the United States, without having offered it in evidence or previously mentioning it, made great capital out of it in summing up. The trial judge has certified in the bill of exceptions that the exhibit, although originally marked for identification, was subsequently offered in evidence. It was within his discretion either to grant or to deny the defendant's application at that late stage of the case, and we cannot say that he abused his discretion in denying it

[5] The objection as to the competency of Wax as a witness because of previous convictions is not good. Rosen v. United States,

245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406.

[6, 7] Such of defendant's requests as were proper, which the court refused, it covered in the charge. It is within the province of the trial

judge to exclude questions which have been previously answered, and to prevent unnecessary and prolix examination. We discover no harmful error in the other assignments.

The judgment is affirmed.

#### LEHIGH VALLEY R. CO. v. PIDCOCK.

(Circuit Court of Appeals, Second Circuit. May 15, 1918.)

No. 231.

1. APPEAL AND ERROR \$\infty\$1002\to Review\text{-Verdict.}

A verdict on conflicting fact issues will not be reviewed on writ of error.

2. Witnesses €=270(2)—Cross-Examination—Scope.

Where plaintiff, a brake inspector, was injured while between cars repairing a brake, and the conductor, who had directed the removing of a blue flag, which indicated the presence of employés, testified on direct examination that he saw plaintiff standing by the car, a question as to whether plaintiff told him anything before going between the same, objected to as immaterial and irrelevant, *held* permissible cross-examination

3. WITNESSES \$\infty 270(2)\$—Cross-Examination—Scope.

While the cross-examination of a witness is not to be extended to collateral, irrelevant, or immaterial matters, the rule is not so strict as in direct examination, and the trial court has considerable latitude of discretion

4. Trial \$\infty 252(2)\$\to Injuries to Servant-Instruction.

In an action by a brake inspector, injured when the car he was repairing was moved, an instruction that the moving of a blue flag warning of the presence of employés between cars was negligence, etc., held warranted, and not open to attack as submitting the case upon a hypothesis of fact, which might possibly be deduced from defendant's case, pieced out by portions of plaintiff's case.

In Error to the District Court of the United States for the Southern District of New York.

Suit by Lewis Pidcock against the Lehigh Valley Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed

The plaintiff in error is hereinafter referred to as defendant, and the defendant in error as plaintiff. The plaintiff was, at the time of the injury complained of, on July 13, 1917, in the employ of the defendant as an air brake inspector in the defendant's railroad yards, located in the city of Perth Amboy, in the state of New Jersey, which yards are used by defendant in the furtherance of the interstate commerce in which it is engaged. It is alleged that on the day mentioned it became necessary in the regular course of his employment for the plaintiff to inspect and repair one of defendant's cars, which car was a part of a train which at that time was being made up in the yards, and being prepared for interstate movement. In pursuance of his duties it became necessary for him to get between two cars of the train to repair the air brake system and the connecting air hose of the car and while the train of which the car was a portion was standing still. When so engaged and without warning to him, he claims, an engine and cars backed against the train in which was the car upon which he was at work, causing the cars to move violently and suddenly and to run over him inflicting the

injuries to redress which the suit is brought. It is alleged that the injuries to plaintiff were occasioned by the negligence of defendant in backing the engine and cars without warning to plaintiff, knowing that he was at the time engaged in repairing a car of the train and in a position of danger between two cars of the train. It is alleged that defendant at the time failed to have the cars equipped as required by the Safety Appliance Act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605–8612]), and that the car on which plaintiff was working was not equipped with grabirons as required by said act. The left leg of plaintiff was run over, and the injuries sustained required its amputation, and other injuries to various parts of the body were alleged. The action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]). The jury returned a verdict for the plaintiff in the sum of \$18,000.

Allan McCulloh, of New York City (Clifton P. Williamson and Edward W. Walker, both of New York City, of counsel), for plaintiff in error.

John C. Oldmixon, of New York City, for defendant in error. Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The versions of the accident presented by plaintiff and defendant respectively are diametrically opposed. The jury's duty was to determine the facts and they have found for the plaintiff. This court does not sit to review conclusions of juries upon questions of fact. The plaintiff's version of the accident is corroborated by a witness who was working with him on the same train when the accident occurred. On the day of the accident there was in force and effect a rule of the defendant's which is as follows:

"A blue flag by day and a blue light by night displayed at one or both ends of an engine, car, or train indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals without first requiring the workmen to remove them."

The plaintiff claims that he began his inspection at the rear end of the train, starting at the caboose and working forward. When he had examined some 8 or 10 cars, he discovered a break in the train line; that a nipple was broken in the thread and had to be repaired. He then walked to the tool box near the head end of the train in order to get a nipple to make the repair with. After getting it from the tool box he went to the head end of the train, and there saw that the blue flag was up and no engine was attached to the cars, and he told the man in charge of the blue flag that he had a small repair to make and to be sure and look out for him. He then went back to make the repair, and while he was still between the two cars and was about to couple the hose, without any warning to him, no whistle or bell being heard, there came a violent crash against the train upon which he was working, which carried the whole line of cars nearly a whole car length back, causing a wheel of the car upon which he was working to run over his leg, making necessary an amputation four inches below the knee.

The yard conductor was called as a witness for the defendant, and testified that on the day of the accident he was instructed by the yardmaster to drill out of the train and put into the shop a certain car marked for the "shop," which was about in the middle of the train upon which plaintiff was at work. This witness stated that when he arrived at the train the blue flag was up and that he waited until the flag was taken down. Two trainmen testified that the flag was taken down because the yard conductor ordered it down, and that the yard conductor, as soon as the flag was taken down, hooked up the engine. This appears to have been done without any one taking the trouble to ascertain whether men were under the train, as the blue flag indicated that they were; and then, according to the testimony of the plaintiff, came the crash and the resultant injury.

[2, 3] The first assignment of error—there are three in all—relates to the admission of testimony. When the yard conductor was on the stand and was asked on cross-examination: "Did you tell this plaintiff anything at all at the time you say you saw him standing at the side of the car, before he went between the cars?" He answered: "It wasn't my place." His counsel then objected to the question as immaterial and irrelevant. The court overruled the objection, and counsel took an exception. An answer was insisted upon, yes or no, and the witness answered: "No." This is claimed to be error, and is designated as an attempt to show "an alleged failure to give instructions." The record, however, does not show that counsel for plaintiff tried to make a point of the fact that this man failed to give any instructions to the plaintiff. Counsel for plaintiff says that he asked the question to test the veracity and recollection of the witness. The question asked was such as counsel was entitled to ask upon cross-examination.

The cross-examination of a witness is not to be extended to collateral, irrelevant, or immaterial matters; but a rule excluding such evidence is not applied as strictly in cross-examination as in direct examination. In this respect a court is invested with considerable latitude of discretion, and especially where such matters have been opened up on the direct examination. The witness had stated that he saw plaintiff standing at the end of the car, with his shoulder up against the car, and had asked him to step to the side. The court, then, was quite within its discretion, to say the least, in allowing the witness to be asked, therefore, on his cross-examination, whether he told the witness anything at all when he saw him standing there.

[4] The second and third assignments of error relate to instructions given to the jury. The first of the instructions objected to was as follows:

"If also you should find from the evidence that this flag was there, even though it was not put there by the plaintiff, but was put there by Sohmers, and you should find that Sohmers did not take the flag away, as concededly he did not, and that the plaintiff still remained in a position of danger in between the cars, and that Kennedy removed that flag, or caused its removal by an order to another, while the plaintiff was in that position of danger, without his exercising reasonable care and caution to give notice to the plaintiff, while he was in this position of danger, then you may find from those

facts that the defendant was neglectful or careless, and you can cause it to respond in damages. But that, gentlemen, you can only find, providing you find that the plaintiff all this time was in between the cars, as he claims he was, engaged in making these repairs."

The second was as follows:

"Mr. McCrossin: I ask your honor to charge the jury that, even though the blue flag were placed in position, if it were moved by any servant of the defendant other than the plaintiff without any notice to plaintiff, if they find they had reasonable ground to believe that plaintiff was working under the train, that that would be evidence of negligence on the part of the defendant.

"The Court: I have charged that. I will charge it again."

The objection urged is that, if instructions are based upon an hypothesis of fact which might possibly be deduced from defendant's case, or upon an hypothesis of fact which might possibly be said to be pieced out of portions of plaintiff's case combined with certain other portions of the defendant's case, it is reversible error. And it is said that the instructions complained of are defective in the particular referred to. It is also said that the plaintiff must succeed or fail, according as he has proved or failed to prove the accident which he pleaded. Of course, no one questions the last proposition. We have examined the charge of the court. The court was presented by defendant with a number of requests to charge and they were all given as requested. The court was then asked by plaintiff to charge the instruction already quoted above, being the third assignment of error, and after the court stated: "I have charged that. I will charge it again"—defendant's counsel said:

"I except to that, and I intended to except to the charge with regard to taking the flag away without giving the plaintiff due notice or reasonable notice, because I do not think that is in the case."

The court thereupon said: "It may not be, but I think it is for the jury to say." Mr. Williamson, one of the defendant's counsel, then said: "I take an exception." We are unable to see anything in these assignments of error. The instructions to the jury were explicit and they were charged that:

"If the accident happened as claimed by the defendant under those circumstances, of course, there would be no neglect or fault on the part of the railroad company, and the plaintiff could not succeed in this action."

There is no foundation for the assumption of the defendant that the case was submitted upon an hypothesis of fact which might possibly be deduced from defendant's case or upon an hypothesis which might be pieced out of portions of plaintiff's case combined with certain other portions of defendant's case. The actual occurrence was either the accident claimed by plaintiff or the one asserted by defendant, and it was properly submitted on that theory.

Judgment affirmed.

#### HODGE et al. v. MEYER et al.

(Circuit Court of Appeals, Second Circuit. May 1, 1918.)

No. 225.

1. MALICIOUS PROSECUTION \$\igcream 10\)—SUITS AGAINST RAILROADS—INJURY TO STOCKHOLDERS.

Though the institution of lawsuits against railroad incidentally caused injury to stockholders, the latter have no cause of action against plaintiff therein, where it does not appear that suits were not brought within legal rights of plaintiffs, or that the right to sue was used as means of injuring such stockholders.

2. Torts &==12-Wrongful Interference with Contract-Rights of Injured Party.

Damages are recoverable, when sustained by reason of the wrongful interference of third parties, resulting in a breach of contract, but only by a party who is shown to be damaged thereby.

- 3. Corporations \$\iff 202\$—Injury to Corporation Securities—Right to Sue.

  The direct and proximate consequences of a wrong done to the securities held by a bondholder or stockholder should be rectified by appropriate suit by the corporation; the bondholder or shareholder's remedy being in and through the corporation.
- 4. Corporations \$\iff 202\$—Contracts—Individual Action by Stockholders. Where principal stockholders of a railroad made contract with principal stockholder of another railroad for amalgamation of the railroads, and subsequent contract between them recited that stockholders approved of prior contract, the principal stockholders, who made agreement, have no individual right of action for damages for wrongful interference of third persons, causing breach of the contract; the injury being to the amalgamated corporation.

In Error to the District Court of the United States for the Southern District of New York.

Action by Nellie C. Hodge, as administratrix of the estate of Hiram A. Hodge, deceased, and another, against Arthur L. Meyer and others. Judgment of dismissal, and plaintiffs bring error. Affirmed.

Appeal from a dismissal of the plaintiffs' complaint in an action at common law. Hiram A. Hodge and Frank D. White instituted this suit to recover \$2,500.000 as damages for an alleged wrong committed by the defendants, in that, by their acts as set forth in the complaint, they caused a contract made by the plaintiffs with the defendant Meyer to be breached. By a stipulation entered into the motion was preliminarily heard when the cause was reached, and the complaint dismissed, on the ground that it failed to set forth a cause of action. The action is in tort, and it is alleged the defendants combined and conspired together to prevent the performance of a contract entered into on the 16th of October, 1901, between Hiram A. Hodge. acting for himself and all the stockholders of the Quebec Southern Railway Company, and the defendant Arthur L. Meyer, acting for himself and all the stockholders of the South Shore Railway Company. The contract provided for a consolidation of the two lines of railway. Among other things, it provided that an application be made to the Canadian government for a charter for a railroad company to be organized for the purpose of amalgamating the two companies, with a capital stock of \$4,000,000; bonds to be issued on the lines of railroad to be constructed at a rate not exceeding \$20,000 per mile. The application for the charter was to be undertaken by Hodge; the name of the company and the directors thereof to be agreed upon. The shareholders of the Quebec Southern Railway Company were to receive for

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their property 57 per cent, of the stock and first mortgage and income bonds. and the shareholders of the South Shore Railway Company were to receive 43 per cent. of the stock, with a certain amount of first mortgage and income bonds. There were to be issued bonds to be held in the treasury and used from time to time as might be necessary for the new company. Provision was made for the conveyance, free and clear, as of the date of the agreement, of the property of the respective railways, except that the Quebec Southern Railway Company was to be conveyed subject to a bond indebtedness of \$1,000,000. A further provision, not material here, was made for possible defects in the title. Provision was made for future management of the new railroad to be organized. Later it was determined to amalgamate the two companies under the existing charter of the Quebec Southern Railway Company, and the agreement for such amalgamation was entered into on July 24, 1902. This provided for the increase of the capital stock of the Quebec Southern Railway Company to \$4,000,000, and for the issuance of first mortgage and income bonds aggregating \$20,000 per mile. It recited that the stockholders approved the agreement entered into between Hodge and Meyer on October 16, 1901, and provided for an extension of its lines of railway from its then termini—provided for the conveyance of the property of the South Shore Railway Company to the Quebec Southern Railway Company, and that the amalgamated companies shall carry out and perform the terms and conditions of the October 16, 1901, agreement.

The complaint after setting up both agreements, alleges that "the defendants at divers times and places, well knowing the facts and premises, combined and conspired together for the purpose, among other things, of breaking said agreement of October 16, 1901, and causing and procuring the same to be broken, and of hindering and delaying and of wholly preventing the further performance thereof, and also of said agreement of January 24, 1902. by either or any of the parties to said agreements or either of them, of avoiding, annulling, undoing, and setting aside the several acts and things so done as aforesaid in pursuance and performance of said agreement, in amalgamating and uniting said companies, and of hindering and wholly preventing the further or continued amalgamation or union thereof, and of hindering and wholly preventing the plaintiff White and said late Hiram A. Hodge, from having, receiving or enjoying any of the property, profits, gains, benefits," etc. Therefore plaintiffs seek redress for alleged damage due to the failure of performance of the contracts referred to. The complaint alleges that the plaintiffs were the owners of a large majority of the capital stock of the Quebec Southern Railway Company, and that Meyer, the other contractor in the October 16th agreement, was the owner and in control of a large majority of the capital stock of the South Shore Railway Company; that after the execution of the contracts the parties proceeded to carry out the same as provided therein, reorganizing the board of directors, procuring the authority of the stockholders to the amalgamation agreement and the execution of the January 24, 1902, agreement, the transfer of the property of the South Shore Railway Company to the Quebec Southern Railway Company on March 11, 1902, the application on April 15, 1902, of a sanction and order fixing the capital stock of the Quebec Southern Railway Company at the sum of \$4,000,000, subject to the provisions of the amalgamation agreement, the execution and delivery of a trust mortgage to the National Trust Company, the making of a contract with a contractor to build extensions for the amalgamated company, and a contract for the printing and engraving of the bonds, the rendition of services by Hodge and White, and the expenditure of money in the furtherance of attempting to carry out the October agreement. It alleged a willingness to fully perform said agreement. which would have resulted in profit to the plaintiffs; alleges the plaintiffs would have been entitled to certain stocks and bonds from the amalgamated company, had the contract been fully performed. It then alleges the conspiracy to cause the October agreement to be broken, and to hinder, delay, and prevent its performance, and also the performance of the agreement of January, 1902, with the object of acquiring for the defendants possession of the stocks and bonds of said railway and the control and profits of the railroad. The defendants Cannon and Vanderbilt are charged with having joined this conspiracy soon after its formation and participated in its consummation. The complaint then alleges that, pursuant to said conspiracy, false statements were made to the National Trust Company, resulting in their withholding the certification of the stock mortgage bonds; false representations were made to the contractor, Dunn & Co., as to the mortgage affecting the property of the South Shore Railroad Company, the bonds of which were to be taken by the contractor in part payment; that suits were maliciously instituted, which were all disposed of because of lack of prosecution, all of which resulted in the trust company refusing to certify the mortgage bonds of the amalgamated company, or to act as trustee under the mortgages; and that the contractor refused to proceed with the performance of his contract for extending the line, by reason of which acts the road was finally taken away from the plaintiffs, eventually passed into the hands of a receiver, and was sold at judicial sale, resulting in the stocks and bonds becoming worthless, all of which resulted in damage to the plaintiffs.

Walter Carroll Low and Monroe J. Cahn, both of New York City,

for appellants.

Francis S. Bangs, Henry B. Anderson, Howard Taylor, Philip W. Russell, and Roy C. Gasser, all of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). The judge below dismissed the complaint on the ground that the acts complained of, if wrongful, were wrongful as against the amalgamated company, and not the plaintiffs as stockholders. Undoubtedly, the intention of Hodge and Meyer, as obtained from the October agreement, was to provide for the amalgamation of the two railroad companies, thus making a continuous line, with profit to the railroads by reason of such consolidation. The object of the January agreement was the amalgamation of the two companies, after having obtained the approval of the stockholders, with the same purposes in mind, although the conditions were somewhat changed, in that the South Shore Railway Company conveyed its property to the Quebec Southern Railway Company, whose capital stock, it was provided, would be increased to \$4,000,000, and the idea of obtaining a new charter was abandoned.

Plaintiffs' suit is predicated upon an injury done to property interests jointly held, and those interests are ownership in stock and therefore whatever injury was done by reason of the alleged tortious acts was suffered by the plaintiffs by virtue of their positions as shareholders. Hodge signed the October agreement "for himself and stockholders of the Quebec Southern Railway Company," and Meyer signed "for himself and stockholders of the South Shore Railway Company."

The October agreement provided that the obligations imposed upon the shareholders of the respective companies "are binding upon the present shareholders of each company, and do not extend to future holders of stock transferred as herein provided. The stock and bonds of the new company as herein allotted are to be issued, respectively, to the present shareholders of the Quebec Southern Railway Company and the South Shore Railway Company, and are not to be construed as belonging to shareholders of either company who acquire their holdings subsequent to the execution of this agreement as herein provided." It further provides that the first mortgage bonds and income bonds must be held in the treasury and used from time to time as may be necessary for the purposes of the new company. This agreement provided only for the possibility of the building of an extension, whereas the January agreement provided for an extension.

The alleged tortious acts have to do entirely, so far as any alleged material loss is concerned, with the prevention of additions and extensions to the amalgamated company. The January agreement recited that the stockholders of both companies "have taken communication and have declared themselves to be satisfied with a certain private agreement entered into on the 16th of October, 1901, between certain of the stockholders of the above parties with respect to the assumption of obligations before them and the remuneration to be paid therefor, so as to assist in bringing about the amalgamation proceedings herein finally consummated," and it further recites that the "same are satisfactory in all respects to them and have become parties to these presents and confirmation thereof."

These recitals indicate satisfaction of the stockholders, including the plaintiffs in this action, one of whom signed as president of his company. Therefore the idea of amalgamation and substantially the terms of the October agreement, with changes voluntarily imposed, were taken over, written in, and made part of the January agreement. Whatever rights of contracts were thus acquired by the contracting parties under the January agreement accrued for the benefit of the respective corporations, and therefore their stockholders. The plaintiffs' interest is derivative from the corporation. There was no particle left in regard to which the October agreement was not fully performed, or performance permanently waived and abandoned by consent of all concerned. What is intended in the January agreement, when the parties stated that the October agreement was to be further performed, could only give effect to those provisions which were not abandoned when the January contract was made.

Examining the alleged wrongful acts committed by the defendants, it is charged that by reason of the actions of the defendants, because of false representations as to the authorization of the bonds by the company, the National Trust Company refused its certification and to act as trustee, and this act, so charged, consists of a telegram of June 24, 1902, to the National Trust Company. But there is nothing to show any interest of Hodge or White personally in any bonds which were refused certification, nor is there any allegation that the letter which was subsequently sent to the Trust Company, and a similar letter sent to the Canadian government, requesting it not to sanction the amalgamation of the companies, had any effect. Indeed, it appears in paragraph XI that the Canadian government did sanction the amalgamation.

As to the charge that a letter was written to Dunn & Co. with similar false representations, it does not appear anywhere in the October agreement that either party bound themselves to build any

extension of the consolidated property, and this contract was made solely by reason of the covenant contained in the January agreement to build such an extension. Nowhere in the complaint is there any allegation tending to show that the so-called maliciously instituted suits were not brought within the absolute legal rights of the plaintiffs therein, nor does it anywhere appear that this legal right to suit was used as a means of injuring the plaintiffs.

[1] The plaintiffs here, although incidentally injured by the plaintiffs in the Canadian suits, have no cause of action therefor. While the complaint is full of allegations and legal conclusions as to a conspiracy, the specific acts are above referred to, and, if such acts were of a tortious character, they breached only the January agreement.

- [2] This action seeks to recover damages to the plaintiffs personally. They sue in individual capacity, and not on behalf of other shareholders, or such as may come in. All the benefits accruing to either or both of the plaintiffs must accrue through the amalgamated corporation. It is well settled that damages are recoverable, when sustained by reason of the wrongful interference of third parties resulting in a breach of contract, but this right accrues only to him who is shown to be damaged thereby. Angle v. Chicago, etc., Ry., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Miles Med. Co. v. Park, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; Lewis v. Bloede, 202 Fed. 7, 120 C. C. A. 335.
- [3] In contemplation of law, the direct and proximate consequences of a wrong done to the securities held by a bondholder or stockholder should be rectified by an appropriate suit on the part of the corporation. The bondholder's and shareholder's remedy is in and through the corporation. Niles v. N. Y. C., etc., R. Co., 176 N. Y. 119, 68 N. E. 142; De Neufville v. N. Y. & N. Ry. Co., 81 Fed. 10, 26 C. C. A. 306.
- [4] We concluded that, if there were any injury, it is to the corporation, and gives no individual right of action, although the injury to the corporation may incidentally result in the depression of the value of the stock and bonds. The judgment below was a dismissal upon the merits, but the error of this is of little importance, for it appears that the statute of limitations has intervened against any further claim.

The judgment will be affirmed.

In re A. J. ELLIS, Inc. NEW JERSEY TITLE GUARANTEE & TRUST CO. v. McBURNEY. McBURNEY v. SLOANE et al.

(Circuit Court of Appeals, Third Circuit. August 8, 1918.)

Nos. 2288, 2349.

1. Bankruptcy \$\infty\$331—Claim by Trustee for Bondholders—Termination.

Where the formal legal right of a trustee for bondholders to use its own name while collecting the money for the bondholders from a bank-

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rupt estate was disputed, the bondholders, if it had such right, were not required to file individual claims, and might safely wait until the trustee's right was finally decided.

2. BANKRUPTCY \$\simes 336-Parties Entitled to Prove Claims-Bondholders Under Deed of Trust.

Where the trustee for bondholders under a deed of trust filed a claim in bankruptcy for a deficiency judgment, stating that it was acting for the bondholders, though its right to do so was in dispute, the District Court had power to allow an amendment, filed by the holders of outstanding bonds, ratifying the action of their trustee and making the claim a direct claim by the bondholders.

3. Bankruptcy \$\sime 331\to State Statute.

The lis pendens provision of section 51 of the Mortgage Act of New Jersey does not apply in a case where a mortgage has been foreclosed after bankruptcy.

Appeal from the District Court of the United States for the District

of New Jersey; J. Warren Davis, Judge.

In the matter of A. J. Ellis, Incorporated, bankrupt. From the referee's disallowance of the deficiency claim of the New Jersey Title Guarantee & Trust Company, trustee for bondholders, opposed by E. L. McBurney, trustee, affirmed by the District Court (242 Fed. 156), the Trust Company appeals; and from an order of the District Court allowing William J. Sloane and another to amend the proof as to the claim, the trustee appeals. Appeal by the Trust Company dismissed, and order appealed from by the trustee affirmed.

Gilbert Collins, of Jersey City, N. J., for claimants.

Walter L. McDermott and Runyon & Autenreith, all of Jersey City, N. J., for trustee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. These appeals have to do with successive phases of the same controversy. The undisputed facts are as follows:

In June, 1910, the bankrupt, A. J. Ellis, Incorporated, executed 200 bonds, each for \$500, to the New Jersey Title Guarantee & Trust Company as trustee for the future holders. The bonds were 10-year 6 per cent. obligations, interest and principal payable at the trustee's office in Jersey City, and were secured by a mortgage on real and personal property. If certain specified defaults should occur, the trustee was bound to foreclose if two-thirds of the bonds should so request. Default did occur, the request was made, and in May, 1915, the company filed a foreclosure bill in the state chancery. At this time the bankruptcy proceeding was in progress—the adjudication had been entered in March—and McBurney, the trustee in bankruptcy, was made one of the defendants in the bill by permission of the District Court. There was no defense, and in October all the mortgaged property was sold for \$50,000. As the decree had been for more than \$86,000, with interest, and as certain costs and fees had also accrued, the

result was that the sale left nearly \$38,000 of the mortgage debt unpaid. A deed for the property was made in December, 1915, and a month later the trust company on behalf of the bondholders filed a claim in bankruptcy for the deficiency. McBurney objected, and in October the referee disallowed the claim, his disallowance being affirmed by the District Court on April 27, 1917, 242 Fed. 156. From this order the first appeal now before us was taken by the trust company.

The claim was rejected on the ground that it should have been made by the hondholders themselves and in their own names, and accordingly on April 30 a petition to amend the claim was filed by William J. Sloane and Babette Mohler, who held all the outstanding bonds, except 8: these being unrepresented in the proceedings, both below and in this court. The petitioners averred inter alia that after the foreclosure sale a deficiency of \$230.04 existed on each bond, and that they had requested and instructed the trust company to act as their agent to prove their claim against the bankrupt estate for such deficiency, that the company had proved on behalf of all the bondholders, and that the petitioners had ratified and did ratify whatever the company had done as their agent, praying leave to amend the proof so as to make it a direct claim by William J. Sloane and Mrs. Mohler upon the bonds held by them respectively. The District Court allowed the amendment, and the second appeal is from this order. The opinion below, which has not been reported, is as follows:

"The bankrupt in the above-stated cause in order 'to raise money for the purpose of discharging and paying certain debts against the said corporation,' etc., issued its bonds and secured payment of the same by executing and delivering to the New Jersey Title Guarantee & Trust Company, as trustee, a mortgage upon certain of its real estate and personal property to secure the payment of said bonds. Default was made in the payment of interest and taxes on certain of the bonds, whereupon in accordance with the terms of the mortgage the same became due and payable and the mortgage The proceeds of the foreclosure sale were insufficient to was foreclosed. pay the indebtedness on the bonds. The petitioners were holders of certain of said bonds and were cestuis que trust under the said mortgage. The trustee under the mortgage, acting for and in behalf of the petitioners, filed proof of claim with the referee in bankruptcy for the amount of the deficiency of said bonds in the foreclosure proceedings. It was held by this court (242 Fed. 156) that the trustee was not the proper person to prove the claim for said deficiency, in an opinion filed April 19, 1917. More than one year had elapsed between the adjudication and the filing of said opinion. The bondholders filed their petition May 16, 1917, ratifying 'what was done in their behalf by the New Jersey Title Guarantee & Trust Company in presenting such proof of claim, and praying that it may amend so far as your petitioners are interested therein by making it a claim in favor of your petitioners.' The referee refused to allow the amendment and the order of the referee is before this court for review. The referee found 'that the trustee in bankruptcy was well aware of the character and existence of the petitioners' claims and that the principal and interest represented by the one hundred sixty-four (164) bonds was a valid claim against the bankrupt estate without taint of any fraud.' There is no question that 'everybody interested in the estate was informed of the exact status of the claim' of the petitioners. The proof of claims filed 'put upon the record all the facts necessary to establish a bona fide indebtedness and the circumstances under which it was incurred.' All parties interested were advised of the claims of the petitioners within the year following the adjudication. There is no dispute that the amount claimed is justly owing from the bankrupt. One of the

chief objects of the law regulating the administration of estates in bank-ruptcy is to secure a fair division thereof among creditors and if the litigation of the right of the trustee to file proof of claim for the bondholders was a litigation within the meaning of section 57 of the Bankruptcy Act of 1898, the petitioners should be allowed to amend the proof of claim as prayed. Under the facts of this case it seems to me that the litigation over the right of the trustee to file proof of claim for the bondholders was a litigation within the meaning of the above section, and that in accordance with the principle set forth in the case of In re Standard Telephone & Electric Co. (D. C.) 186 Fed. 586, and the cases cited therein, the amendment should be allowed.

"The referee further refused to allow the amendment because of the failure of the petitioners to file a lis pendens in accordance with the provisions of section 51 of the Mortgage Act of the Compiled Statutes of New Jersey, vol. 3, page 3423. I am satisfied that the said provision is inapplicable in this case and the objection on that ground without merit. In re McAusland, 235 Fed. 173. The order, therefore, will be set aside and the amendment allowed."

[1, 2] We need not consider the question raised by the first appeal. The only bondholders on this record are the two just named, and if they were properly allowed to adopt the trust company's claim already on file the company's appeal becomes academic. We think Judge Davis was right in allowing the amendment. The claim set forth all the facts with particularity, and expressly stated that the company was acting for the bondholders. Every one knew the facts and was aware that the company did not own the bonds and could not benefit by the balance still due on the mortgage debt. Whether it had a formal legal right to use its own name while collecting the money for the bondholders was a matter of dispute; if it had, the bondholders did not need to file individual claims, and we see no reason why they might not safely wait until that question should be finally decided. In re Standard Co. (D. C.) 186 Fed. 586. Instead of waiting, however, the bondholders assumed that the company might be wrong, and (pending the final decision) took steps to amend the claim, thus acquiring the second string for their bow. Save in the disputed point, the company's proof was complete; the objection made to it was wholly based on a rule of procedure, and had no support in the merits, for the balance was undoubtedly due to the bondholders, and the company had authority to make the claim as agent. The only mistake (if mistake it were) consisted in failing to set forth positively that the real creditors were themselves asserting their conceded right, and that the company was merely an agent. The equities are plainly with the bondholders, and fortunately we see no reason to doubt the court's power to afford relief. If the question were before the New Jersey Court of Errors and Appeals, it seems clear that the substitution of one plaintiff for another would be allowed (Farrier v. Schroeder, 40 N. J. Law, 601), and we do not think the equitable power of a court of bankruptcy is more restricted. See, also, În re Roeber (C. C. A. 2) 127 Fed. 122, 62 C. C. A. 122, and In re McCarthy Co. (D. C. N. J.) 205 Fed. 986. In a word, the proof as originally filed was expressly on behalf of the bondholders and asserted their rights. It may be that the company had taken too much on itself-upon that point we intimate no opinion-but in any event, as the step had been taken in good faith, and as all the facts had

been clearly and seasonably stated, we think the District Court was right in allowing the real parties in interest to take the company's place on the record.

[3] We agree also that the lis pendens provision of the New Jersey statute (3 Comp. St. 1910, p. 3423, § 51) does not apply in a case like the present, where a mortgage has been foreclosed after the bankruptcy. In re McAusland (D. C. N. J.) 235 Fed. 188, 189.

In No. 2349 the order appealed from is affirmed, and in No. 2288 the

appeal is dismissed.

## WASHINGTON & BERKELEY BRIDGE CO. v. PENNSYLVANIA STEEL CO.\*

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1583.

1. Appeal and Error \$\infty\$=1195(4)—Findings by Appellate Court—Evidence
—Weight of Finding on New Trial.

Where Circuit Court of Appeals reversed judgment on writ of error, its finding on the evidence before it can have no weight on the new trial, unless the evidence is practically the same as that on which the court based its finding.

2. Indemnity \$\infty\$ 15(9)—Negligence—Jury Question—Condition of Pier.

In steel work subcontractor's action against bridge contractor to recover over upon a judgment recovered against it by an employé injured in the fall of a pier, whether subcontractor's foreman put the span on a green and unsafe pier, relying on negligent assurance of contractor's engineer that it was safe, or was himself negligent in placing span on an apparently green and unsafe pier, held, under evidence, for jury.

3. Indemnity \$\infty 14-Judgments-Conclusiveness-Proximate Cause.

Where employe recovers judgment against steel work bridge subcontractor for injuries sustained in fall of pier, the judgment is conclusive, in subsequent action by subcontractor to recover over against contractor, that green condition of pier was a proximate cause of the injury, but is not conclusive as to whether it was sole proximate cause.

4. Indemnity \$\inside 15(8)\$—Subcontractor's Action Against Contractor—Condition of Pier—Contributory Negligence—Instruction.

In steel work subcontractor's indemnity action against bridge contractor for negligence in authorizing work on green and unsafe pier, court should have instructed that, even if contractor was responsible for use of green piers, subcontractor could not recover, if preponderance of evidence showed that it negligently allowed span or battering ram to strike pier, or used defective traveler, and that but for all or one of such acts pier would not have fallen.

5. EVIDENCE 527—EXPERT—ENGINEERS.

In steel work subcontractor's action against bridge contractor for negligence in authorizing work on unsafe pier, evidence of contractor's engineer as to defects in subcontractor's machinery tending to cause accident, and his opinion as to cause of falling of pier after an examination, held competent on question of subcontractor's contributory negligence.

6. Evidence 527—Expert Testimony—Engineers.

In steel work subcontractor's action against bridge contractor for negligence in authorizing work on unsafe pier, testimony of engineers as to effect of the span being allowed to strike pier *held* competent on question of subcontractor's contributory negligence.

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge. Action by the Pennsylvania Steel Company against the Washington & Berkeley Bridge Company. Judgment for plaintiff, and defendant brings error, Reversed.

Charles D. Wagaman, of Hagerstown (Wagaman & Wagaman, of Hagerstown, Md., and Brown & Brown, of Charles Town, W. Va., on the brief), for plaintiff in error.

Stuart W. Walker, of Martinsburg, W. Va., and Henry H. Keedy, Jr., of Hagerstown, Md. (Charles J. Faulkner, of Martinsburg, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Judgments of the District Court in favor of plaintiff have been twice reversed. 215 Fed. 32, 131 C. C. A. 340; 226 Fed. 169, 141 C. C. A. 167. Regrettable as it is, the judgment recovered by the plaintiff on the third trial must also be reversed for the failure of the District Court to observe the rules of law laid down by this court in its former opinions. An effort will be made to make clear our conclusions on the legal questions involved, without detailed reference to the numerous exceptions and assignments of error.

The bridge company, having undertaken to construct a bridge across the Potomac river near Williamsport, Md., contracted with the steel company to furnish and put in position the steel girder spans. Under a contract similar in terms, Elmore & Hamilton Contracting Company undertook to furnish the material and construct the concrete piers and abutments. Mason D. Pratt, as engineer, agreed with the bridge company to supervise, inspect, and take charge of the construction of the bridge as its representative. On 16th of December, 1908, pier No. 10 fell while the workmen of the steel company were placing on the steel superstructure, killing some of its men and injuring others. Frank L. Benning, one of the workmen who was seriously injured, sued the steel company in the circuit court for Washington county, Md., claiming damages for his injuries, on the allegation of negligence that the steel company knew, or by the exercise of reasonable care could have known, that the pier was "green, weak, defective, and of insufficient strength to carry the weight for which it was intended." The steel company gave the bridge company written notice of the pendency of the suit and of its intention to hold the bridge company responsible for any recovery in favor of Benning. Benning recovered judgment for \$13,500 against the steel company.

After paying the judgment the steel company brought this action, alleging that it was the duty of the bridge company to see that the piers were safe for the placing of the steel superstructure, that the work was done under the direction of its engineer, that the defendant knows, or by the exercise of reasonable care and caution could have known, that the pier was green, defective, and of insufficient strength to carry the weight, and that nevertheless the defendant authorized and directed the employés of the steel company to proceed with the work of placing the steel superstructure on pier 10. On this allegation

of negligence the plaintiff asked for judgment against the defendant for the amount of the judgment in favor of Benning, together with interest and costs.

By the former judgments of this court these points were settled: First. The judgment of Benning against the steel company was conclusive against the bridge company as to matters necessary to Benning's recovery, namely: (a) The negligence of the steel company as a proximate cause of the injury in failing to furnish Benning a reasonably safe place to work; (b) the absence of contributory negligence on the part of Benning and of any act of a stranger as an intervening cause of the injury; (c) the correctness of the verdict is an estimate of the damages suffered by Benning. Second. The judgment in favor of Benning was not conclusive as to matters not necessary to Benning's recovery. Third. Since the steel company could not escape liability to Benning for failure to perform its nondelegable duty of furnishing him a reasonably safe place to work, by showing that it had relied on the bridge company to furnish a safe pier, it follows that the judgment in favor of Benning against the steel company did not settle the issue of negligence between the steel company and the bridge company. Fourth. The bridge company was bound by its contract to use due care to furnish the steel company with a pier strong enough to bear the steel superstructure; and, since the engineer was the agent of the bridge company, it was bound by his representations to the steel company as to the safety of the pier as fully as if they had been made by the company itself.

The questions open at the second trial between the steel company and the bridge company under the evidence then offered were: Did the bridge company, through its engineer, negligently represent to the steel company that the pier was safe, so as to fix upon itself negligence as the proximate cause of the accident? Was the steel company guilty of contributory negligence, either in disregarding the warning afforded by the appearance of the pier itself or the opinion of the assistant engineer that it would not be safe, or in using a battering ram to force the girder to its proper place on a cement pier not fully dry? The judgment in Benning's case established the negligent use of a green and unsafe pier as a proximate cause of his injury, but it did not determine whether the plaintiff or the defendant in this action was responsible

for the negligent use.

[1] In the opinion rendered on the second reversal, it was held that the evidence offered clearly showed that the steel company placed the span on the green and unsafe pier, relying on a negligent assurance of Pratt, the engineer, that it was safe. But that finding by this court under the evidence then before it was not intended to have, and could not have, any weight on the new trial, unless the evidence on the subject was practically the same. "The reversal operated to set aside the verdict and put the issues at large as they were before." Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 399, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. On the new trial, therefore, it was competent for the defendant to introduce the evidence of Pratt, and any other new evidence to the effect that Pratt did not tell the plaintiff's agent that the pier was safe.

[2] Under this evidence the defendant was entitled to an instruction submitting to the jury the question whether or not plaintiff's agent, Bickle, put the span on a green and unsafe pier, relying on a negligent assurance of Pratt that it was safe, or was himself negligent in placing the span on an apparently green and unsafe pier. Under the evidence the instruction should have been that if Pratt told Bickle to put the span on pier 10 when he reached it, and nothing else appeared, Bickle had a right to rely on the statement and proceed, and would not be chargeable with contributory negligence, but that, even if Pratt did give the assurance of safety, and afterwards Bickle should have known as a reasonable man, either from the suggestion of Darby, or from the appearance of the pier, or from any other fact brought to his attention, that the pier was unsafe, then he would be chargeable with contributory negligence, and the plaintiff could not recover. Instead of an instruction to this effect the District Judge charged the jury on this subject as follows:

"Therefore the responsibility of determining whether these piers were hardened and strong enough to bear the weight designed to be placed upon them
must be held to have been with Pratt, the engineer, for whose error of judgment the bridge company was responsible, unless the condition of the pier
at that time was so manifestly bad as clearly to inform any man of ordinary
sense and judgment, unskilled in concrete work, that it would not sustain
the weight, but would collapse. You are to determine from all the evidence
whether such was the condition of the pier at the time, and whether Bickle,
the steel company's foreman, with such knowledge, or chargeable with such
knowledge, as a man of ordinary sense and judgment, unskilled in concrete
work, recklessly went on and assumed the risk. It is only under such a
condition that the bridge company can be relieved of the responsibility for
Pratt's failure to be present and determine, in advance of allowing the
work to go on, all questions as to safe and unsafe condition of the pier."

This meant that the plaintiff would not be guilty of contributory negligence unless its agent recklessly put the span on the pier, knowing it would fall; and it was in effect an instruction to find for the defendant, for there was no evidence from which the jury could find that Bickle was so reckless and conscienceless as to order men to go on the pier and place the span, knowing it would fall. The issue was negligence; not recklessness or wantonness. In the following language the jury were in effect again instructed to find against the defendant on the issue of contributory negligence:

"But, aside from this, I again charge you that we are bound here by the finding of the Maryland court that the approximate cause of the accident was the weakness and insufficiency of the pier. This being so, this evidence as to the ramming cannot be considered by you in this case, unless you find that it was of such violent character as to have shattered and caused the pier to collapse, if it had been sound and sufficient. The only testimony in the case was that of the expert, who stated that it would not have been so shattered, and caused the pier to collapse, if it had been sound and hardened."

[3] The judgment in Benning's case is conclusive that the green condition of the pier was a proximate cause of his injury, but not that it was the sole proximate cause. This court so decided in the last opinion, in holding that the issue of contributory negligence should have been submitted to the jury. Hence, as against the plaintiff, the way

was open for the defendant to show by the testimony that, even if it was negligent in turning over to the plaintiff for use a green and unsafe pier, yet the pier would have supported the span, but for the negligence of the plaintiff in putting additional strain upon it by use of a battering ram, or allowing the traveler or the span to strike the pier,

or by any other means.

[4] Evidence was introduced, requiring the issue of contributory negligence to be submitted to the jury. Had a sound and sufficient pier fallen from the ramming, or from a blow of the span, or from a defect in the traveler, there would have been no negagence on the part of the defendant, and therefore no issue of contributory negligence. The instruction should have been that, even if the defendant was solely responsible for the use of a green and unsafe pier, yet if the preponderance of the evidence showed that the plaintiff negligently used a battering ram on it, or negligently allowed the span to strike it, or negligently used a defective traveler, and that the pier would not have fallen, but for all or any of such acts of negligence on the part of the plaintiff, then the plaintiff cannot recover.

[5, 6] The testimony of Pratt as to defects in the machinery used by the plaintiff tending to cause the accident, and his opinion as to the cause of the falling of the pier arrived at by him as an expert engineer by an examination of the pier, the span, and the traveler was competent on the issue of contributory negligence. So, also, on the same issue, was the testimony of other expert engineers as to the effect of the

span being allowed to strike the pier.

It follows, from the views stated, that there were vital errors in the charge, and that the evidence referred to in the assignments of error numbered 2, 3, 4, 5, 6, 7, 8, and 9 was competent.

Reversed.

### E. I. DU PONT DE NEMOURS & CO. v. SMITH.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1918. Rehearing Denied July 29, 1918.)

No. 1585.

1. MASTER AND SERVANT ← 286(10)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injury to a machinist's helper, who, while oiling a loose pulley in the nighttime, had his arm caught and broken when the belt on a moving machine shifted from a tight pulley to the loose pulley, *held*, on the evidence, that defendant's negligence was for the jury.

2. MASTER AND SERVANT & 289(15)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injury to a machinist's helper, who, while oiling a loose pulley in the nighttime, had his arm caught and broken when the belt on a moving machine shifted from a tight pulley to the loose pulley, *held*, on the evidence, that the plaintiff's contributory negligence was for the jury.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Corporations \$\iff 580\)—Financial Reorganization—Assumption of Liabilities—Suit Against New Corporation.

Where the company employing plaintiff when he was injured in order to effect a financial reorganization transferred all its assets to a new company, which assumed all the old company's liabilities, and there was little change in the management of the business, plaintiff might sue the new company directly for the negligence of its predecessor.

4. MASTER AND SERVANT €==270(7)—PERSONAL INJURY—EVIDENCE—SUBSE-OUENT REPAIRS.

In an action for injury caused by a machine alleged to be defective, the subsequent alteration or repair of the machine is not competent evidence of negligence in its original construction, as such acts furnish no legitimate basis for an inference of previous neglect.

5. APPEAL AND ERROR \$\iff 1048(6)\$—HARMLESS ERROR—ADMISSION OF EVIDENCE. In a servant's action for injury while oiling a loose pulley, any error in the admission of testimony on a long cross-examination that screens, subsequently placed around the pulleys to exclude dust and particles of cotton, would also operate to protect employés, was not so harmful as to require a reversal.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Leslie C. Smith, an infant, by M. H. Smith, his next friend, against E. I. Du Pont De Nemours & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles E. Plummer and J. Gordon Bohannan, both of Petersburg, Va., for plaintiff in error.

L. O. Wendenburg, of Richmond, Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. Defendant in error, plaintiff below and herein so called, recovered judgment for personal injuries sustained by him in June, 1915, while in the employ of the E. I. Du Pont de Nemours Powder Company, the predecessor of E. I. Du Pont de Nemours & Co. The assignments of error, 17 in number, present three

questions, which will be briefly considered.

[1, 2] 1. It is first insisted that the proofs fail to show any negligence on the part of the powder company, and therefore a verdict should have been directed for defendant. At the time he got hurt plaintiff was about 18½ years old and had been employed since the previous February as machinist's helper. The company had nearly completed a number of large buildings at Hopewell, Va., and was testing the installed machinery preparatory to turning it over to the operating department. This machinery consisted of a main driving shaft, which ran along the building on one side, and from which power was transmitted by belts to the countershafts of the 36 machines in that building. On each countershaft were four crown-face pulleys arranged in pairs and occupying together a space of about 17 inches. Two of them were 12 inches in diameter; the other two, 24 inches. The outside pulleys, one large and one small, were fastened to the countershaft; the inside pulleys were loose. All four were connected with the driv-

ing shaft by two 4-inch belts, one for the large pulleys and one for the small. When a belt was placed on a tight pulley, the countershaft revolved and operated the machine; when placed on a loose pulley, the pulley revolved around the countershaft without operating the machine. To shift a belt from one pulley to the other of the same size, as from tight to loose or vice versa, a belt-shifting device was provided, the "fingers" of which moved the belt when the lever was moved in one way or another. From this it resulted that a machine could be made to run fast or slow, as might be desired, or could be brought to a standstill by putting both belts on the loose pulleys. It appears, however, that a belt would sometimes shift of its own motion from the fixed pulley to the loose pulley of the same size; and this might happen because the particular countershaft was not in correct alignment with the driving shaft, or because the belt itself was not properly cut and adjusted. Instances of such shifting were not infrequent, and the attention of the foreman had been called to their occurrence.

Just how plaintiff was injured is not altogether clear. He says he was oiling the small loose pulley on one of the machines, which had been started up an hour or two before to be "broken in"; that he was holding the pulley with his left hand and oiling it with his right; that while so engaged the belt from some unknown cause shifted from the tight pulley to the loose; and that his left arm was caught and broken. The negligence of defendant in any of the respects alleged is not very convincingly shown; but we are of opinion that enough appeared, taking the proofs as a whole, to warrant submission of the question to the jury. The accident occurred at night. The height of the countershaft made it necessary for plaintiff to stand on a box in order to reach the pulley. He was between the driving shaft and the machine. and so under or nearly under the moving belt and in close proximity to it. If the belt shifted, as he claims, because of some slight defect in its construction or in the adjustment of the machine, it is quite possible that his arm was drawn in and fractured without fault on his part. Although he had been employed about the plant for some months, helping the machinists in various ways, it seems that he had not done any oiling until two days before in another building; and his testimony tends to show that he was then set at this somewhat hazardous work with little or no instruction, and without warning of its danger. It is argued that he voluntarily went between the driving shaft and the countershaft, and thus beneath the revolving belt; whereas, he should have gone on the other side of the countershaft, and so been in a place of comparative safety. But he says that no one had told him where to stand when oiling a pulley, and it was stated by at least two witnesses that plaintiff's position at the time was the same as that taken customarily by other boys doing similar work. It cannot, therefore, be said that he was chargeable with contributory negligence as matter of law. In short, and without reviewing the circumstances in greater detail, we are constrained to hold that the court below was not in error in refusing to direct a verdict for defendant.

2. The various assignments of error based upon instructions to the

jury, both those given and those refused, require no extended or separate discussion. The case is undoubtedly close on the facts, but it involves no principles of law which are not settled and familiar. We have carefully examined the rulings to which these assignments relate, and are satisfied that they are not open to serious objection. The jury were clearly and correctly told what they must find in order to render a verdict for plaintiff, and we are not persuaded that the rejection of defendant's requests was erroneous or in any wise misleading. Assuming, as we hold, that the proofs presented a question of fact, we are of opinion that the case was not improperly or unfairly submitted.

[3] 3. The E. I. Du Pont de Nemours Powder Company, plaintiff's employer, was succeeded some three months after the accident by the defendant corporation, which was organized about that time, and to which all the property and assets of the powder company were transferred. As part of the consideration therefor the defendant agreed "to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital stock liability and the funded debt of the vendor herein-before specifically mentioned." Whilst the powder company is described as "vendor" in the transfer papers, the transaction was in fact, as recited in the resolutions adopted by the board of directors, "a financial reorganization of the business," with a very large increase of capitalization. There was little, if any, change of ownership or management, and the business went on under the new corporate name the same as before. The old company was continued in existence for certain specific purposes, but it ceased to be a going concern and apparently retained no property in the state of Virginia. In practical effect it was merged or consolidated with the new corporation.

Taking into account the declared purpose for which the defendant company was organized, and its inclusive and unlimited assumption of liability, we think it could be sued directly for the negligence of its predecessor which caused the plaintiff's injury. His cause of action was an obligation which it had plainly agreed to discharge, and no good reason appears for not enforcing its contract. As was said in Langhorne v. Richmond R. Co., 91 Va. 369, 374, 22 S. E. 159, 161,

citing a number of cases:

"But the better view seems to be that, when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him."

Accepting as applicable this salutary principle, we are not disposed to sustain a defense which upon the facts here disclosed seems wholly wanting in merit.

[4, 5] 4. The assignments of error bring up a question of evidence which perhaps should not pass unnoticed. On cross-examination of one of defendant's witnesses it appeared that wire screens were placed around these pulleys some months after the accident, not for the protection of employés, as the witness explained, but to prevent the entrance of dust and particles of cotton. Asked by the court if the screen would not "also operate to protect the man," he replied in the affirmative. The general rule undoubtedly is that, in an action for injuries caused by a machine alleged to be defective, the subsequent alteration or repair of the machine is not competent evidence of negligence in its original construction; and this for the reason that such acts furnish no legitimate basis for an inference of previous neglect of duty. Columbia R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Virginia Wheel Co. v. Chalkley, 98 Va. 64, 34 S. E. 976. Strictly speaking, therefore, the answer of the witness was inadmissible and should properly have been excluded. Inasmuch, however, as it was shown without dispute that these screens were not provided to guard against accident, but for another and necessary purpose, we think the admission of the fact that they incidentally afforded some protection to the employé did not have the mischievous effect which the rule seeks to avert. In no reasonable view of the case does it seem to us that the error in question, cropping up as it did in the course of a long cross-examination, was of such harmful character as to require a reversal of the judgment. In our opinion it should be disregarded.

Affirmed.

# VANCE et al. v. CLARK et al.

(Circuit Court of Appeals, Fourth Circuit, July 2, 1918.)

No. 1592.

Where there has been severance of title to land and underlying minerals, the owner of the surface, in possession thereof, does not acquire title to the coal by taking from existing openings of the veins coal for his own domestic purposes, and occasionally permitting neighbors to take it, or himself digging it and selling it to them, for their domestic

2. Appeal and Error \$\iff 204(1)\$—Objection and Exception—Admission of Evidence.

Admission of evidence cannot under the rules of the court be reviewed, there having been no objection and saving of that question by bill of exceptions.

In Error to District Court of the United States for the Southern District of West Virginia, at Huntington; Chas. A. Woods, Judge.

Action by Herbert L. Clark and others against Jasper Vance and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Maynard F. Stiles, of Charleston, W. Va., for plaintiffs in error. W. C. W. Renshaw and W. R. Thompson, both of Huntington, W. Va. (Z. T. Vinson and John H. Meek, both of Huntington, W. Va., and Joseph S. Clark and Henry A. McCarthy, both of Philadelphia, Pa., on the brief), for defendants in error.

Before PRITCHARD and KNAPP, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge. This is a writ of error to a judgment of the District Court of the United States for the Southern District of West Virginia, entered in favor of the defendants in error upon a verdict in their favor directed by the court. The defendants in error will hereinafter be referred to as the plaintiffs, and the plaintiffs in error will hereinafter be referred to as the defendants; such being

the relative positions the parties occupied in the court below.

Herbert L. Clark and others, trustees for Guyandotte Land Association, brought action of ejectment against Jasper Vance, Carrie Davis, and others, to recover possession of a tract of about 200,000 acres of land lying in the counties of Mingo, Logan, Wayne, Lincoln, and Cabell, state of West Virginia. Defendants disclaim any right to the 200,000 acres, except the small pieces occupied by them, respectively, aggregating 198.21 acres. It appears from the evidence that Samuel Smith procured from the commonwealth of Virginia four grants—one for 120,000 acres, one for 33,000 acres, and two for 31,000 acres each. These four tracts of land joined. That title came by regular chain of conveyances to Lowe and Aspinwall, who, in the year 1874, instituted several actions of ejectment in the District Court of the United States for the District of West Virginia for the recovery of this land from various parties then occupying portions of it. One of these suits against Winchester Adkins embraced all of the land within these patents lying on the west side of Guyandotte river, and this action resulted in a judgment in favor of the plaintiffs for the recovery of the land sued for in that action, which contained about 200,000 acres.

The description of the land sued for in this action is identical with the verdict and judgment in that case, and the lines of the 33,000-acre grant, and some of the lines of the 120,000-acre grant. This will appear from an inspection of the declaration found in the printed record and the grant for the 120,000 acres and the 33,000 acres and the verdict map. The land in controversy lies wholly within the exterior lines of the grant of 33,000 acres. In this grant there was an exception of 29,651 acres of prior claims. It was discovered that one Carnahan had procured a grant for 30,000 acres prior to the grant to Smith of the 33,000 acres, and when this 30,000-acre grant was located it was found that its entire area practically was embraced within the lines of the 33,000-acre grant. Thereupon the predecessors in title of the plaintiff below, and at a time anterior to the institution of the ejectment suits by Lowe and Aspinwall, above referred to, acquired the title to the Carnahan grant. In 1850 one Adkins procured two grants from the commonwealth of Virginia, one for 300 acres and one for 86 acres, both of which were inside of the lines of the 33,000-acre

grant and also of the Carnahan 30,000-acre grant. Prior to the institution of the ejectment suits referred to, the predecessors in title of the plaintiff below and of Lowe and Aspinwall made a settlement of the conflicting claims of title between themselves and Adkins, by which they conveyed to Adkins the surface of the land for which he had procured grants, reserving and retaining to themselves all of the minerals underlying it. Richard Adkins' title to this surface passed by regular conveyances to the defendants, as was shown by the deeds introduced in evidence at the trial of this action, and some of which do not appear in the printed record.

The learned judge who tried this case in the court below charged the

jury as follows:

"I charge you that the plaintiffs in this case have established by evidence so strong that no reasonable man can come to any other conclusion than that they have title derived from grants from the state of Virginia, which they have traced down from these grants to the present time, which gives them a good, legal title to the property. Of course we might enter into the field of conjecture, and say possibly these lands were not properly located by the surveyors; but we cannot decide cases on conjecture or possibilities. Evidence has been introduced here (and no evidence to the contrary has been introduced) tending to show that these lands are held by the plaintiffs under these grants. Therefore the only question that could arise after the plaintiffs have traced that title from the state to themselves is the question of adverse possession.

"I charge you that the surface may be severed from the coal and other minerals, and that one man may own the surface and another the minerals. The possession of the surface, however, is not adverse possession of the minerals, after the conveyance has taken place by a deed which conveys the coal to one man and leaves the surface to another; that is to say, the fact that these defendants occupied the surface even for 10 years, and used it as their own, as the evidence in this case shows, gave them no title to the coal under the land. The plaintiffs claim only the coal. In the case of Carrie Davis, there is no evidence at all, no pretense of evidence, that she ever exercised any adverse possession of the coal or used it in any way; therefore you will see that she has no claim whatever under adverse possession.

"The testimony of Jasper Vance, I confess, has given me a great deal of trouble. I am going to state to the jury briefly my reasons for saying that I do not think it is sufficient for you to base a verdict in his favor on the ground of adverse possession. Adverse possession, in order to give title, must be notorious, continuous, and hostile. Generally it is peaceable. The possession of the surface, together with the mere incidental use of the coal, that which any man in living on the surface might from time to time be tempted to make and might make as a mere incident to the use of the surface,

would not give adverse possession to the coal.

"To make it clearer to you, reverse the situation: Suppose that there had been a mine on this land, which the plaintiffs were operating, and the defendant, although the owner of the surface, had been away from there, and that the plaintiffs in the operation of that mine had from time to time used some of the dirt on that land merely as an incident to its mining operations, had cut trees from time to time as an incident to the mining operations, to support the roof of the mine, that would not confer adverse possession. For possession of the minerals to be adverse, they must be used in an enterprise different and distinct from the use of the surface. Use of the minerals merely incidental to the possession of the surface is not sufficient. So, also, for the owner of coal to acquire possession of the surface by adverse possession, there must be adverse use of the surface distinct from the mineral enterprise, not merely a use incidental to the mining of the coal.

"I think I have made the matter clear to you, as I understand it, gentlemen, and of course it is my responsibility. If it turns out that I am wrong,

there is a court wiser than I am to correct my error. I direct you to find a verdict in favor of the plaintiffs in this cause."

Thus it will be seen that the court, before directing the verdict, found the facts upon which the judgment is based, the court having found as a fact that the plaintiffs had title from the state of Virginia, and, in addition thereto, chain of title to the lands in question up to the time of the institution of this suit. It necessarily follows that plaintiffs are vested with legal title to the same. We think the evidence amply warrants the conclusions of the court below as respects this point, therefore the only other question is as to adverse possession.

- [1] There having been a severance of the minerals from the surface of these lands, it was incumbent upon the defendant, who sought to acquire title to the same by possession, to show such possession of the minerals as is required of one to gain title to the surface by occupancy of the lands for the statutory period. In the case of Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140, the first and second syllabi are in the following language:
- "1. A conveyance of the underlying coal, with the privilege of its removal from under the land of the grantor, effects a severance of the right to the surface from the right to the underlying coal and makes them distinct corporeal hereditaments. The presumption that the party having the possession of the surface has the possession of the subsoil also does not exist when these rights are severed.
- "2. The owner of the surface, when the underlying coal had been so conveyed, can acquire no title to the coal by his exclusive and continued possession of the surface; nor does the owner of the coal lose his right or his possession by any length of nonusage. To lose his right he must be disseised, and there can be no disseisin by an act which does not actually take the coal out of his possession."

We quite agree with the court below that the evidence by which it was sought to establish adverse possession was wholly insufficient. The evidence offered by the defendants was to the effect that there were several openings of the coal veins underlying the land on which Vance lived, and that he only used these openings for domestic purposes. It further appears that Vance occasionally permitted his neighbors to take coal for domestic use, and occasionally he dug the coal, or some member of his family dug it, and sold it to some of his neighbors, and that this practice had continued from 10 to 12 years. In this connection it is significant that Vance was unable to furnish the names of more than two or three persons to whom he had sold coal during the period mentioned. Vance, among other things, on cross-examination, testified as follows:

"The coal bank is just above his house, and one is below. Has dug and used coal for domestic purposes; dug it along as he used it and wanted it. Q. Don't have any time in the year, just go there whenever you want it and dig some? A. I generally dig it in the fall, and I am in shape that I can. Q. You have no mine there equipped, however; it is just a hole where you have dug the coal out for your purposes, isn't is—domestic purposes? A. I have sold coal from there; yes. Q. Who did you sell it to, and when? A. I have sold coal pretty near all the time—at the start when I first opened the bank along. Q. When? A. I have sold coal to Emily Brock, and I have sold coal to Vinson Spurlock and Willie Brock, and one of the Adkinses—I forget his name. I know his name, too. Q. When did you do that? A. Just when I wanted to. Q. I know, but give me the date. A. The last I

have sold has been about a year or two ago, I reckon. Q. When was the first you sold? A. Why, I have sold ever since I have been up there. When I first went up there I went to selling, and have sold on. Q. How much did you sell? A. I couldn't tell you that neither. Q. How much did you sell to any one person? A. I couldn't tell you that, neither, exactly. I have sold wagon loads, though, of it at a time. Q. How did you get the coal from the face back to the drift mouth? A. Well, sir; I dug the dirt off of it and throwed her back out of the way is how I got her, and took the coal out. Q. And lifted it out? A. Yes, sir. Q. What did you load it on when you got it outside? A. Put it on a wheelbarrow, and wheeled it out to the mouth, and then loaded it on a wagon. Q. How did you get it from the drift mouth down to the wagon? A. Wheeled it out on a wheelbarrow."

The foregoing is the evidence by which defendants seek to establish adverse possession of the coal underlying the surface, which, in our opinion, is not sufficient. This principle is announced in the case of Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436.

[2] It is insisted by counsel for the defendants that the court erred in permitting the surveyor to give his opinion "as to the location of the lines of the several grants, and also the maps and plats and resurvey made by Johnson of the Carnahan grants," as such opinion was incompetent and irrelevant, and should have been excluded. An examination of the transcript shows that this evidence was admitted without objection. The defendants having failed to object to the introduction of the same, and to save the question by proper bill of exception, under the rules of this court we cannot consider that point.

The chief contention of the defendants seems to be that there is not sufficient evidence to warrant the verdict for the plaintiffs. A careful consideration of all of the evidence impels us to the conclusion that the findings of fact by the court below are amply justified by the evidence.

The judgment of the court below is therefore affirmed.

## SAVANNAH & N. Y. TRANSP. CO. v. KLAREN BRIDGE CO.

(Circuit Court of Appeals, Fourth Circuit. July 3, 1918.)

### No. 1593.

1. NAVIGABLE WATERS \$\infty 20(3)\$—Bridges—Injury by Vessel.

Bridge over navigable waters, built according to plans approved by Secretary of War, as required by River and Harbor Act, as amended by Act July 13, 1892, § 3, and repaired on his direction, as required by Act March 3, 1899, § 18 (Comp. St. 1916, § 9970), may not as a nuisance, because of narrowing of original width, be injured without liability by a passing vessel; but the test is whether the narrowing was a proximate cause of the collision.

- 2. Shipping ⇐=86(3)—Bridges—Injury by Vessel—Question for Jury.

  Whether slight narrowing of span of bridge over navigable waters was proximate cause of vessel injuring it is a question for jury on conflicting evidence as to point of collision.
- 3. Shipping \$\iff 86(3)\)—Toll Bridges—Injury—Damages,
  Relative to damages from injury of toll bridge by vessel, no deduction
  is to be made from what gross receipts would have been during period of
  repairs; bridge company's operating expenses not being lessened.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action by the Klaren Bridge Company against the Savannah & New York Transportation Company. Judgment for plaintiff, and defendant

brings error. Affirmed.

J. P. K. Bryan, of Charleston, S. C., for plaintiff in error.

H. L. Erckmann, of Charleston, S. C. (H. H. Ficken, of Charleston, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This case comes here on a writ of error to the District Court of the United States for the Eastern District of South Carolina. The facts may be epitomized as follows:

Wappoo cut, or creek, is a narrow navigable stream in the state of South Carolina, running westwardly from the western bank of the Ashley river opposite the city of Charleston. In January, 1897, Wappoo Bridge Company received a charter from the state authorizing it to operate a toll bridge. The General Assembly of South Carolina then passed an act, approved the 11th of February, 1898, authorizing the bridge company to erect a toll bridge across the stream above mentioned. 22 St. at Large, p. 952. Act Cong. July 13, 1892 (27 Stat. 110, c. 158), required the location and plans of the bridge to be submitted to the Secretary of War and approved by him. This was done. The plans, among other things, required the draw span opening to be 66 feet in the clear, and also called for batter piling behind certain parts of the fenders. This was done, and the bridge was built according to the plans and specifications duly approved.

The bridge was thrown open to the public on January 10, 1899. The Klaren Bridge Company, defendant in error (chartered in 1906), became the owner of such bridge and proved title thereto. It seems that in the course of repairs during the years many of the batter piles called for by the plans rotted away and were not replaced. Further, owing to bad measurement or due to action of the tides, the opening had slightly sagged and bulged in some parts, so that, instead of being 66 feet, the eastern half ran from 66 feet to 67 and 68 feet (more than required by law) in the clear, and portions of the western half ran

from 66 feet to as low as 64 3/10 feet.

The Secretary of War, under Act March 3, 1899, c. 425, § 18, 30 Stat. 1153 (Comp. St. 1916, § 9970), when he has reason to believe that a bridge is an obstruction on account of its draw span, is required to make the owner alter same so as to render navigation free. It appears that this bridge was inspected on a number of occasions by the United States engineer, representing the Secretary of War, and on January 10, 1917 (the time of the accident), there was no demand on the part of the War Department remaining uncomplied with, but all work had been done to the satisfaction of the engineer in charge. The middle fender (the one injured) was only two years old, and the government had required certain changes since 1906. Testimony was intro-

duced to show that the middle fender (the one alleged to be injured)

was strong and substantial.

From 50 to 100 vessels were accustomed to pass through the draw-bridge daily; this including all kinds of vessels with the exception of large sea-going barges. On January 10, 1917, the Savannah & New York Transportation Company, plaintiff in error, attempted by its tug Passport to tow a large sea-going barge from the Ashley river in a westerly direction through this bridge, going to Wiggins, S. C. The testimony shows that the barge was 180 feet long, 40 feet wide, and stood out of the water 14 to 18 feet, and drew 7 feet of water. It appears that Capt. Nelson had been advised by an experienced local pilot not to attempt to take the barge through by this route. Capt. Nelson had no sea-going license. The barge captain testified that it was almost impossible to go through the bridge with that barge without coming in contact with the fenders.

For some reason, the tug or barge, on entering, struck the northeast fender. The Klaren Bridge Company alleges that the tug did it; that both were painted green. The barge had fenders, and green paint was found on the northeast fender after the accident, which was never there before. Witness testified that the northeast fender was hit, but did not give way; that the tow became unmanageable, and the barge crossed over to the southern fender and crashed into it with a "powerful noise." L. B. Sauls, the bridge keeper, living about 80 or 90 feet from the bridge, testified to hearing the scrape on the northeast fender, and that he came out to the foot of the bridge, saw the barge strike the draw fender east of the cylinder; that it broke the fender, struck the draw, and kept striking, going right on down; and that after it had cleared the bridge there was considerable noise and confusion, and cries, repeated three or four times, from the tug, "I told you to pull hard over." The record shows that the southern fender was broken, and the iron drawbridge injured and damaged.

The evidence shows that bill for actual repairs amounted to \$2,129.43; the bridge was put out of commission for nearly three months, with loss of tolls, estimated on basis of previous year, \$514.17; extra lumber cost \$17.25; use of wagon, \$105; or total of \$2,832.94. The case went to trial before a jury during the June, 1917, term of the District Court, at Charleston. At the conclusion of the testimony plaintiff in error moved for a directed verdict, which was refused. The jury found a verdict of \$2,832.94, which was reduced by the presiding judge to \$2,732.94, and judgment duly entered accordingly. The defendant in error will hereinafter be referred to as the plaintiff, and the plaintiff in error will be referred to as the defendant; such being the relative

positions the parties occupied in the trial at the court below.

[1] The defendant insists that the plaintiff is not entitled to recover in this action by virtue of section 7 of River and Harbor Act Sept. 19, 1890, c. 907, 26 Stat. 454, as amended by 27 Stat. 110, § 3, which is in the following language:

"It shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments \* \* \* over or in any \* \* \* navigable river or navigable waters of the United States under any act of the legislative assembly of any state until the location and plan of such

bridge \* \* \* have been submitted to and approved by the Secretary of War. \* \* \* "

At the trial in the court below witness Dawson, who states that bridge was built according to plans and specifications, testified as follows:

"I was the engineer who made the plans of the bridge, as is shown upon the plan. According to these plans the bridge was adopted and accepted by the company and accepted by the government. I superintended the construction, and at the time the bridge was so constructed it did conform to the plan in 1898, when it was built."

According to this witness the bridge was erected in accordance with plans that had been approved by the War Department. The important question involved herein is as to whether a bridge built in accordance with the law becomes, on account of wear, tear, and incidental repairs, with unsubstantial variations from the original plans, an unlawful structure, which may be injured by a passing vessel, without such vessel incurring liability to the owner of the bridge, regardless of the fact as to whether such variations or defects were approximate cause of the injury or not.

We do not think that the section first above quoted applies to the case at bar, but relates solely to the construction of bridges in the first instance. However, we are of the opinion that 30 Stat. 1153, § 18, is intended to apply to a case like the one at bar. This section is in the fol-

lowing language:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them."

This act also prescribes a penalty or fine not to exceed \$5,000 for noncompliance with the act. It also vests the Secretary of War with the power to require changes.

Maj. Youngberg, a witness introduced on behalf of the defendant,

among other things testified as follows:

"The records of my office show that the bridge has been inspected on number of occasions from the date of erection or date of beginning work up to the present time. I don't recollect any repairs remaining not complied with on the 10th of January, 1917."

According to the testimony of this witness the bridge had been inspected from time to time by the United States engineers, and there had been no demand which had not been complied with at the time of the accident.

The defendant's contention is tantamount to saying that, inasmuch as the bridge company, in repairing the bridge, made variations of a few

inches in the width of the same at one point, such action on the part of the bridge company conferred upon the navigator the right to strike the bridge at another point, where there was no variation from the original plan, and thereby demolish the same. In other words, counsel for defendant proceeds upon the theory that whereas, in this instance, an immaterial variation existed, the right thereby devolved upon the public to abate the same as a nuisance. It cannot be reasonably claimed that Congress could have intended to convey such meaning, and one only has to read the plain provisions of the statute to find that they do not justify such a construction.

We find the following in the A. & E. Encyclopedia of Law, vol. 1, pages 84, 85, which we think is very pertinent to the question at issue:

"The right to abate is limited to the removal of that in which the nuisance consisted; and for any excess of abatement the party abating will be liable to an action. Where there are more ways than one of abating a nuisance, he must choose that which is the least mischievous to the wrongdoer."

We think the case of Ft. Plain Bridge Co. v. Smith et al., 30 N. Y. 44, is very much in point; also the case of Miss. & Missouri R. R. Co. v. Ward, 2 Black (67 U. S.) 485, 17 L. Ed. 311. In the last-mentioned case there was a conflict of evidence as to whether the variance was a substantial deviation from the original construction sufficient to warrant the inference that the variation was a concurring, contributing, proximate cause of the accident, so as to exonerate the defendant from liability, even if it were found to have been negligent. The court very properly submitted this question to the jury.

The learned judge who tried this case in the court below, in referring to the construction of the bridge in question, among other things, said:

"I charge you that the requirement of law is that that bridge must be constructed and maintained according to the requirements of the plans approved and sanctioned by the Secretary of War. I charge you further that if any one constructed such an obstruction as a bridge, assuming it to be under the authority of the state and of the permission of the Secretary of War, and does not construct it so as to conform with the plans and regulations, it is an unlawful structure, and the person who constructs it is under the statute liable to a severe penalty, to be inflicted by the United States, for disobeying the requirements of the plans in the construction or maintenance of that bridge, and is also liable by the United States authorities to be ordered to remove it, and make it conform to those plans. No matter what the circumstances may be, they can be required to move or alter it, or change it to conform to those plans. It is an unlawful structure in that sense; but I charge you that it is not an unlawful structure in the sense that anybody has a right to go and knock it down or move it, or disregard it. To illustrate what I mean: If a wharf is authorized by the United States to extend towards the channel 66 feet, and the wharf owner, through inattention or inadvertence, constructs to 67 feet, that does not mean that anybody can hurl a heavy barge against it, the whole pier, or that he can destroy a part of the wharf, or that he can take an ax and destroy the wharf because the requirement at the time was disobeyed, and it was constructed 67 feet out in the channel, instead of 66 feet. So I charge you, gentlemen, that if a person or a corporation is authorized to construct a bridge and he is directed by the plans to construct it with a draw 66 feet in width, and he constructs it 65 feet, or 65 feet 11 inches, so as to be less than the requirement by 1 inch, that does not authorize anybody to destroy that bridge, or hurl a boat, or any other object which will hurt it, against it, and destroy it because the party who constructed it may have made an immaterial and unsubstantial alteration and have disobeyed the requirements of the plans. The remedy in those cases is not that the whole bridge is declared outlawed, open to destruction and to be ignored by any one, but that the party should be reported, and required under the statute by the War Department to tear down his bridge and reconstruct it, if necessary, as the War Department may accept and ratify, or the party is liable to prosecution and punishment by fine for not having obeyed the plans; but, because he has done it, he is not open to have his property destroyed as if he were an outlaw. His bridge is there, and has been authorized to be there, though required to be put there according to the plans approved by the War Department; yet a variation between those plans and the actual structure does not mean that the party who constructed it forfeits all right to his property or to the use of it.

"I therefore charge you in this case that the fact that the draw in this case may at this time, nearly 20 years after the original authorization of the construction of the bridge, vary from the width required by the plans to the extent of 19 inches, does not mean that anybody who wishes may disregard the whole authority for the construction of the bridge, and treat it as an unlawful construction existing, which they can destroy, and for which the party owning it is not entitled to any remedy or reparation if it is carelessly or negligently destroyed; if it is not constructed according to the plans, not only is he subject to prosecution under the statute, but to the general common law that he must place no obstruction in navigable waters which causes injury as the proximate cause, because a man is not liable to another simply because he has an obstruction in the navigable water. He is only liable if that unlawful obstruction is the cause of injury to another, to the individual, as distinguished from the government, and therefore I charge you in this case that not only if he did not follow the plans is he still bound by the law that his obstruction must not be one that is such an obstruction to the navigable stream as in any case causes injury to a party; but I charge you that, if that draw was less than 66 feet, he is not entitled on the construction of the draw to any protection as having fully complied with the plan in this respect. If he constructed it 66 feet wide, then any boat that touched or injured that bridge was negligent. If he conformed to the law and constructed it full 66 feet wide, then that was the requirement of the law, and no boat passing through that draw had the right to strike the fender and obstruction on either side, so as to injure it; but if he constructs it at less than 66 feet he is deprived of that absolute protection, and a party who strikes it is not presumptively negligent or careless, but the bridge owner would be presumptively in fault, unless he can show that the lessening of the width, if the jury find it to be unsubstantial, was not any one of the factors or causes which contributed to the injury. What I mean is this, gentlemen, to put it more concretely to you: If the law authorized the construction of a bridge there with a width of 66 feet, any boat that goes through there is expected to do so without striking anything at the side. She is notified by law that she has a clear way of 66 feet, and no more, and is to be piloted, managed, and guided accordingly; and if she strikes within the 66 feet, when it is 66 feet, unless he can show it was due to some uncontrollable cause, which exists whenever you deal with navigation, a boat that strikes is presumptively negligent; but, if it is less than 66 feet, then that presumption is destroyed, and the bridge owner is entitled to recover from the boat it strikes or injures only if he can show that lessening of the width was in no way responsible for or contributed to the accident or disaster.

"If there was, if the barge was so navigated and towed through that lane or bridge way, so that it was carelessly and negligently allowed to strike against the side with an impact not simply incident to the usual and ordinary impact of a boat going through, then I charge you you would be authorized to infer that there was negligence on the part of the boat. Now, it is for the jury to say: Was it negligently carried through, so as to strike the bridge structure? And if it did, and broke it down, and in consequence of such carelessness and negligent management it then struck against—directly or indirectly against—the swinging bridge and injured that, then I charge you that the defendant would be in the first instance responsible. In this case there is no

question of narrowing of the waterway at the swinging bridge itself, because the testimony is that at the time the bridge was completely swung away, off the waterway, did not protrude to one side, and the only question is: Was this barge so unskillfully handled by the tug which was towing it, by the people on board the barge, that she by any unskillful management struck against those piles and injured the bridge structure and the bridge? If that was due to the negligence of the parties on the tug or the barge, then they are responsible. But, however, if you find that that was due to the fact that the draw opening at that point was 64 feet 5 inches, and not 66 feet, that the diminution of it by 1 foot 7 inches was the contributive cause of that striking against the bridge, then they would not be responsible, as, for instance, if a boat which had a beam of 65 feet could be safely carried through, and when she got to a place where the width was reduced to 64 feet 5 inches, there was 7 inches too little, why then that would manifestly be the responsibility of the bridge, because the boat that went through was entitled to 66 feet, and if 65 feet prevented it from going through it, with only 64 feet 5 inches it would be the responsibility of the bridge. That is, of course, an extreme case,

"Now, I charge you in this case that, if you find that this boat, which was 40 feet beam, that the lessening of the draw opening to 64 feet 5 inches at that point was a concurring, contributing, proximate cause of the injury, was the concurring thing in making the boat strike, it would be contributory negligence on the part of the bridge owner, and although there may have been unskillful management of the tug in causing it to strike in the first instance, the tug owner or barge owner would not be responsible, and that is pretty much this case. There has been some evidence, I charge you, as to the condition of the iron structure of the bridge, but the testimony is that that was all removed from this draw opening; that, therefore, could not be a contributing cause to the accident at all, and the only contributing causes in this case, shown upon the testimony, that would justify the jury in finding it, are: First, the lessening of the draw width; and, next, the decayed-if you find it existed-rotten condition of the fenders and piles, that they were in an unsafe condition. Now, if you find that those piles and fenders were so decayed as not to be able to withstand the ordinary, usual bump, scrape, touch, or contact to the sides in the passage of a boat of this size through that draw opening, then I charge you you are also authorized to find that there was contributing negligence on the part of the plaintiff, provided that was a concurring, contributing, proximate cause of the accident. Under the testimony those are the only two causes which are shown to have been capable of contributing to the injury here. One is the lessening of the size of the draw by 19 inches; the other is by the condition of the piles and fenders, shown not to be in accordance with the plans, according to the testimony to have been in a decayed condition; if either of those factors, the lessening of the width of the draw or the condition of the piles and fenders, were in any wise the contributing, concurring, proximate cause of this accident then the plaintiff is not entitled to recover."

We think the court below clearly stated the law bearing upon the facts and circumstances surrounding this transaction. This being a case where the government is not proceeding against the bridge company to recover penalty for failing to construct the bridge in strict compliance with the plans and specifications as approved by the Secretary of War, and it appearing that the bridge was originally constructed in accordance with law, the positive duty imposed upon a bridge company by section 7, 27 Stat. 110, supra, does not apply. That portion of the charge to the jury which we have just quoted clearly distinguishes the instant case from a case where the government seeks to recover a penalty, due to failure of the bridge company to comply with the requirements of the government in the construction of a bridge in the first instance.

[2] In view of the facts and circumstances as shown by the testimony, we think the judge very properly permitted the jury to say whether the variation was a material one, and, if so, whether it was the proximate cause of the accident; there being conflicting evidence as to the width of the span where collision occurred. In other words, there was conflicting testimony as to where the collision actually occurred. The case of Missouri River Packet Co. v. The Hannibal, etc., Rwy. Co. (C. C.) 2 Fed. 285, is very much in point. There the construction of a bridge was authorized by an act of Congress to have a span not less than 160 feet in the clear. The court held in that case that a bridge was not a legal structure unless constructed according to specifications. The court further charged as follows:

"Though we may find from the testimony that the width between the piers as constructed was less than the act of Congress requires, yet the violation of law by the defendant is not available to plaintiff in recovering damages unless it caused or contributed to the injury by plaintiff complained of."

The cases of Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and Union Pacific Ry. Co. v. McDonald, 152 U. S. 283, 14 Sup. Ct. 619, 38 L. Ed. 434, are pertinent, and fully sustain the action of the court below in submitting the question to the jury as to the width of the draw span; also, as to whether any of the factors of this case contributed to the injury as proximate cause.

[3] There are a number of exceptions, but we have already disposed of practically every point presented. Without entering into further discussion of the various questions raised, we are of the opinion that the assignments of error are without merit. There is one point, however, involved in exception No. 15, which we will refer to in passing. It is insisted that the court below erred in refusing to charge the twenty-first request of defendant, which is in the following language:

"The jury are further instructed that the plaintiff cannot recover the gross receipts of toll collections that he would have received during the time the bridge could not be used, but only the net receipts for such time; that is, the gross receipts less the operating expenses."

In refusing this request the court said:

"I charge you that, if the expenses followed, he is entitled to recover the gross receipts. As to that, however, I shall make up my mind, and allow a remittitur if I find it is incorrect."

Later the court considered this question on defendant's motion for a new trial, and reduced the verdict \$100 on account of the previous damage to the cord east of the cylinder, thus taking into consideration the net loss to plaintiff. Instead of the evidence showing that the expenses were curtailed during the interim as a result of the damage, it clearly appears that the keeper of the bridge and the president of the bridge company continued working in the meantime. In addition to this, the plaintiff lost the interest on the money necessarily expended in making repairs, and the extra work of Klaren in superintending the work should be considered. Under these circum-

stances, we think the ruling of the lower court is entirely justified

and proper.

We think that the jury was warranted in finding that the damage sustained by the plaintiff was occasioned by the neglect of the defendant. The jury having found such to be the case, we are not inclined to disturb their verdict.

For the reasons stated, the judgment of the court below is affirmed.

#### THE KIA ORA.

# MERRITT & CHAPMAN DERRICK & WRECKING CO. v. READ.

(Circuit Court of Appeals, Fourth Circuit, July 15, 1918.)

No. 1595.

1. SALVAGE €=26-AMOUNT-ELEMENTS IN ESTIMATE.

The elements which enter into the estimate of salvage enumerated.

2. SALVAGE 51-APPEAL-REVIEW.

While since Act March 3, 1891, as before Act Feb. 16, 1875 (Comp. St. 1916, §§ 1585, 1586), appellate jurisdiction in admiralty is not limited to matters of law, finding of fact as to allowance for salvage should not be disturbed for mere doubt, or inclination to differ, but only for clear and certain conviction.

3. SALVAGE \$\infty 27\text{--Amount-Computation.}

The per cent. basis is no longer followed in determining allowance for salvage, and no formula meeting the justice of every case can be given.

4. Salvage €==26-Value of Vessel.

Relative to award of salvage for rescue of vessel, her real value is her value as reduced by the fact of her being under requisition of the British government.

5. SALVAGE \$\sim 51-APPEAL-FREIGHT MONEY.

There being nothing to show on appeal in a salvage case that the value of the cargo was estimated at point of shipment, and not at point of destination, there is no ground for adding freight money.

6. SALVAGE \$\ightharpoonup 30\to Future Peril-Absence of Other Aid.

Future peril of complete loss from storms, frequent in the region, is to be considered in awarding salvage for rescue of vessel stranded on a coral reef near the Bahamas, especially, in view of no other aid being procurable, except from a distance.

7. SALVAGE \$\infty 26-Maintenance of Local Salvage Plant.

Vital importance of a local salvage plant and vessel to ships navigating those waters justifies encouragement of their maintenance by fairly liberal awards for salvage.

8. SALVAGE \$\iiins 30-Stranding-Amount of Award.

All things considered, *held*, an award of \$100,000, for rescue by vessel of a local salvage plant of a ship, with cargo worth \$3,900,000, from coral reef near the Bahamas, should be increased to \$150,000.

9. Interest \$\infty 39(2)\$\to Salvage-Decree-Increase on Appeal.

Decree on appeal increasing allowance for salvage will draw interest from date of District Court decree.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Suit in admiralty for salvage by the Merritt & Chapman Derrick &

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Wrecking Company against A. C. Read, master of the steamship Kia Ora and claimant and bailee thereof, and her cargo and freight money. From a decree for less than claimed (246 Fed. 143), libelant appeals. Modified.

H. H. Little and Leon T. Seawell, both of Norfolk, Va. (Hughes,

Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Floyd Hughes, of Norfolk, Va., and Chauncey I. Clark, of New York City (Burlingham, Veeder, Master & Fearery, of New York City, and Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The District Court awarded \$100,000 to Merritt & Chapman Derrick & Wrecking Company, on a claim of \$600,-000 for salvage service to the British steamship Kia Ora. The libelant appealed alleging the award to be grossly inadequate. The Kia Ora on February 24, 1917, reached the Crooked Island Passage in the Bahama Islands on her way from Melbourne, Australia, to London, via the Panama Canal. In the evening of that day, the vessel struck a coral reef and grounded thereon from about amidships nearly to the bow. In response to her wireless call, the Wrecking Company, from its office at Kingston, directed its salvage ship, Relief. to go to the steamer's assistance. The Relief started at 5 p. m. on Saturday, February 26, and reached the Kia Ora 360 miles distant at 6 a. m. Tuesday, February 27. The master of the Relief, under agreement with the master of the Kia Ora, immediately took charge of the stranded vessel and began the work of rescue. Continuous and skillful work resulted in releasing the Kia Ora at 3:45 p. m. Saturday, March 3, in such condition that, although somewhat injured, she was able to proceed without assistance to Newport News.

[1] The elements which enter in the estimate of salvage are: (1) The value of the property in peril and the proportion of the value lost and saved; (2) the degree of peril from which lives and property are rescued; (3) the value of the property employed by the salvor, and the risk of life and property incurred; (4) the skill and dispatch shown in rendering the service together with the foresight and skill exercised in the preparation to render it; (5) the time consumed and the labor performed by the salvor. The Blackwall, 10 Wall. 1, 19 L. Ed. 870. The consideration of all these elements should result in an award which will express reasonable actual compensation for the labor, risk, and skill of the salvor and the use of his vessel and appliances, and an added amount based on the degree of peril of property and life and the value of the property saved and lost sufficient to promote the highest degree of readiness and efficiency for the relief

of vessels in distress.

[2] Act Feb. 16, 1875, c. 77, 18 Stat. 315 (Comp. St. 1916, §§ 1585, 1586), gave to the Supreme Court appellate jurisdiction in admiralty only as to matters of law. That limitation was not incorporated in the Judiciary Act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 826),

and the Circuit Court of Appeals now has the same appellate jurisdiction in admiralty, both as to matters of law and fact, that the Supreme Court had before the act of 1875. In the Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, the court says:

"Before the act of 1875, this court, upon an appeal in a case of salvage, gave the same weight, and no more, to the decree of the court below, that a court of common law would allow to the verdict of a jury, and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which should govern the subject was shown. Post v. Jones, 19 How. 150, 160 [15 L. Ed. 618]. Since the act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only, and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case."

This language, together with the following statement in The Ariadne, 13 Wall. 475–479 (20 L. Ed. 542), expresses as accurately as the nature of the subject will admit the limits to be observed by appellate courts in reviewing findings of fact of trial courts:

"We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer. Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a presumption, prima facie, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect."

A doubt, or even a decided inclination to differ, does not warrant interference with the finding of fact of the trial court, and this is especially true as to the amount to be allowed in salvage cases; but when a careful examination of the evidence in all of its bearings results in a clear and certain conviction of the appellate court, differing from the finding of the trial court, it is the duty of the appellate court to follow that conviction.

[3] Examination of the many cases with their varying facts gives a general sense of the proportion which the award ought to bear to the risk and expense incurred, the skill employed, the value of the property saved and the property lost, the peril of the vessel and cargo, the investment and enterprise of the salvor, the liberality of the allowance for profit in order to encourage enterprise in assisting and saving vessels in peril. But no formula can be derived which will meet the justice of every case. The per cent, basis is no longer followed, because its application to the large values of modern times would lead to obvious injustice. Post v. Jones, 19 How. 150, 15 L. Ed. 618. In view of these rules, we consider the strong and perspicuous opinion of the District Judge.

[4, 5] There was no error in the District Court's estimate of the value of the property in peril and the proportion of it saved and lost. The Kia Ora was built in 1907, and classed "A1" at Lloyd's. She was 448 feet long, 57 feet beam, 35 feet deep, 6,557 tons gross, 4,168

tons net, with a cargo capacity of 11,800 tons. Her cost was \$700,000. Free on the market at the time she was stranded, her market value would have been \$3,000,000; but the fact that she was under requisition of the British government reduced this market value to \$1,772,600. It seems clear that her real value, as properly found by the District Court, was her value under the actual condition of requisition, not what would have been her value with that condition removed. The value of her cargo of wool, fresh meat, and cheese was admitted to be \$2,565,863. But to accomplish the salvage it was necessary to jettison meat and cheese of the value of \$428,310, leaving the net value of the cargo, \$2,128,533. This, with the value of the ship made the total value of the property saved \$3,901,173. As there is nothing to show that the value of the cargo was estimated at point of shipment and not at point of destination there is no ground to add freight money to the value of the cargo as fixed by the District Court.

- [6] This great property was in danger of total loss. It is true that the master of the Kia Ora and the master of the Relief disagree on this point, but the finding of fact of the District Court that a large ship stranded on a coral reef near the Bahama Islands was in great danger of being broken up by the frequent storms of that region is within common knowledge, and is well supported by the testimony. Such future peril is to be considered in awarding salvage. Anderson v. The Edem (D. C.) 13 Fed. 135; The St. Paul (D. C.) 82 Fed. 104; Id., 86 Fed. 340, 30 C. C. A. 70. The importance of this element of danger of complete loss of the vessel and cargo, in the estimation of the value of the service rendered, is magnified by the fact that no other assistance was at hand, or could have been procured short of Norfolk or New York, and by the evidence of the master of the Relief that he knew of no other wrecking concern that could have released the Kia Ora. The Boyne (D. C.) 98 Fed. 444.
- [7] The value of the salvor's ship was \$450,000. It was built especially for wrecking purposes at a cost of \$175,000, and carried a crew of 70 men. The value of the plant at Kingston does not appear, but it was maintained at an annual expense of \$36,000. The vital importance of this plant and the salvage vessel to all ships navigating those waters, especially to large vessels like the Kia Ora, obviously justifies the encouragement of their maintenance by fairly liberal awards for salvage. There was some, but no great, peril incurred by the Relief and her crew. Taking no account of the time spent in getting the Relief ready, and in reloading a part of the cargo landed from the Kia Ora, the time actually taken by the Relief and her crew from the start of the Relief from her port until the Kia Ora was floated was 6 days.
- [8] If only ordinary skill, preparation, and dispatch had been added to the elements mentioned as entering into the award made by the District Court, we should have been content with it. But we are constrained to think that the special and complete preparation for the work in vessel and appliances, officers, and men, and the dispatch, care, and ability with which the work was done, the award should have been somewhat greater, in order not only to encourage the main-

tenance, but the improvement, of such standards of preparation, skill, and dispatch. It cannot be doubted that this preparation, skill, and dispatch resulted in getting the Kia Ora afloat, not only in better condition, but in a much shorter time than the result could have been otherwise achieved, if, indeed, it could have been achieved at all by other available means. The saving of the vessel and cargo was the primary consideration; but, in this time of scarcity of ships, every day of service saved to the vessel was a great gain. It is to be considered also that the award of \$100,000 was of hardly more value or greater encouragement for such service than an award of \$50,000 would have been 10 years ago. A review of the cases would be of little value, since they are collated in text-books and in annotated cases; each of them depending on its own peculiar facts and in a

degree on the mental attitude of the judge who decided it.

The well-considered case of The St. Paul (D. C.) 82 Fed. 104, and 86 Fed. 340, 30 C. C. A. 70, is most nearly analogous. The St. Paul. a ship worth \$2,000,000, with a cargo of equal value, was stranded on the Jersey coast, and was rescued by wrecking vessels of the value of \$400,000. The award was \$131,000 for the vessel and \$29,-000 for the cargo. It is true that several tugs and 207 men were occupied 11 days, while here one vessel and 70 men were engaged 6 days. It is also true that the vessel and all the cargo were saved, while goods in the Kia Ora of the value of \$428,310 were lost. But over against this is to be set the fact that more than one-half of the value of the cargo of the St. Paul was gold, and that this, and it seems all the cargo, could have been taken off, even if the vessel had been lost, while the larger part of the cargo of the Kia Ora necessarily would have been lost with the vessel. In this view, we reach the conclusion that the benefit of the services to the Kia Ora was therefore at least equal to that rendered the St. Paul. Looking at the case in the light of the award in the case of the St. Paul, comparing the awards made in various other cases, American and British, and considering the great value and the great peril of the ship and cargo, the preparation for the work, the skill and dispatch of the service, the importance of time to the Kia Ora, the perishable nature of a large part of her cargo, and the decreased value of money, and giving due weight to the strong opinion of the learned and experienced District Judge, the majority of this court cannot escape the clear and strong conviction that the award should be increased to \$150,000.

[9] As the decree of the District Court would bear interest from its date, the decree, as modified, will bear interest as if the increased award had been allowed by the District Court. The decree of the District Court is modified accordingly.

Modified.

### NORFOLK & W. RY. CO. v. BIRCHETT.

(Circuit Court of Appeals, Fourth Circuit. July 15, 1918.)

No. 1597.

CARRIERS \$\infty\$ 318(4)—INJURY TO PASSENGERS—LURCHING OF CARS—NEGLIGENCE—EVIDENCE.

That a passenger fell from her chair from mere movement of car of fast train does not make out a prima facie case of negligence; and her mere characterization of the movement as a "terrific" or "violent" lurch adds nothing from which negligence can be legitimately inferred.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by Harriet P. Birchett against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

William Hodges Mann, of Petersburg, Va., and F. S. Kirkpatrick, of Lynchburg, Va. (F. Markoe Rivinus, Theodore W. Reath, and Joseph I. Doran, all of Philadelphia, Pa., on the brief), for plaintiff in error.

Randolph Harrison, of Lynchburg, Va. (Harrison & Long, of Lynchburg, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. Defendant in error, plaintiff below, recovered judgment, entered upon the verdict of a jury, for injuries received by her while a passenger in a sleeping car on one of the railway company's trains. The accident occurred on the morning of January 12, 1916, just after the train west bound had left the station of East Radford, Va., and plaintiff's account of what happened is this:

"I got up early, and went to the dressing room, and made my toilet, and had completed it, and was seated in the chair, just putting a few finishing touches to my waist or something, when this terrific lurch came. I never knew what it was, but that just threw me across the room. In catching myself, I suppose I threw this arm (indicating the left) back, and it broke it. It was just as though cars were coming together. That is the way I felt about it; a great lurch. \* \* \* Q. You say, when this lurch came, this violent lurch that you have described, that it threw the cars together? A. Yes, sir; it seemed so to me. I went with a crash. It was that kind of a lurch; just as if some one would take a football and kick it-I went with just as much force across the car. It all occurred very suddenly. I was taking due precaution, and I was seated in the chair, firmly seated there. It was a chair that is placed in the ladies' dressing room for the use of ladies. As I remember, the chair was turned over. I remember seeing the chair out of its natural position. I was suffering, and had fainted, and don't remember \* \* \* I had comwhat position the chair was in, except that it was over. pleted my toilet before the accident happened, except for a few finishing touches, to place a ribbon or a piece of lace or something while I was sitting in the chair. I cannot state now how I was sitting in the chair, except that I was sitting there firmly. I know that is a fact, because I am cautious, very cautious. I am a good traveler, and have traveled a good deal, and this is my first serious accident. \* \* \* I have never had an attack of vertigo

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in my life. I am as steady as can be. I could not explain how the accident occurred, or how I was thrown out of the chair—only a certain thing threw me out of my chair. \* \* \* My height is 5 feet  $2\frac{1}{2}$  inches, and my weight 145 pounds. As to my strength, it is very good, very good."

The only negligence charged in the declaration or asserted at the trial was the unskillful and careless handling of the train, which is alleged to have caused the plaintiff's injury. It is not questioned that the roadbed and appurtenances were in good condition at the time and place, that the train equipment, including engine and cars with their various appliances, was also in good condition, and that the engineer and conductor in charge were rated among the best in the company's The sleeper in which plaintiff was riding was of recent construction, described as "one of the best class of cars the Pullman Company makes." There was no "accident," in the sense that anything broke or gave way or got out of order. The train went on, after plaintiff was hurt, the same as before, and no one else on board seems to have suspected that anything in the least unusual had happened, until she summoned the porter by ringing the dressing room bell. In short, there is not the slightest corroboration by testimony or circumstance of her statement of a "terrific" or "violent" lurch of the car, indicating improper handling of the train. On the contrary, we think it was proven as conclusively as the nature of such a case admits that nothing of the kind occurred. The engineer, who first heard of the accident at the next stopping place, an hour or so later, testified that the train was operated in the customary manner; that he could tell in the engine "if there was a run-up or a run-out"; that is, as he explained, the "slack" running up or running out; and that when informed of plaintiff's injury he could not recall that anything of the kind had happened that morning. The dining car steward, who learned of the occurrence within a few minutes, when he was going through the sleepers to announce breakfast, says that none of the china or glassware was broken or disturbed, as would be the result of a violent jerk or lurch. The train conductor, the two brakemen, the Pullman conductor, and the Pullman porter, all of whom knew of the accident almost immediately, testified that no unusual lurching or jolting of the car had been observed. To the same effect was the testimony of five passengers, four of whom were in the same sleeper with plaintiff and heard of her injury shortly after it happened. Not only do these witnesses say that nothing at all uncommon had been noticed, but their detailed statements of what they were doing at or about the time—for example, two of them had been shaving—tend strongly to show that any violent or unusual lurching of the car would have attracted their attention. In a word, so far as negative testimony could disprove what the plaintiff says was the cause of her accident, and it is not perceived that the case made by her could be otherwise met, the fact was established bevond reasonable doubt that she had the misfortune to be injured, not by an extraordinary or exceptional lurching from which negligent handling of the train might be inferred, but rather and solely by one or another of those swaying or tilting movements, however described. that the most skillful operation cannot avoid.

Moreover, according to the testimony of several witnesses, the plaintiff did not at the time claim that her injury was caused by any violent or unusual lurch of the car. The porter, whom she summoned to the dressing room, quotes her as saying: "I have hurt my arm, porter." The train conductor says:

"I asked her how she fell, how she got hurt, and her remark was she didn't know; that she was in the ladies' dressing room sitting in a chair, and the next she knew she was in her berth; that she didn't know how she came to be hurt or to fall at all."

One of the brakemen states that he heard the conductor ask her how she got hurt, and gives substantially the same version of her reply. The company's surgeon, who in response to a telegram boarded the train at its next stop in order to attend her, testified that he wrote down at the time her answers to certain questions, and produced his memorandum, which showed the following reply to the inquiry as to how the accident occurred:

"I had been to the toilet and was sitting in the chair. As the train was getting under headway from the last stop, I was thrown from the chair against the radiator and injured my left arm."

He further testified that:

"She did not complain to me of any rough handling, or excessive speed, or improper service on the part of the railway company."

In this connection it may be noted that the plaintiff's case, so far as the accident is concerned, rests wholly on her own testimony; her only other witness being a physician, who described the condition of her arm at the time of the trial. On cross-examination she was asked if she did not make to the surgeon the statement just quoted, and said in reply that she did not remember, but that she would not contradict him. In answer to other questions of like import, she repeatedly declared that she could not recollect, but did virtually deny having told the conductor that she knew nothing from the time she was sitting in the chair until she found herself in her berth. But after the defendant's witnesses had given the testimony above set forth, as to her statements directly after the accident, she made no attempt in rebuttal to controvert anything they said. And the significance of all this is that it amounts to a full admission that at the time her injury was received she did not attribute it, by anything then said or suggested to those with whom she talked, to a violent and unusual lurching of the car, or to any improper operation of the train from which negligence could be inferred.

The intimation that the train was running at excessive speed around a certain curve, and that the accident may have been caused by a severe lurch at that point, deserves perhaps a word of comment. It appears that the distance from the station at East Radford to the station at New River is 2.3 miles. Something less than a mile east of New River station is New River bridge, at the eastern approach to which there is quite a sharp curve. Elsewhere between East Radford and New River the track is straight, or curves but slightly. From the first-named station to the other the schedule time of this train was five min-

utes; but on the morning in question it made the run to New River, where it did not stop, in four minutes, which the engineer says was not unusual. The average speed was about  $34\frac{1}{2}$  miles an hour, and expert testimony shows that even the bridge curve could be passed at that speed without the least danger, while on the straight track a speed of 60 miles an hour or more would be perfectly safe. With the amplest allowance for time consumed and distance covered in getting under headway, it is therefore evident that the train could run this 2.3 miles in four minutes, as it often did, without improper speed at any point, and there is nothing to indicate that the fact was otherwise. Besides, the proof is convincing that the accident occurred before the bridge curve was reached. One of the brakemen says that he was on the rear platform, as his duty required, until the train passed through the East Radford yard, about half or three-quarters of a mile west of East Radford station; that he then started forward, and had gone through one sleeper, when he met the conductor and was told of the occurrence. He is positive that this was before the train got to the bridge, and his testimony to that effect is in no wise discredited. Indeed, it is confirmed by the plaintiff herself, who specifically states that she would not deny having told the surgeon that the accident happened "as the train was getting under headway from the last stop." It is sufficient to say that there is absolutely no basis for an inference that her injury was occasioned by excessive speed.

The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. If it can be said that her testimony, unsupported by a single circumstance, raises a presumption of negligence, that presumption was overcome by evidence so convincing as to leave no room for reasonable doubt that the accident was not caused by any such extraordinary lurch as she describes. The doctrine of res ipsa loquitur, upon which plaintiff really relies, has but limited application to a case of this kind. The injury for which she sues did not result from collision or derailment, or from the improper character or unsafe condition of any part of the train equipment. It must have been occasioned, as seems to us clearly established. by one or more of those car movements or motions, by whatever name called, which necessarily attend the most careful operation of fast passenger trains. In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. Herstine v. Lehigh Valley R. Co., 151 Pa. 244, 25 Atl. 104; Weinschenk v. N. Y., N. H. & H. R. R. Co., 190 Mass. 250, 76 N. E. 662; Denver & R. G. R. Co. v. Fotheringham, 17 Colo. App. 410, 68 Pac. 978; Nelson v. Lehigh Valley R. Co., 25 App. Div. 535, 50 N. Y. Supp. 63. In the last-named case it was said:

"But it does not follow as a logical conclusion that, because a passenger is shaken or disturbed in his seat by the movement or lurching of a car run-

ning upon a curved road, the imputation of negligence must necessarily arise. That a passenger may, in a greater or less degree, be shaken or jostled, under such circumstances, is a matter of common knowledge and experience. As an ordinary incident to railroad travel, it is a consequence of the operation of counteracting forces, and is to be expected to occur. The courts must take notice of that which is a matter of common knowledge or experience, and when the evidence fails to disclose the lack of the required measure of care, as judged by the light of such knowledge, in view of the attendant circumstances, it ought not to be left to the conjecture of a jury. The plaintiff must give some proof from which there may be a logical inference of negligence, and the mere happening of the accident is not sufficient for the jury."

In Norfolk & Western Ry. Co. v. Rhodes, 109 Va. 176, 183, 63 S. E. 445, 448, a case of the same class as the one at bar, though the facts stated seem decidedly more favorable to the injured passenger, the Supreme Court of Appeals of Virginia says:

"In this case there is no direct proof of negligence, nor can negligence be reasonably presumed from the facts and circumstances disclosed by the record. It is a matter of common knowledge, as well as shown by the record, that trains or cars in passing rapidly over curves in the road, lurch, rock, or swing, and that this is unavoidable. Railroad tracks cannot always be straight. The movement of trains is rapid, and the inevitable result is that the natural laws of motion cause the car to rock or swing or lurch as it passes over curves. This cannot be prevented and is one of the risks which a passenger assumes. \* \* \* It is true that the plaintiff and one of his witnesses express the opinion that the rocking or lurching when the plaintiff was injured was unusual and extraordinary, but they testify to no facts which show that it was unusual or extraordinary. Foley v. Boston, etc., R. Co., 193 Mass. 322, 79 N. E. 765, 7 L. R. A. (N. S.) 1076. The mere fact that the plaintiff, who did not have hold of anything, was thrown or fell in the way he described, does not show that the movement of the train was unusual. No one was to blame for the injury so far as the record shows. It was simply one of those unfortunate accidents which sometimes happen, for which the law holds no one responsible."

An able and discriminating review of the subject will be found in Irvine v. D., L. & W. R. Co., 184 Fed. 664, 106 C. C. A. 600, in the course of which the Third Circuit Court of Appeals has this to say upon the question here considered:

"But, according to the contention of the plaintiff in error, a passenger who by reason of weakness or momentary vertigo, or by reason of the ordinary and regular movement of the train, should fall in the aisle of the car and suffer hurt or damage, would be permitted, in an action against the carrier company, to rest upon a presumption of negligence, as arising from the mere fact that he was injured or hurt, and to throw upon the defendant the burden of negativing negligence on its part. Such a proposition is as unsupported by authority as it is by reason. The counsel for the plaintiff in error has founded his argument upon what we have said was a misconception of the true meaning of the doctrine established by the decisions to which he has referred. This misconception has apparently arisen from considering certain language in the reported opinions of the cases, apart from the facts and circumstances with reference to which the opinions were announced."

The opinion of Judge Gray then proceeds to analyze a number of cases, among them Railroad Company v. Pollard, 22 Wall. 341, 22 L. Ed. 877, relied upon by plaintiff, and Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115, therein cited, and shows that they belong to a different class. The former, for example, was a case where in the operation of shifting or "drilling," when the train was within about 100 yards of

the station and running slowly, one car was bumped into another with such force that the plaintiff, standing at the moment, was thrown against the arm of a seat and injured. These facts being admitted, the court held in effect that it was properly left to the jury to say whether the specific act which caused the injury was negligently performed; that is to say, if the cars were bumped together with unnecessary and avoidable force, the negligence of the company might be inferred. In Stokes v. Saltonstall the passenger was injured by the upsetting of a stagecoach on an open road in daylight, which of itself would be enough to raise a presumption that the driver was negligent. The distinction between such cases and the instant case, with reference to any presumption arising from the mere fact of injury to a passenger, is so clearly and convincingly pointed out by the learned judge, in the opinion quoted from above, that nothing need be added to what is there said. Of C. & O. Ry. Co. v. Needham, 244 Fed. 146, 156 C. C. A. 574, L. R. A. 1918A, 1169, recently decided by us, it suffices to say that on the record in this court the question here discussed was not presented, and our reversal of the judgment was solely on the ground that a refused instruction should have been granted.

The plaintiff has cited no authority, and we have found none, which sustains her contention. The fact that she fell, under circumstances not seriously in dispute, does not make out a prima facie case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred. As was said in N. & W. Ry. Co. v. Rhodes, supra:

"It was simply one of those unfortunate accidents which sometimes happen, for which the law holds no one responsible."

In our opinion a verdict should have been directed for the defendant, as was done in the almost identical case of Ozanne v. Illinois Central (C. C.) 151 Fed. 900.

Reversed.

# SPANN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 2, 1918.)

No. 1599.

- 1. Criminal Law \$\infty\$=1054(1)—Exceptions Below—Admission of Evidence.

  For review of admission of evidence, exception must have been taken.
- 2. CRIMINAL LAW \$\infty\$1043(3)\top-Appeal\top-Objection Below\top-Admission of Evidence.

Objection of admission of ledger sheets, without accounting for the original memoranda, is not available in appellate court; the objection below having been merely irrelevancy and immateriality.

3. CRIMINAL LAW \$\sim 402(1)\$—EVIDENCE—LEDGER SHEETS—ACCOUNTING FOR ORIGINAL MEMORANDA.

Relative to admission of bank's ledger sheets pertaining to defendant's account, offered by prosecution, it appearing the original memoranda, checks, and deposit slips had been delivered to defendant, the court properly *held* that it was impossible for the bank to produce them.

4. Perjury \$=32(8)—EVIDENCE—MATERIALITY.

Testimony of one to whom defendant gave a mortgage that he made no deposit to cover check given by him to defendant, *held*, on prosecution for perjury for statements of defendant in supplementary proceedings, material, as tending to show the mortgage was fictitious.

5. CRIMINAL LAW \$\sim 784(8)\$—Instructions—Weight of Evidence.

Instruction leaving it to the jury to determine whether positive testimony or circumstances shall prevail, according as they believe in the credibility of the witnesses, in view of the circumstances, *held* proper.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

J. A. Spann was convicted of perjury, and brings error. Affirmed.

Stanwix G. Mayfield, of Bamberg, S. C. (Mayfield & Free, of Bamberg, S. C.)

berg, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error, defendant in the court below, was tried in the United States District Court for the Eastern District of South Carolina on an indictment containing seven counts, in each of which he was charged with the offense of perjury. The defendant was convicted on the first and second counts.

It appears that during the years 1915 and 1916 the defendant was involved in financial difficulties, and certain suits were brought against him, both in the state and United States courts. There was also an attempt to put him in bankruptcy; but this suit was dismissed, and he was never declared a bankrupt. Suit having been brought in the United States District Court above mentioned by the Read Phosphate Company, a judgment was obtained in favor of the plaintiff. This judgment not having been paid, supplemental proceedings were had on March 3, 1916. Defendant appeared before the United States District Judge for that district and testified in his own behalf. The learned judge who tried this case charged the jury both as to the law and facts. We think he clearly stated the facts upon which the government relied for a verdict of guilty, the material part of the charge being as follows:

"As I said before, this is an indictment against him for perjury, for misstating facts upon his examination in this court, and upon that point I will explain to you that under the charge in the indictment and the testimony he was examined here for the purpose of ascertaining whether or not he had any property applicable to his creditors, exactly in the same way in which a bankrupt is examined when he goes to get the benefit of the Bankrupt Law. He is examined to find if he had any property, and what property he has applicable to his creditors; and I charge you on that point that the law is very fair to both creditors as well as to an unfortunate debtor. If a man has unfortunately contracted debts in the course of his business, the law does not load him up with that debt; but it allows him to go into bankruptcy, to get rid of the debts, allows him to come into court and show by process of law that

he has done all he could, and he is not to be harassed by process if he has no property that he can deliver up to the law; and I charge you that a man should be honest and truthful in his statements if he desires to be a bankrupt, to take advantage of the Bankrupt Law, and continue to do his part, as an active working unit in the community of which he is a member, he can do so. So, on supplemental proceedings, if he wishes to show that, although there may be judgments against him, he has no property which may be applied to it, he will not be harassed: but in each case the necessary preliminary requirement of the law is that he must tell the truth in his statement, and I charge you therefore that his examination in this court under the supplemental proceedings was that he was examined upon material and substantial matters. and his answers were to material and substantial questions, and that he was under an obligation to speak the truth, sworn obligation to speak the truth, and, if he failed to do it, why he is guilty of the crime of perjury. this indictment is based upon his answers under that examination upon the theory that, in his answers as to the disposition of a certain fund, he knowingly misstated the truth. A man might inadvertently misstate the truth, either from lack of memory or mistake; but to commit the crime of perjury he must knowingly misstate the truth. The testimony, which I am required by law to summarize, so as to direct your minds to the issues, is that on the 26th day of January he borrowed or attempted to borrow from one N. P. Smoak, an official of the People's Bank of Bamberg, the sum of \$3,000. Mr. Smoak's testimony is that he applied for a loan from the bank. Mr. Smoak, who was acting on behalf of the bank, notified him that his financial relations with the bank were such that he could not receive any further advances from the bank. He then applied for a loan from Smoak personally, and Mr. Smoak says he agreed to lend him \$3,000, to be personally lent to him upon the security of a mortgage of his stock of goods, about a few days, or a day or so, prior to the 26th of January. He says that on the 26th of January the defendant Spann came to him and produced before him a mortgage of his stock of goods to secure \$3,000, the mortgage being already recorded, and thereupon he handed Spann his check for \$3,000, which was not to be used by Mr. Spann. however, until some money which Smoak expected came in and should be put to Smoak's credit in the bank; the next day there appears upon the bank account of Smoak—the 27th January—a credit of \$3,000, and a debit of \$3,000. Now Smoak says he made no deposit there, and was not entitled to any credit of \$3,000 that he knows of; that the credit for \$3,000 put upon the books of the bank was made without his knowledge at all. The debit of \$3,000 he admitted, and according to the testimony of Denbow was a debit from a check, was the \$3,000 from the check that he had given the day before to Spann, so that you see the day after he gave the check a deposit of \$3,000 was made to his credit without his knowledge, according to his testimony, and that the very same day a check for \$3,000 was drawn from the bank. Smoak parted with no money; his real balance in the bank was not diminished, and there was only this crossing of checks; the check that he had given for the \$3,000 to Spann was paid out of the deposit of \$3,000 that he says came from he does not know where.

"Now, the theory of the government, the prosecution, is that the \$3,000 credit which made that \$3,000 check was the result of a deposit of seven checks which Spann drew, all dated the 26th day of January—a check to H. C. Folk for \$500; check to F. W. Free for \$500; check to Mayfield & Free for \$1,000; check to O. A. Simmons for \$450; check to Mrs. W. B. Bloom for \$150; check to W. E. Spann for \$250; and check to J. E. Spann for \$150, which exactly total \$3,000. Now, on the same day, 27th January, which shows this cross-deposit and debit in the bank, that is, that the account of N. P. Smoak shows a cross-deposit, and checks or debit, of practically the same amounts, the account of J. A. Spann shows a credit of \$3,000, or a little more, and a debit of \$3,000. Now, Denbow, the cashier, says that the debit of \$3,000 was from these seven checks, and the theory of the government is that Spann took the \$3,000 check given him by Smoak and deposited it to his own account, giving to Spain \$3,000 credit. Then he drew \$3,000 of checks against him, these individual checks, and deposited them again in bank to the credit of

Smoak, which was nothing according to their theory but a cross-deposit and cross-check; and if their theory be correct, and you are satisfied that was the testimony, that Smoak got credit for all these checks, as against the debit of his own check, and that Spann got the credit of Smoak's checks as against the debit of these checks, that no money had passed to anybody, Smoak never deposited any money, Spann never got any money, the holders of these checks to whom they were issued never got any money, according to the bank there was a correct balance of debit and credit on each side, but there still remained outstanding, as if valid and good, a mortgage of \$3,000, the result of check and cross-debit, was that no money passed on either side, but there still remained outstanding a mortgage of \$3,000, and the contention of the prosecution is that it was nothing but a fraudulent scheme to have the appearance of a borrowing of money, so as to cover and conceal and give validity to the mortgage that was already of record; that is the government's theory.

"They rely further upon the testimony of Smoak that he has never foreclosed this mortgage; the mortgage was got from him by Mr. W. E. Free, one of the firm of Mayfield & Free, and that it was foreclosed, and the property sold under this mortgage, which the government contends, from the testimony, was simply an illusory or deceptive mortgage, and Smoak says that when the property was sold a check was brought to him by Mr. J. E. Spann, the son of the defendant (whether his own check or that of the Spann Mercantile Company he does not remember), for the \$3,000, with something that he supposed was interest, making \$3,252, that he declined to receive it, saying that he had never made any loan or deposit against his check, that he had never parted with any money, and that he refused to receive it, but it was arranged by this check that J. E. Spann presented him for \$3,252 being really deposited to his account, but he gave J. E. Spann, or Spann Mercantile Company, another check for \$3,252, which just balanced the other. So Smoak's testimony is that he never parted with any money on the loan; Smoak's testimony is that Spann never received any money from him on the loan, and that he never received any money from the proceeds of the sale. The theory of the prosecution therefore is that J. E. Spann, of the Spann Mercantile Company, received \$3,250, the proceeds of the sale, approximately, on this mortgage, when really not a dollar had been paid out by Spann. In other words, that that \$3,250 was turned over to J. A. Spann, or through him to the Spann Mercantile Company, without his ever having paid a dollar for it, or received a dollar for it, or executed a valid mortgage.

"Now that, gentlemen, is the theory of the prosecution, and if that theory were correct, why Spann would have executed and secured the benefit either to himself or to his son of \$3,250 upon a fraudulent mortgage, if it was true; but we are not trying him on the question of a fraudulent mortgage. We are trying him upon the question whether or not he answered truly when he said that he had really paid out that \$3,000 to the parties named under these dates in his examination, and his testimony he gave there, and the circumstances of the fraudulent mortgage and the truth of the deposit of these checks to the credit of Smoak, which offset his check, is material only as showing that his statements, that he had in reality paid his money to those people, that is a material statement; but this case stands or falls against him upon the question whether his explanation of the disposition of those checks to these parties was true or false. That is practically the whole of this case. Did he really in good faith pay these checks to the parties to whom they were payable, or did he simply take the checks and go to the bank and deposit them to the credit of Smoak, getting these parties to indorse them, so as to give countenance and appearance to the validity of the mortgage? Did he go to the bank and deposit them to the credit of Smoak, so as to offset the credit of \$3,000? If he did not, he is not guilty; but I charge you, if he did take these checks, and procure them to be indorsed by the parties to whom they were payable, and carried them to the bank and deposited them to Smoak's account, so as to offset with these checks the debit on Smoak's account, by his check, and he was aware of it, and knew it, when he testified, then the jury would be justified in finding him guilty, and that is practically, gentlemen, the whole question. "Now, on that point as to the indorsement of the checks, why, of course, the

checks, as to the persons who indorsed them, are very material pieces of testimony. Unfortunately they seem to have disappeared; but it is admitted that the parties named in this letter, to whom the checks were made payable, did indorse them. Therefore, under the testimony taken at this time, the jury would be justified in assuming that they were indorsed by those parties, atthough you have not the checks before you, so as to show you in whose handwriting the indorsements were, whether the check to Mayfield & Free, in whose handwriting that indorsement was, or the check to J. E. Spann, or the check to Mrs. Bloom, in whose handwriting that was. How far that may be material it is impossible to state at this time; the checks are not here, and all the jury, upon the testimony as to the matter of the checks, can deal with is that the checks were indorsed by those parties; that brings you then to the question whether the indorsement was secured by Spann for the purpose of enabling him to carry out his plan, not of paying them, but of apparently securing a loan from Smoak for \$3,000 secured by a mortgage, depositing it to the credit of Smoak's account, so that he should owe Smoak nothing, and at the same time, protecting his property by a mortgage which really had no validity; if he did it, then his statements and answers to the interrogatories were untrue, and, if he knew they were untrue when he made them, then he would be guilty of perjury."

The first two counts relate to the transaction with Smoak, and, as we have stated, defendant was found guilty on these counts. It appears that evidence could not be produced as to the other counts, and therefore defendant was found not guilty as to them.

[1] It is insisted by the first assignment of error that the court be-

low erred-

"in admitting parol and secondary evidence to prove the existence and pendency of a proceeding in court, upon which proceeding the indictment in this case is based, and in allowing witness to testify as to the contents of the said proceeding, when the record in said case was the direct and best evidence."

As respects this point it appears from the transcript of the evidence that

"The prosecutior first introduced, without objection, the stenographer's official notes of the testimony given by J. A. Spann, the defendant, on his examination before the Honorable Henry A. M. Smith, on the 3d March, 1916, in the supplementary proceedings in the case of Read Phosphate Company, plaintiff, v. J. A. Spann, defendant, as the same is fully set out in the indictment here."

There being no exception taken to the admission of this testimony upon which to base this assignment, as required by the rules, we deem it unnecessary to enter into further discussion of this point than to say that, if there had been exception thereto, we think the evidence in question is competent.

- [2, 3] The second assignment of error relates to the ruling of the court in admitting the loose leaf ledger sheets of the People's Bank of Bamberg, showing the accounts of J. A. Spann and N. P. Smoak, without accounting for original entries or memoranda from which the ledger entries were made. The following statement is contained in the record as respects these entries:
- "Q. Who made these entries. A. I did. Q. Have you the checks and deposit slips relative to those deposits and the checks? A. I have not; this record here shows that deposit slips and checks were returned to Mr. Spann that day. Q. Both deposit slips and checks? A. Yes, sir."

Both of the above ledger accounts offered in evidence by Mr. Waring.

Mr. Mayfield then objected to the introduction of same on the ground that they were irrelevant and immaterial. There is nothing whatever in the record to show that an objection was made at the time these slips were offered upon the grounds set forth in the assignment. In addition to this, it appears that the original memoranda pertaining to the defendant's account, consisting of checks and deposit slips, had been delivered to the defendant himself. Under these circumstances the court below very properly held that, the checks in question being in the possession of the defendant, it was impossible for the bank to produce them.

[4] By the third assignment it is insisted that the court below erred—

"in admitting the testimony of N. P. Smoak to the fact that no deposit in the bank was made by him to cover check drawn and given by him to J. A. Spann, on or about the 26th day of January, 1917."

We think this evidence was material to the issue then being tried, relating, as it did, to the transaction at the time the alleged mortgage was executed. In other words, it tended to show that the mortgage was not bona fide, and clearly intended as a means by which the defendant could elude his creditors and create the impression that his property was all covered by mortgage, while, according to this evidence, such was not the case.

[5] By the last assignment of error it is insisted that the judge erred in refusing to charge the jury that more weight was to be attached to direct testimony, when uncontradicted by an unimpeached witness, than to any inference to be drawn from facts and circumstances. It appears from the following statements that the judge clearly stated the law as respects the point to be raised by this assignment, and we think his ruling on this point was eminently proper and should be sustained.

"Mr. Mayfield: Upon the point that where there is positive testimony by a credible witness it overrides any deductions or reasonings to the contrary. "Court: No, sir; I won't charge that, because you may not believe him.

"Mr. Mayfield: I say a credible witness.

"Court: I charge you that whether or not the positive testimony overrides is for the jury; it depends upon the credibility you give the witness; of course, if the jury believes him, it overrides, but whether you believe him or not is for you.

"(Mr. Mayfield excepts to this part of the charge.)

"Court: I charge you, gentlemen, and repeat it, there may be a thousand witnesses, who are positive; but if you think the circumstances show that their credibility is not good and you don't believe them, then you are not bound to believe them, any one of them or any part of them, and you are entitled in that case, according to the credibility which you extend to them, to override their credibility by the circumstances."

An examination of the proceedings in the court below, we think, clearly discloses the fact that the defendant deliberately entered into a scheme whereby he hoped to cover up his property with the alleged mortgage, which in reality had no foundation. It was evidently his purpose by this fraudulent scheme to create the impression upon his creditors that he had no property which could be reached by execution or other process, whereas in truth and fact his sole object was, without any consideration whatever being passed, to get his property into the

hands of his son, and thus deprive his creditors of that to which they were entitled. We think that the charge of the judge who heard this case was eminently fair. Upon such charge the jury has said they are satisfied beyond a reasonable doubt as to the guilt of the defendant, and we find no reason to disturb this verdict.

Therefore the judgment of the court below is affirmed.

# E. I. DU PONT DE NEMOURS & CO. v. KELLY.

(Circuit Court of Appeals, Fourth Circuit. July 15, 1918.)

# No. 1619.

1. MASTER AND SERVANT \$\infty 284(3)\$—Injury—Questions for Jury.

On conflicting evidence in servant's action for injury from fall of scaffold, whether he was required to go on it in the course of his employment *held* for jury.

- 2. Master and Servant \$\iff 286(17)\$—Defective Scaffold—Jury Question.

  Whether a master was negligent in the construction of a scaffold from which a servant fell and was injured held for the jury.
- 3. MASTER AND SERVANT &= 289(19)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECTS—QUESTION FOR JURY.

Whether a servant knew of defects in a scaffold and was negligent in using it *held* for the jury.

4. Master and Servant \$\iff 235(4)\$—Injury—Scaffold—Right to Assume Proper Construction.

Servant, required to work on scaffold, had right to assume it was properly constructed.

5. EVIDENCE \$\infty 419(20)\$\top-Parol EVIDENCE\$\top-Release\$\top-Consideration.

Oral testimony of master, in support of written release by servant of claim for injury in consideration of \$5, that statutory benefits for injured employes were promised, was in direct conflict with writing, and so unavailing.

6. Release \$=55-Consideration-Presumption.

A consideration of only \$5 for a release of claim by an employé seriously injured raises the presumption of imposition.

7. Compromise and Settlement \$\sim 23(3)\$—Evidence.

It being inferable that half pay allowances by master to injured servant while disabled were made as a mere kindness, failure of employé to return the money was not conclusive of acceptance thereof in whole or partial satisfaction of claim.

8. TRIAL \$\infty 260(1)\$—Instructions—Requests Covered.

All the issues being fully and accurately covered by the charge, requested instructions need not be given.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Eugene P. Kelly against E. I. Du Pont de Nemours & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles E. Plummer and J. Gordon Bohannan, both of Petersburg, Va., for plaintiff in error.

L. O. Wendenburg, of Richmond, Va., for defendant in error. Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOODS, Circuit Judge. The plaintiff, a carpenter, while employed by the defendant, fell from a scaffold and was seriously injured. In a declaration containing 5 counts, and covering 8 closely printed pages, the fall is alleged to have been due to the breaking of the scaffold, because (1) the supports of the board from which plaintiff fell were too weak, and (2) the brackets which supported the boards were so defectively constructed that the board on which plaintiff was walking crept away from its support and fell; and on this negligence is charged to the defendant (1) in not providing its employé a reasonably safe place to work, and (2) in not making a reasonable inspection of the support.

By an answer containing 15 paragraphs the defendant sets up (1) general denial; (2) contributory negligence; (3) assumption of risk; (4) negligence of fellow servant; (5) discharge by written release for a valuable consideration. The plaintiff recovered judgment, and the case comes here on 25 assignments of error, based on an equal

number of exceptions.

There was no error in refusing the motion to direct a verdict made on the grounds: (1) The plaintiff was not required to go on the scaffold in the performance of his duties as an employé, and went there without the knowledge or consent of the defendant; (2) no actionable negligence on the part of the defendant was proved; (3) plaintiff assumed the risk of his employment; (4) plaintiff was guilty of contributory negligence; (5) plaintiff released all his rights against the defendant.

[1-4] According to plaintiff's evidence, he worked under one Crowder as his "walking boss." Crowder, on the day of the accident, directed him to obey orders of one Davis. Davis ordered him to go on the scaffold and get a chalk line left there. While he was on the scaffold in obedience to this order the plank on which he was standing fell. The evidence on behalf of the defendant that the plaintiff was not put under the orders of a man named Davis, and that no employé named Davis could be found to testify that he ordered plaintiff to go on the scaffold, made a strong showing in support of the defendant's contention that plaintiff was not required to go on the scaffold in the course of his employment, especially in view of the plaintiff's rather confused testimony on the subject. Nevertheless, taking all the evidence together, an issue of fact on this point was made for the jury.

The next issue was whether the defendant had constructed a scaffold, which the foreman as well as the plaintiff had the right to assume was reasonably safe to work on, so negligently that it fell from plaintiff's weight. There was abundant evidence that plaintiff fell because the scaffold was negligently constructed. He had the right to assume that it was properly constructed. There was evidence that he did not know of the faulty construction, and there was no conclusive evidence that the faulty construction was so obvious that plaintiff should have observed it and refused to go on the scaffold.

We find in the record no evidence of contributory negligence; but,

if there was, it certainly was not a sufficient basis for the contention that no issue was left for the jury.

[5, 6] The paper under seal, relied on as a release, expressing a consideration of \$5, purported to release defendant in this language:

"I hereby release and forever discharge said company from any and all actions, causes of action, claims, and demands for, upon, or by reason of any damage, loss, or injury, of whatsoever kind or nature, which heretofore has been, or which hereafter may be, sustained by me in consequence of such accident or injury. It is agreed that said payment is made in full settlement, compromise, and satisfaction of any claim arising from the aforesaid accident or injury, and is not to be construed as an admission on the part of said company of any liability whatsoever on account thereof."

In support of the release, one Ralph Derr, an employé of defendant who took it, testified that at the time it was taken he, as agent of the defendant, orally promised the plaintiff the benefits receivable by injured employés under the New Jersey statute (Act April 4, 1911 [P. L. p. 134], as amended by Act April 1, 1913 [P. L. p. 302]), and thus substituted by agreement this statutory liability for any common-law liability. This oral testimony that the liability provided by the statute of another state should be substituted for any common-law liability was in direct conflict with the written instrument, which was in terms an absolute release, and therefore it was unavailing to support the claim of substituted liability. Smith Lumber & Manufacturing Co. v. Parker, 224 Fed. 347, 140 C. C. A. 33, and authorities cited.

Derr testified that he had no authority to alter the form of the release as printed. If his testimony is to be taken, it leads to the inference that the purpose of the defendant was to bind the injured employé by a written release while refusing to bind itself to a consideration, except by the loose oral statement of a subordinate employé. Indeed, the defendant failed to show even that Derr had oral authority to undertake to alter the written release by an oral agreement to substitute the liability provided by the New Jersey statute for the common-law liability; for according to the testimony his authorization from the E. I. Du Pont de Nemours Powder Company expired when the business was taken over by the defendant company. Derr could not testify with certainty that when the business was taken over he had received any authority from the defendant to make the substitute liability. We have, then, a release presented by the defendant, taken from a man seriously injured on the head, for the consideration of \$5, which consideration was not enlarged by any obligation binding on the defendant. This inequality in the entire transaction was itself sufficient to raise, not only the question of fraud, but the presumption of imposition.

There was no such ratification by the plaintiff of the release as to bind him, or by the defendant of the oral agreement for liability in accordance with the New Jersey statute, testified to by Derr, as to bind it. There is nothing in the evidence from which it can be inferred that the plaintiff was ever informed by any one what would be the benefits under the New Jersey statute. Derr himself seems

not to have known. The evidence of Derr and others was to the effect that plaintiff was perfectly rational at the time he signed the paper; but the plaintiff himself testified that he was in such a weak mental state that he had no recollection of signing it, and that he did not know until after the suit was commenced that he had

signed it.

[7] Further, the defendant did not, after the execution of the release and the alleged substitution of the liability fixed by the New Jersey statute, pay or in any way indicate an intention to pay for plaintiff's permanent disability according to the New Jersey statute. From this fact the jury might well infer that the defendant made the half pay allowances while plaintiff was disabled as a matter of kindness and not of obligation, and that the plaintiff so understood it until Derr testified on the trial. The failure of the plaintiff to return the payments made was not, under the circumstances, conclusive that he accepted them as satisfaction, or even part satisfaction, of his claim. Had counsel so requested, defendant would have been entitled to an instruction that the damages found should be credited with the payments made.

Negligence of a fellow servant was not involved, for there was no allegation and no proof that it was negligent to order the plaintiff to go on the scaffold. It follows that on none of the grounds presented would a directed verdict have been proper.

[8] The District Judge charged the jury fully and accurately in applying the familiar law to all the issues involved. His refusal to charge in the language of the requests, and with the elaboration desired by counsel, was not error.

Affirmed.

### TUNISON v. GUTHRIE et al.

# In re DAKOTA COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. July 22, 1918.)

No. 1622.

ATTORNEY AND CLIENT \$== 135-CONTRACT-PERFORMANCE.

Under the evidence, *held*, contract of attorney with financially embarrassed mining company to rearrange its affairs, so as to relieve it from control of its sales agent, and directors from liability as indorsers, was not performed, so as to entitle attorney to the stipulated fee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy; Alston G.

Dayton, Judge.

In the matter of the Dakota Coal & Coke Company, bankrupt. From a decree of the District Court, reversing ruling of the referee, and directing refusal of the claim of B. C. Tunison, allowed by the referee, over objections of Doty Guthrie and others, claimant appeals. Affirmed.

E. M. Showalter, of Fairmont, W. Va., for appellant.

G. B. Shaw, of Greensburg, Pa. (Neely & Lively, of Fairmont, W. Va., and John C. Silsley, of Greensburg, Pa., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. In the fall of 1915, the Dakota Coal & Coke Company, a West Virginia mining corporation, was in financial straits. It owed altogether upwards of \$150,000, including notes to the amount of about \$85,000, indorsed by its directors and the appellee Guthrie, and some of its creditors were pressing. Its sales agent was the Commonwealth Fuel Company, of Pittsburg, and that concern seems to have been in charge and control of its coal operations. It was indebted to the fuel company to the aggregate of about \$51,000, subject, perhaps, to some offsets. This indebtedness included six notes, of \$1,000 each, indorsed by directors, and also a note of \$20,000, secured by like indorsement and by a mortgage or deed of trust which the fuel company was threatening to foreclose. The secretary of the coal company, W. H. Cochrane, lived in Pittsburg, and meetings of the directors were often held at his office in that city, or at the office of the fuel company.

At the instance of Cochrane, the appellant, Tunison, a Pittsburg lawyer, had several conferences with some of the directors at Greensburg, Pa., at which the affairs of the company were fully discussed. Omitting details, it transpired that Tunison offered to submit a plan of relief, if paid the compensation he demanded. On the 19th of October a resolution was adopted, as appears from the minutes of the board, to the effect that appellant be paid the sum of \$5,000 "for a plan to raise and pay such moneys on a plan evolved by him on which to refinance and refund pressing obligations, and especially the trust deed of the Commonwealth Fuel Company, provided said plan is accepted by this board and put into successful operation by him with the assistance of this board and the company, and that said refunding be accomplished, all to be done by him in the best interests of the company and in no wise to be done in any other interests." A few days later, in a communication too long to reproduce, Tunison submitted two plans, one for a bond issue, which was impracticable, because the company held its coal lands only by lease, and the other for a transfer of the sales agency to the firm of Hite & Rafetto, who he stated would take over the obligation secured by the trust deed, extend the time of payment, and reduce the interest thereon, and make certain advances of money, etc. As to the results which would be secured he said:

"This plan relieves the directors and Mr. Guthrie of their indorsement upon the \$20,000 note, as well as the six \$1,000 notes held by the fuel company, and materially reduces the indorsement liability of Mr. Guthrie and the directors.

\* \* These sales agents will have absolutely nothing to do with the principal operation of the properties, neither will they undertake to keep the books of your company. They will be merely exclusive sales agents."

He also stated, what the directors apparently understood before, that the fuel company would accept \$40,000 in cash in full of all its claims against the coal company and assign the same to the nominee of the board. At a meeting held on the 28th of October it was voted, though not unanimously, to accept this plan, and a committee of two, Cochrane and Director E. E. Morris, was appointed "to negotiate and close a contract with sales agent as proposed in the communication of B. C. Tunison this day received and filed, and that said committee have full discretion in providing for the details of such contract." The minutes of that meeting, after a minor correction, were "approved as read" on the 4th of November.

The committee made a contract with Hite & Rafetto, dated October 29, and in a report to the board, under date of November 3, asked a ratification of its action in that regard. The minutes of the November 10 meeting show that the report was "ordered withdrawn," and that no vote was taken on the motion to ratify the contract; the chair ruling that, "as the contract had been executed by the committee appointed to negotiate and close it, ratification by the board was unnecessary." Under this contract, to which further reference will presently be made, Hite & Rafetto became the "sole and exclusive" sales agent of the company. They gave Tunison, acting for the committee, the \$35,000 agreed to be advanced, of which \$20,000 was for an assignment to them of the note for that amount indorsed by the directors and secured by deed of trust, as above stated. Of the \$15,000 balance, for which the company was to give them its note, \$14,000 was paid to the fuel company in full of its unsecured claim, stated to be \$25,628.20 as of September 30, and \$1,000 retained by Tunison on account of his services. A contract with the fuel company of about the same date provided for the termination of its agency and for the gradual payment of the six \$1,000 notes, indorsed by the directors and Guthrie, which that company continued to hold.

Whatever relief the coal company thus obtained proved to be but temporary, for it was adjudicated bankrupt a few months thereafter. In due course Tunison filed a claim for the balance alleged to be due upon a contract to pay him \$5,000 for professional services. The five appellees, two of them creditors and all of them stockholders of the corporation, filed objections to the claim, but it was allowed in full by the referee. Upon petition for review the court below, by decree of August 6, 1917, reversed the ruling of the referee and directed that the claim be refused. Tunison appeals. In the meantime, owing to the rapid advance of coal prices and the value of coal properties, the trustees were able to pay to creditors the full amount of their claims, and to stockholders a dividend of 44 per cent. on the par value of their shares.

For the purpose of deciding the case thus outlined, it will be assumed that Tunison was duly employed to advise and assist the company in its grave embarrassment, that nothing appears which made it improper for him to act as its attorney, that his written proposal to the board of directors and their acceptance of the same by resolution constituted a valid contract, and that he is not shown to have acted other-

wise than in entire good faith. But we are nevertheless of opinion that his claim was properly rejected as a contract obligation, for the reason that he failed in essential respects to accomplish results in accordance with his representations; and there are some circumstances connected with his employment which seem to justify holding him to at least the substantial performance of his undertaking. He had been for some time the attorney of Hite & Rafetto, and continued to represent them afterwards. Their contract with the coal company was drawn by him, and they had no other counsel. He was the personal attorney and friend of Cochrane, and it was Cochrane's insistence, to put it mildly, that got from the board a reluctant assent to his proposal. In view of these relations, if on no other account, it was due to himself, as well as the directors, that he secure for them the benefits they had a right to expect from the arrangement.

In important particulars his promises were not fulfilled. For example, in his communication of October 27 he repeated the assurance that the plan therein proposed would restore to the company the actual management of its plant, then in the hands of the fuel company, and this appears to have been strongly desired by the directors. But the contract two days later with Hite & Rafetto expressly bound the company to employ a superintendent and manager to be approved by them, which in effect put the whole mining operations under their control. And so it quickly turned out. The manager appointed by the board on the 10th of November, Cochrane voting in the negative, was virtually forced to resign after a service of 11 days, because he was said to be unsatisfactory to Hite & Rafetto, and Cochrane thereupon appointed another manager, who presumably met with their approval. It would seem that the committee had no power to make such a contract, since its only authority was to "close a contract with sales agent as proposed in the communication of B. C. Tunison," and manifestly that communication, with reference to the provision here considered, was of quite the opposite import. But, even if the contract actually made, though unratified, be binding on the company, which we decline to hold, the fact remains that in this material respect Tunison failed to meet the conditions of his employment.

It was also definitely stated in his proposal, as quoted above, that the plan presented by him would relieve the directors from their liability as indorsers on the notes of the fuel company; and this was confirmed by his own testimony before the referee, as follows:

"Q. In your letter submitted, your proposition in writing, did you not state that the plan you had to propose would release the indorsers on the \$20,000 note? A. Yes, sir; I did. Q. And on the six \$1,000 notes? A. Yes, sir. Q. And that it would materially reduce the liability of Mr. Guthrie and the other directors? A. I did."

But this promise, to so describe it, was in no part kept. Hite & Rafetto simply took over the \$20,000 note, with all the security therefor which the fuel company held, and there was no discharge or reduction of any indorser's liability.

Without further recital, it is enough to say that all Tunison did, so far as we can see, amounted to little more than a transfer of the sales

agency to Hite & Rafetto, with the incidental extension of time on the fuel company's debt and some abatement of interest on the \$20,000 note. This was so far short of what he undertook to accomplish as to deprive him of the right to enforce a contract made in reliance upon his representations. That he performed services of considerable value to the company is not to be doubted, but the claim here presented is not based upon quantum meruit, and we have no occasion to consider whether the \$1,000 he retained was sufficient compensation.

Affirmed.

CENTRAL BANK & TRUST CORPORATION et al. v. CLEVELAND et al.

(Circuit Court of Appeals, Fourth Circuit. July 19, 1918.)

# No. 1612.

1. RECEIVERS \$\infty 40-Public Utilities-Receiver's Certificates.

In considering the question of appointment of a receiver for a public utility corporation, the court will assume, unless it otherwise appears, that it can be operated so as not at least further to impair the value of assets, and will direct it to be operated, even by the issue of receiver's certificates, until arrangements can be made to meet the exigencies of its stoppage.

2. RAILROADS \$\infty 215\to Operation\to Proceedings to Compet\to Operation at Loss.

Where a small branch railway has for some years been running at a loss, and has been unable to pay indebtedness, residents, who are neither stockholders nor creditors, cannot require continued operation of such railroad.

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Bill by the Central Bank & Trust Corporation as mortgagee, against the Greenville & Western Railway Company, for foreclosure and sale of the railroad. Upon appointment of a receiver and an order discontinuing operation of trains, R. Mays Cleveland and others intervene. From an order appointing a co-receiver of the defendant, and directing receivers to issue receivers' certificates, the Central Bank & Trust Corporation and others appeal. Remanded for modification.

Joseph A. McCullough, of Greenville, S. C. (McCullough, Martin & Blythe, of Greenville, S. C., on the brief), for appellants.

C. F. Haynsworth, of Greenville, S. C. (H. J. Haynsworth, of Greenville, S. C., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This is an appeal from an order appointing a co-receiver of the defendant the Greenville & Western Railway Company, and directing the receivers to issue receivers' certificates not to exceed the sum of \$3,000, and use the proceeds thereof, or so much as may be necessary, in repairing the roadbed of the railway, so as to make it safe to operate trains over the same, and, as soon as trains can be safely run over the road, to resume the operation thereof. It

appears that the Greenville & Western Railway Company, owner of a small railway covering some 23 miles of railway in the state of South Carolina, in Greenville county, had paid no interest on its first mortgage bonds, and had also for some years been running at a net loss every year, which net loss aggregated on the 31st day of August, 1917, the sum of \$41,589.99. A bill was filed by the Central Bank & Trust Company, as mortgagee, in the District Court of the United States for the Western District of South Carolina against the Greenville & Western Railway Company for the foreclosure and sale of the railroad, and the application of the proceeds to the payment of the first mortgage bonds. Under this bill a receiver was appointed, and subsequently, on the application of the receiver to the effect that the road was in an unsafe condition, and that since the appointment of a receiver it had been operated at a loss, the judge of the District Court ordered that the receiver be authorized to discontinue the operation of trains over the road until the further order of the court. Thereupon a petition was filed in the court by a number of residents and property owners along the line of the railroad, asking the leave of the court to intervene, and that the court should rescind its order authorizing the discontinuance of the operation of the railroad, and that the receivers should be directed to continue the operation of the railroad. This intervention was permitted by the court, and an answer filed to the petition, and on the hearing of it, and the testimony taken under it, the presiding judge made the order from which this appeal is taken.

It appears that all parties interested in the railroad are before the court—the mortgagee for the bondholders, the unsecured creditors, the railroad company, and its stockholders. It further appears that the amount of bonds outstanding secured by the mortgage is largely in excess of any possible value of the railroad and its assets; its outstanding first mortgage bonds alone being in amount \$460,000, with a large amount of unpaid interest. It further appears that these interveners are people who are neither stockholders, nor creditors, nor bondholders of the railroad company, but simply outsiders, residents along the line of the railroad, who are discommoded by its nonoperation, and who now attempt to assert their claim as the right of the public to have the railroad operated. The contention of these interveners is that, under the law, the court can compel (as the state of South Carolina in their view can compel) the operation of the railroad, although its operation is at a continuous loss, and may mean a continuous impairment and ultimate possible entire loss of all the capital invested in the railway. The logical consequence of their contention is that the effect of subscribing to the capital, or lending on the application of a railroad company, and its construction therewith, is to subject all the property of the corporation to a first lien to the state for the indefinite operation of the road, and, although its operation may prove to be unprofitable and at a loss, the owners of the property, or the holders of securities secured by a lien upon the property, cannot cease operation and realize on the security, but they are bound to continue the operation of it. even to the entire exhaustion of the assets of the railroad.

Upon this point the controversy is between all the persons who have

any financial interest in the property on the one side, and on the other only the interveners, who have no financial interest in the property, but claim the right on behalf of the public to compel the operation of the railroad upon the theory that in the case of a railway the public has a right to compel its operation, even if the result be the sequestration of the entire amount invested without compensation to the owners. This court has authoritatively declared its view to be the contrary of this contention.

A railroad was formerly constructed along the very line of the railroad now concerned. Its name was the Carolina, Knoxville & Western Railway Company. The operation of the railroad having proved unsuccessful, and that it could only be operated at a loss, foreclosure proceedings were instituted, in the Circuit Court of the United States for the District of South Carolina, for foreclosure and sale, and a sale at auction was ordered. It was twice exposed for sale at auction without any bidders, and it was finally bid in for \$15,000. The purchaser did not attempt to operate it, but sought to remove and sell the rails. Thereupon a number of persons, relators, acting in the name of the state, just as in the present cause, intervened and sought to have the court require the rails taken up and sold to be replaced by the pur-

chaser and the road to be operated.

The case came on to be heard before Judge Simonton, sitting in the Circuit Court. The very point was made that is made in the present case, that under the statute of the state of South Carolina referred to in the order of the learned judge below, slightly modified as embodied in section 3117 of the Code of Laws of South Carolina, the purchaser of a railroad was required to organize and put it in operation within 60 days of the purchase and acquisition thereof, and that that meant that the stockholders accepted an obligation to maintain and operate, and keep on operating, although the operation was at a loss. After a full hearing Judge Simonton decided to the contrary. Jack v. Williams, 113 Fed. 823. He held that, while a railroad was in a sense a public concern, for whose construction and operation the action of the sovereign was needed, yet that, whilst thus serving the public, no corporation or person is thereby bound to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. He decided, further, that the effect of the act of the Legislature referred to was not to forfeit or sequestrate the property of a railroad company to the use of the public, by requiring its operation even at a loss, but only that, if the purchasers did not organize and operate within the time limited, they forfeited the franchises of the railroad corporation. The state could not compel the stockholders to exhaust their assets in the operation of a losing concern, but it could say that, if you do not choose to operate, you shall not be entitled to the public franchises given to a common carrier, and in that case the only thing left to the owners of the property would be to sell the property, without being able at the sale of the property to sell the franchises and the right of operation. That decision was appealed from, but was affirmed by this court.

State of South Carolina v. Jack, 145 Fed. 281, 76 C. C. A. 165. This court affirmed the judgment of Judge Simonton, and the only question would be whether it be so that it be established that the road cannot be operated except at a loss to the owners. This court further held in that case that the very fact that the road does not pay the expenses of running trains was persuasive evidence that the service to the public did not require it to be kept in operation. The learned judge below in the present cause in his order finds as a conclusion of fact that the railroad has lost money from the beginning, but voices his belief that, notwithstanding previous losses, the receivers should issue a sufficient amount of receivers' certificates to put the railroad in condition to run trains over it, and that the interest of the public made this service imperative, and that he is bound to believe that such service would be equally beneficial to bondholders.

Were this the case of a private corporation, there would be no diffi-The rule is generally accepted in the case of private financial corporations that, without the assent of the existing lienholders, a court of equity will not, by the issue of receivers' certificates, displace prior liens, save to the extent actually required for necessary expenditures incident to administering the assets and preserving the property from deterioration pending the winding up of the business and the settlement of the receivership. The whole rule is fully discussed in International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152, cited and reaffirmed in Nowell v. International Trust Co., 169 Fed. 505, 94 C. C. A. 589. It seems, also, generally accepted that, where a receiver is directed to operate a business, it is because the income of operation will, as clearly shown by the facts. exceed the outgo, and the operation therefore be beneficial to the holders of the liens; the income being the primary fund to which the expenses of a receivership must be referred.

In the case, however, of public utility corporations, especially in the cases of railways, the rule has been modified by reason of the interest that the public have in the operation of the concern. In the case of a great railway corporation, for instance, if suddenly its operation were put an end to, all the avenues of transportation and trade around which public life and interests had grown up and clustered for many years, would be destructively paralyzed by a sudden stoppage. So, also, in the case of a receivership of a large public utility corporation for the furnishing of gas, water, or other public necessity to a community—its sudden stoppage would entail such untold injury to the community that the stoppage is not permitted; and the theory has been adopted that, unless it manifestly appears otherwise, the very existence of the utility corporation shows that it can be operated at sufficient income to pay its cost of operation and not to impair the value of the property.

[1] This does not mean, however, in these cases, that the courts have a right to require an indefinite operation, to the exhaustion of the assets, but that, in view of the fact that the public utility corporation has been created and exists, the court will take it for granted that it can be operated so as not at least further to impair the value of the as-

sets, and will direct it to be operated, even by the issue of receivers' certificates, until arrangements can be made to meet the exigencies. If it should be found that it cannot be operated, except at a loss, it would be open to the public, if it be authorized as a public measure, to condemn the property and take it for public purposes at its ascertained value; but it cannot take it by the method of requiring its operation to the absolute exhaustion of the assets, and in that way effect the taking of private property for public purposes without compensation.

There has been no case in which such a doctrine has been announced. For the general rule, see Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Kneeland v. American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Western Car. Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; V. & A. Coal Co. v. Central R. R. Co., 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. The principle decided in these cases extends to the effect that certain classes of debts already incurred for operating expenses may, by reason of the public right and necessity for operation, be given priority in payment over mortgage liens, under the view also that, like supplies advanced or repairs made to a vessel, they had been actually necessary to preserve the existence of the res itself, upon the existence of which res all other liens depended.

The present case, however, does not fall in any of these categories. In the first place, it is a small branch railroad, and it is not the public, as a general whole, which is affected, but only the limited number of individuals who are connected with the neighborhood of a small branch railroad. Next, the facts show that it is unreasonable to expect this railroad to be operated, so as to pay its costs of operation, except as a speculative hope. The only grounds upon which expectations are based that it can be operated so as not to entail further loss by the operating expenses being greater than the operating receipts is a speculative hope that business may be built up so as to have this result. This is not a conclusion based upon past operation, but a hope voiced upon speculative contingencies. The railroad, therefore, is in the same position as the line referred to in the previous case, when it was ordered in the previous decree of this court to be sold.

[2] The insistence of the relators in this intervention is in effect that private property should be taken for public use without compensation. All the owners of this property, stockholders, unsecured creditors, and bondholders, all object to its further operation and the creation of this prior lien. The only ground upon which it can be justified in the face of further objection is that there is some superior right of the public to have the road operated, although at the destruction of the property of the security holders. This doctrine was openly announced by the counsel for appellees at the hearing. If the residents along the railway, or the public generally, desire that the railroad should be operated for their benefit, they can do so by supplying the income for that purpose, without making it a prior charge upon the property. The operation of the property otherwise than by the crea-

tion of a prior lien in the issue of receivers' certificates would not appear to be practicable under the circumstances in this case. It would seem that the judge below should direct that the test of whether or not its operation would be successful, in the sense of procuring enough to pay for the expense of operation, should be at the charge and at the expense of the persons to be benefited and who insist upon that operation. It should be required of the parties for whose benefit the railroad is thus to be operated, to secure the receipt of a sufficient amount to pay for its operation without creating any prior charge on or further depreciating the value of the assets of the corporation and security holders by the furnishing of such security as the court will require, so that no ultimate loss shall be upon the parties interested in the property.

This can be effected by the requirement that, before the operation of the railroad be resumed and continued, and the certificates issued, sufficient security be given on behalf of the relators for the repayment of these certificates, and of all loss or impairment of value that may result from the operation, less any increased value that at any sale may be shown to have accrued to the security holders from any expenditures for permanent repairs or betterments, or from the sale of the property as a continued operating railway. The cause must therefore be remanded to the court below for a modification of its order, so

as to accord with this opinion.

Modified.

# STANDARD POCAHONTAS COAL CO. v. NEW POCAHONTAS COAL CO.

(Circuit Court of Appeals, Fourth Circuit. July 2, 1918.)

### No. 1616.

- 1. MINES AND MINERALS \$\iff 602(1)\$—MINING LEASES—CONSTRUCTION.

  Leases and agreements as to coal lands held to give the lessee and its assignees the right to work all seams of coal under the land included in the demise.
- 2. ESTOPPEL \$\iff 93(8)\$—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

  Where the lease and a subsequent agreement gave defendant's predecessor the right to work any coal seams within the property demised, that defendant did not discover lower seams until after their existence was discovered by successors of the lessor on adjacent property held not to estop defendant from working such seams; it appearing that defendant in the meantime had been complying with the lease as to the mining of seams already known.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Bill by the New Pocahontas Coal Company against the Standard Pocahontas Coal Company. From a decree for complainant, defendant appeals. Affirmed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Malcolm Jackson, of Charleston, W. Va., and Walter C. Merrick, of Cleveland, Ohio (Brown, Jackson & Knight, of Charleston, W. Va., and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, on the brief), for appellant.

Graham Sale, of Welch, W. Va., and John H. Holt, of Huntington, W. Va. (Holt, Duncan & Holt, of Huntington, W. Va., on the brief),

for appellee.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This case comes up upon an appeal from a decree of the District Court of the United States for the Southern District of West Virginia, filed August 10, 1917. The facts appear to be that on the 30th of November, 1901, a corporation known as the Pocahontas Thin Vein Coal Land Company, in West Virginia, made an agreement with a corporation, also of West Virginia, called the Slick Rock Coal Company. Under this contract the Pocahontas Thin Vein Coal Land Company leased for coal-mining and coal-coking purposes only, to the Slick Rock Coal Company for the period of 30 years from the 1st day of January, 1902, a tract of land in McDowell county, W. Va., containing 306 acres, and giving the particular metes, bounds, and courses of this land. This lease contained the following clause:

"It is mutually understood and agreed, however, that if the lessor shall discover any other workable seam or seams of coal on said tract of land other than the seam that the lessee is now operating, known as the Tug River seam of coal, that it shall offer the same for lease to the lessee upon the terms, conditions, and stipulations herein contained, except as to royalty, which may be such sum as shall be agreed upon by the parties hereto, except that it shall not in any case exceed the amount herein provided, to wit, 8 cents per ton of 2,240 pounds for coal mined, and 15 cents per ton of 2,240 pounds for coke manufactured, from such other vein or veins of coal, unless such other vein or veins be four feet or more in thickness, in which case the royalty shall not exceed 10 cents per ton of 2,240 pounds for coal mined, and 15 cents per ton of 2,240 pounds, for coke manufactured from such vein or veins of coal."

"If the party of the second part does not desire to operate such seam or seams, and does not elect to accept such lease of the same within six months from the time the lessor offers it, upon the terms and conditions herein set forth, then and in that event the lessor shall have the privilege of leasing said seam or seams of coal upon the same terms and conditions that the same were offered to the lessee to any other person, persons, partnership, or corporation, for the purpose of mining coal and manufacturing coke therefrom; but in the event of said seam or seams of coal being so leased to any other person, persons, partnership, or corporation, then said parties so leasing the same shall take said lease subject to all the rights of the lessee hereunder, and shall not be permitted to mine or operate the same so as to interfere with, disturb, or injure the lessee in its operation under this lease."

In paragraph third of the same agreement it is provided that the following royalties shall be paid by the lessee:

"To wit, 8 cents per ton for each and every ton of 2,240 pounds of coal mined, dug, carried away from, or sold or used on the said premises for any other purposes than the manufacture of coke, and fifteen (15) cents for each and every ton of 2,240 pounds of coke manufactured upon the said premises, and sold therein or therefrom."

[1] It will be thus noted in this agreement that after in the first paragraph making a positive lease of a certain described and bounded piece of land, for coal and coke purposes, it proceeds in the second paragraph to practically limit the seam of coal leased by limiting the terms of the grant in the first paragraph and confining the same, so as to lease to the lessee the right to mine only the seam that it was then operating, known as the Tug River seam of coal. If, however, the lessor (nothing being said about any discovery by the lessee) should discover any other workable seam or seams of coal on the said tract of land, it was obligated to offer a lease of it first to the lessee upon the mentioned terms and conditions, and only if the lessee did not decide to accept the lease within six months from the time of receiving the offer, then the lessor had the privilege of leasing it to any one else, providing that it should be offered to such third party only upon the same terms and conditions as was offered in the first instance to the lessee. On the 4th day of December, 1902, a supplemental agreement was entered into between the same parties, viz., the Pocahontas Thin Vein Coal Land Company and the Slick Rock Coal Company, which provided that the agreement of the 30th of November, 1901, should be modified, first, by changing the provisions of said agreement, so that the royalty paid for coal mined on the premises should be 5 cents per ton in lieu of 8 cents per ton; and, second, that the provision in the contract in regard to any other seams of coal which might be found underneath the seam then being worked should be entirely omitted. and that such seams of coal might be worked by the party of the first part (the lessor) itself, at the same royalty therein provided—that is, 5 cents per ton for each ton of 2.240 pounds.

An inspection of this agreement shows that there is evidently a clerical error in it, where the words used are that such seams of coal may be worked by the party of the first part, viz., the lessor, and the evident meaning of the whole agreement is that what was intended was that such seams might be worked by the party of the second part (the lessee). To give any other construction of this clause would seem very inconsistent with the two agreements taken as a whole. The limitation inserted in the first agreement of the 30th of November, 1901. confining the lessee to working only the seam known as the Tug River seam of coal, is entirely withdrawn and obliterated, and the agreement of the 30th of November is therefore left as if the unlimited grant in the first paragraph giving the right to mine coal for coal-mining and coal-coking purposes upon the entire 306 acres was left to the lessee in an unlimited manner; that is, that it could mine any and all seams of coal on the land leased. The provisions following this, that such seams of coal may be worked by the party of the first part (the lessor) at the same royalty therein provided (that is, at 5 cents per ton for each ton of 2,240 pounds), was evidently intended to provide that the party of the second part, to whom was thus given the unlimited right to work all seams of coal that might be within the limits of the leased premises. should, however, work all other seams that might be discovered upon the same royalty (that is, 5 cents per ton), as was provided expressly in the agreement of the 30th of November, 1901, as modified by the agreement of December 4, 1902, as to coal mined from the seam known as the Tug River seam of coal.

This construction of these agreements is confirmed by the circumstance that on the same day, viz., the 4th of December, 1902, the Pocahontas Thin Vein Coal Land Company entered into an agreement with one James A. Henchey, whereby it leased to Henchey for coal-mining and coal-coking purposes only, for the period of 30 years from the 1st day of January, 1902, a tract of 1,100 acres in McDowell county, W. Va., which it proceeds to describe in particular as being the portion of the tract of land conveyed to the Pocahontas Thin Vein Coal Land Company by John Rapelije and Emily T. Rapelije, his wife, on the 30th of June, 1901, excepting, however, from the 1,100 acres the land leased by the Pocahontas Thin Vein Coal Land Company to the Slick Rock Coal Company by a contract of lease bearing date the 30th of November, 1901. Reading the three deeds together, as evidencing the intent of the lessor, it appears that the lessor was on the 4th of December, 1902, the owner of a tract of 1,100 acres, out of which it had carved and leased on the 30th of November, 1901, and 4th of December, 1902, to the Slick Rock Coal Company 306 acres, with the right to work all seams of coal thereon at a certain royalty, and it then proceeded to lease to James A. Henchey the rest of the 1,100 acres, excepting the part leased to the Slick Rock Coal Company, on exactly the same terms of royalty upon which it by the supplemental agreement of the same date had leased all the coal on the 306 acres to the Slick Rock Coal Company. The appellee, the New Pocahontas Coal Company, is the successor or assignee of the rights of the Slick Rock Coal Company, and is entitled to assert all the rights of the Slick Rock Coal Company.

Subsequent to these agreements of the 4th of December, 1902, the Pocahontas Thin Vein Coal Land Company conveyed all its property in McDowell county to the said James A. Henchey, who subsequently conveyed to the appellant, the Standard Pocahontas Coal Company. After the conveyance to the Standard Pocahontas Coal Company, that company put down a shaft on its own lands (outside of the boundaries of the 306 acres, leased to the appellee) which at a depth of about 360 feet found a thick and valuable seam of coal, called the Pocahontas No. 3 seam, and thereupon the appellant undertook to mine coal in that seam, underneath the surface of the 306 acres, claiming that the two agreements between the Pocahontas Thin Vein Coal Land Company and the Slick Rock Coal Company of November 30, 1901, and December 4, 1902, gave the right to the Slick Rock Coal Company and its assigns to mine only the seam of coal known as the Tug River seam of coal, and did not give it the right to mine any other seams. the right to mine which had been reserved by the Pocahontas Thin Vein Coal Land Company, and by that company was subsequently conveyed to James A. Henchey, and from him to the appellant, the Standard Pocahontas Coal Company.

It further appears from the evidence that at the time of the lease of November 30, 1901, James A. Henchey, together with his brother-inlaw, Mark Packard, owned all the stock in the Pocahontas Thin Vein Coal Land Company, and that James A. Henchey was also at that time the vice president of and the owner of about one-fifth of the stock of the lessee, the Slick Rock Coal Company, and knew all the circumstances of the case, and was well acquainted with the terms of the agreements. Henchey subsequently parted with his interest in the lands leased to the Slick Rock Coal Company by the sale by that company of its rights to the appellee, and the case presents, therefore, the position that Henchey, aware of all the facts, having parted with all his interest in the lease to the Slick Rock Coal Company to the 306 acres, took a lease to himself from the Pocahontas Thin Vein Coal Land Company, owned wholly by himself, and his brother-in-law, Packard, under which appellant now claims the right to all other seams of coal under the 306 acres, except the Tug River coal seam.

In the opinion of the court, the proper construction of the two agreements between the Pocahontas Thin Vein Coal Land Company and the Slick Rock Coal Company dated the 30th of November, 1901, and the 4th of December, 1902, gave to the Slick Rock Coal Company and its assignees the right to work all seams of coal under the 306 acres, and the subsequent agreement between the Pocahontas Thin Vein Coal Land Company and James A. Henchey passed to James A. Henchey and his assigns no right to work any coal seams within the limits of that 306 acres. Upon this point the decree of the

court below is in the opinion of this court fully justified.

[2] It is, however, claimed by the appellant that the Slick Rock Coal Company and its successors in the title never having made any effort to discover the existence of, and to operate, any seams of coal on the 306 acres underlying the Tug River coal seam, and having failed to do so for more than 13 years, must be considered as having abandoned all right to operate the same, and such an abandonment constitutes in equity a bar to its claim thereto, especially in view of the fact that the appellee and its predecessors, with full knowledge of the facts, stood by and permitted this appellant to develop and operate the lower coal seam, called Pocahontas No. 3 seam. Assuming, for the purposes of the discussion, that where land containing coal is leased for coal mining purposes, the failure of the lessee to effectuate the purposes of the lease and utilize the rights given to him may, where there is nothing in the lease or the circumstances to show otherwise, be construed as having abandoned the lease, yet the testimony in the present case does not justify such an inference.

There are no facts inferable from the testimony justifying an estoppel in pais as relied upon by the appellant here, when it says that the appellee stood by and permitted the appellant to develop and operate the other coal seam, and expend thousands of dollars in such development. The evidence shows that the shaft driven by the appellant, by the driving of which it claims was discovered the lower and underlying seam called Pocahontas No. 3—this shaft was driven wholly on its own lands, and there is nothing in the testimony to charge the appellee or its proper officers or agents with any knowledge that through this shaft the appellant was working or claiming to work another seam of coal within the limits of the 306 acres. The shaft

was driven on the lands of the appellant, where they certainly had a right to drive it, and where neither the appellee nor its officers or agents had any right to inspect or know what was being done. There is no evidence that charges them with that actual knowledge. To permit a furtive and concealed trespass of this kind to operate as notice would be contrary to the principles of what is held in law to be necessary to bar one by knowledge.

This leaves the question simply whether the nonuser or nonworking by the appellee of any other seam of coal than that known as the Tug River seam of coal can be considered to be an abandonment, because it was not or had not been worked up to this time, or rather up to the time of the filing of the bill of complaint herein. Under the original lease the Slick Rock Coal Company and its successors had 30 years within which to mine the coal, for coal-mining and coal-coking purposes. There is no evidence to show that at any time they have not been diligently mining the coal, nor to show that at any time any complaint has been made by the lessor against them for not mining with due diligence, nor any objection made to the insufficiency of the royalty paid and the requirement that they mine up to the coal capacity. So far as the evidence shows, there has been an entire acquiescence by the lessor, the appellant, in the amount of mining done by the Slick Rock Coal Company and its successors, and in the amount of royalty paid, and no demand seems to have been made for any greater mining. Under these circumstances the court is constrained to hold that there is no sufficient testimony upon which a conclusion of abandonment could be based, and that the decree below should be affirmed.

Affirmed.

## SOUTHERN RY. CO. v. O'DELL

(Circuit Court of Appeals, Fourth Circuit. July 22, 1918.) No. 1624.

1. Master and Servant  $\Longrightarrow$  289(17)—Safe Place to Work—Negligence—Question for Jury.

Relative to question of negligence of master as to furnishing safeplace to work in allowing certain conditions to exist, conflicting evidence held to make it a question for the jury whether there was good reason for an electrician, repairing a motor, to stand where he did to make observations.

2. MASTER AND SERVANT \$\infty 288(15)\$\infty Injury\$\infty Assumption of Risk\$\infty Promise to Repair.

A servant did not as matter of law assume risks of defects where he was working; the master on his complaint having promised to remedy them, and the evidence not being conclusive that his injury was so long thereafter that he must have abandoned hope of performance of promise.

3. Appeal and Error \$\sim 901\text{-Burden of Showing Error.}

A case for injury to railroad employe, fairly tried on the merits, will not be reversed on refined distinctions between interstate and intrastate commerce, except on a clear conviction of error in the trial judge's view.

4. EVIDENCE \$\infty\$29—JUDICIAL NOTICE—STATUTES OF STATES—FEDERAL COURTS.
Federal courts take judicial notice of the statutes of the states.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Action by Clarence L. O'Dell, by his guardian ad litem, L. B. O'Dell, against the Southern Railway Company. Direction of verdict for defendant was refused (248 Fed. 345), and defendant brings error. Affirmed.

See, also, 248 Fed. 343.

T. P. Cothran, of Greenville, S. C. (Cothran, Dean & Cothran, of Greenville, S. C., on the brief), for plaintiff in error.

E. M. Blythe and J. J. McSwain, both of Greenville, S. C., for de-

fendant in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. The foot of C. L. O'Dell, an employé, was caught in the cogwheel of defendant's cinder carrier or crane at Asheville, N. C. For the resulting injury, O'Dell recovered a verdict for \$14,000 on the allegation of negligence in furnishing an unsafe place to work by reason of these conditions: (1) Absence of electric lights at the carrier sufficient to obviate the necessity of the use of the torch held by the plaintiff in his hand; (2) absence of a guard for the inner gear of the carrier; (3) use of a framework on which the carrier ran, insecure by reason of vibration; (4) use of a controller of the carrier so out of repair that the application of the electric current caused a sudden, instead of a gradual, start of the carrier. The defenses were: (1) Denial of any negligence of the defendant; (2) averment that the injury was received while the plaintiff was engaged in interstate commerce, and that therefore there could be no recovery under the common law or statute law of North Carolina; (3) negligence of plaintiff as the sole proximate cause of the injury; (4) contributory negligence; (5) assumption of the risk of the employment. The trial court refused a motion to direct a verdict for the defendant, made on the ground that the evidence proved the defenses to the exclusion of any other reasonable inference.

These facts were not in dispute: At Asheville, N. C., a junctional point for both interstate and intrastate trains, the defendant kept a cinder pit, into which all engines emptied cinders. To dispose of and utilize the cinders after they had cooled in the pit, the defendant maintained a transverse section of track over the surface track on which was run a carrier. This carrier, about six feet square, contained two motors with cogwheels attached, by force of which it conveyed buckets of cinders suspended below from a point above the cinder pit to a point across the tracks over cars into which they were emptied. The cinders were thence carried away in cars for ballast and for fills in the road and in the yard. The plaintiff was a night electrician; his duty being to repair motors, lights, and other electrical appliances. Having received a report that the motor in the cinder hoist or carrier was out of order, plaintiff, with one Browning, a foreman, did the repair work on the night of October 22, 1916. After

finishing the work, plaintiff sent Browning to the house from which the current was controlled, directing him to turn on the current, so that he could discern whether the motors would operate successfully. The plaintiff remained standing in or on the carrier. The motor responded suddenly when the current was applied by Browning, causing plaintiff to lose his balance, and, in the effort to recover himself, to put his foot involuntarily into the unprotected gearing, by which it was crushed.

On the issue of defendant's negligence, the plaintiff's testimony was to this effect: The controller in a house at the end of the transverse track had been originally provided with nine fingers, by the use of which the motor could have been started so gradually that there would have been no substantial danger in standing in the carrier to observe the working of the motor; but at the time of the accident three or four fingers were off, and the absence of these caused the motor to start very suddenly when the current was applied. Electric lights had been provided, under which the carrier could have been run, so that the working of the motor could have been observed; but these lights had failed, and were not in use at the time. Because of their absence, plaintiff was obliged to hold a torch in one hand in order to make the repairs. Had the hand in which he held the torch been free, he would have been able to catch and restore his balance without putting his foot in the gear. The cogwheels by which the carrier was run when the current was turned on were not guarded. Some time before the accident the head electrician, in response to complaints of the plaintiff, had promised to supply the lights, to repair the controller, and to place guards for the gearing.

[1] The most forcible contention against plaintiff's case is that the carrier was not constructed with the view that any employé would stand in it while it was moving; that there was no reason for O'Dell to do so, and therefore it could not be lack of due care not to guard the cogs or to use a framework insecure by reason of vibration, or a controller which started the motor very suddenly because out of repair, or to provide better lights to protect plaintiff while standing in the carrier—a use of the carrier never contemplated by either employer or employé. In support of this contention, it was insisted in argument that plaintiff admitted that he could have stood outside and observed whether the motor was running as it should, and what the

defect, if any, was.

As it seems to us, the plaintiff's testimony does not admit of this construction. He says:

"I told Browning to go and start up the motor. I repaired it, and told him to start it up. My left foot was on this shaft box. My business required me to keep it there, bring my right foot around to this flat plate, and then squat down, so that I could see the head of the motor, and learn whether it was operating right or not; and if it had been running all right I could have gone out of the carriage to this house, had Browning to start it up, and could have told from that house whether it was running all right or not; if it had not been running all right, I would have known that, but in the house I could not have told where the trouble was. \* \* If I had left the carriage and gone over into the house, I could not have told what was wrong, if the motor had proved to be wrong. I was obliged to be inside of

the carriage in order to tell where the trouble was, if there had been trouble. The current was turned on to test it. The sockets were for 400 to 450 candle power lights. After I complained, I thought they would fix it as soon as they got a chance. I suppose they had not had a chance. If I had gone back into the house and turned on the current, in case it should have gone all right, my duty would have been completed. In case the motor did not run all right, I would have got the controller off and gone back out there. I could not tell the trouble then, so I couldn't have been nearer my trouble than I was in my house. In order to test it, I had to be there where I could see the motor. A workman has to test his work before he leaves it."

It is true that the defendant testified that he could have told whether the motor was working properly when standing outside the carrier, or even at the controller house; but the above extract from his testimony, it seems to us, meant that it was desirable, if not absolutely necessary, for the repairer of the motor to stand inside the carrier and observe the working of the machine, so as to determine where the trouble in the motor was, in case it should not work properly. True, there was testimony on behalf of the defendant that it was entirely unnecessary and dangerous to stand in or on the carrier for any purpose; but this only made an issue for the jury whether there was any good reason for plaintiff in the performance of his duty to stand in or on the carrier, and, if so, whether due care required the cogs to be guarded. Thus the evidence of the plaintiff made an issue of negligence on the part of the defendant to go to the jury; and hence the refusal to direct a verdict was proper.

There was no request for the withdrawal of any particular charge of negligence from the jury as unsupported by the testimony, nor was there any exception to the specific instructions applicable to the case

which were given.

[2] The defendant was not entitled to a directed verdict on the ground that the plaintiff, having knowledge of the defect, had assumed the risk, because he testified that the defendant, in response to his complaints, had promised to remedy them. The evidence was not conclusive that the accident occurred so long after the complaint was made that the plaintiff must have abandoned all hope of performance

of the promise.

[3] We are unable to hold that plaintiff was injured while engaged in interstate commerce. Without going into the intricacies of the distinctions, it is enough to say that in our opinion the case is controlled by Delaware, etc., R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; Chicago, etc., R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Raymond v. Chicago, etc., Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583. When a case has been fairly tried on the merits, we are not inclined to reverse on refined distinctions between interstate and intrastate commerce, except upon a clear conviction that the view of the trial judge was erroneous.

[4] There is no force in the position that it was necessary to plead and prove the applicable statute of the state of North Carolina, where the accident occurred. The federal courts take judicial notice of the statutes of the states. Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857.

29 L. Ed. 94. We find no ground for reversal.

Affirmed.

### NORTHERN PAC. RY. CO. v. DULUTH S. S. CO.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

No. 5055.

1. NAVIGABLE WATERS \$\infty 20(5)\$—Collision with Bridge—Damages.

Where a steamer collided with the draw of a railroad bridge over a navigable river, and both the steamer and bridge were injured, the railroad company, in event that the steamer was at fault, as well as its bridge tender, may recoup against the damages to the steamer the damages to its bridge.

2. Shipping \$\infty\$15-Harbor Rules-Construction.

The regulations for the operation of steamships and bridges in Duluth harbor, established by the Secretary of War by authority of acts of Congress, have the legal effect of statutes upon the subjects of which they treat, and like statutes should be interpreted so as to give effect to the intention, unless that effect is contrary to any permissible construction.

3. NAVIGABLE WATERS \$\iiiin 20(5)\$—Collision with Bridge—Regulations.

Regulation 10 for operation of steamships and bridges in Duluth harbor, which provides that after giving the signal for opening the bridge the pilot should watch for return signals, and that if a return signal be not received the vessel shall be checked, held applicable, where the draw of a bridge was already open and the bridge tender made no reply to the signal; hence a vessel which was not checked down, so as to stop before reaching the bridge, must be deemed at fault for a collision which resulted when the tender closed the draw.

Appeal from the District Court of the United States for the Dis-

trict of Minnesota; Page Morris, Judge.

Libel by the Duluth Steamship Company against the Northern Pacific Railway Company. From a decree for libelant, respondent appeals. Reversed and remanded, with directions to render decree for respondent.

A. C. Gillette, of Duluth, Minn. (C. W. Bunn, of St. Paul, Minn., and Oscar Mitchell, of Duluth, Minn., on the brief), for appellant.

Thomas H. Garry, of Cleveland, Ohio (Cotton, Neukom & Colton, of Duluth, Minn., and Goulder, White & Garry, of Cleveland, Ohio, on the brief), for appellee,

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. About 1:30 in the morning on July 23, 1913, the steamer Sonoma, which was owned by the Duluth Steamship Company, a corporation, was proceeding easterly along the St. Louis river in Duluth harbor when it collided with the drawbridge of the Northern Pacific Railway Company across that river, and the steamer suffered damages in the sum of \$1,810.61 and the draw in the sum of \$2,282.39. The Steamship Company filed a libel in admiralty against the Railway Company, and alleged therein that the collision was caused by the negligence of the bridge tender of the Railway Company, and it prayed for a decree for the recovery of the amount of the damages to the steamship from the Railway Company. The latter company answered that the collision was not caused

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by the fault of its bridge tender, or of itself, but by the negligence of the captain of the Sonoma, and prayed to be dismissed. The parties stipulated that their respective damages were as above stated, the suit was tried in due course, the court found the bridge tender was guilty of causal negligence, and that the captain of the steamer was not. In this court the finding of the negligence of the bridge tender is not seriously challenged, but it is strenuously asserted that the court erred in its finding that the captain of the steamer was not also guilty of substantial causal negligence.

[1] If the captain of the steamer was guilty of substantial negligence which directly contributed to cause the collision, the Railway Company is entitled to recoup its damages against this Steamship Company up to the amount of the latter, and, as its damages are greater than those of the Steamship Company, to a decree of dismissal of the suit on its merits. Ebert v. The Reuben Doud (D. C.) 3 Fed. 520, 530, 531; The North Star, 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. Ed. 91; Bowker v. United States, 186 U. S. 135, 140,

22 Sup. Ct. 802, 46 L. Ed. 1090; 1 Corpus Juris, 1321.

[2,3] The question in this case therefore is: Does the evidence clearly prove the negligence of the captain of the steamship? for the legal presumption is that the finding of the court below was correct, and it may not be disturbed, unless the record presents a substantial preponderance of the evidence to the contrary. The answer to this question is conditioned by the true answer to the question: Did the captain comply with the regulations for the operation of steamships and bridges in Duluth harbor established by the Secretary of War by authority of the acts of Congress? Those regulations are printed under several headings, such as "Speed of Vessels," "Signals for Opening Bridges," "Signals by Bridge Tenders," "Equipment," "Aerial Bridge," "Rafts," "Towing Through Bridges." Under the heading "Signals for Opening Bridges," regulations 7, 8, 9, and 10 are found. Regulation 7 prescribes the kind of blasts of the steam whistle of a steamship to be used as the signal for the opening of the respective bridges, as for the "Wisconsin draw, N. P. bridge, 2 long, 2 short." Regulations 8 and 9 prescribe the distances from the respective bridges at which the signals should be given. This is regulation 10:

"After giving the signal for opening the bridge the pilot should watch for the return signals from the bridge tender described in paragraphs 11, 12, and 13, and be governed accordingly. If a return signal should not be received at once the vessel shall be checked down prepared to stop before reaching the bridge, and the opening signal shall be repeated."

Under "Signals by Bridge Tenders" regulations 11, 12, 13, and 14 are grouped. The first paragraph of section 12 is the only one relative to the controversy in this case. It reads in this way:

"12. Upon receiving a signal for opening the draw the tender shall at once answer with a return signal, which shall be the same as the signal for opening, to indicate that the vessel signal has been heard."

This is what happened at the time of the collision in this case. When the Sonoma was approaching the Wisconsin draw of the 252 F.—35

Northern Pacific bridge at a speed of two or three miles an hour, at a distance of about 2,000 feet therefrom, the captain clearly saw that the draw was open and gave the prescribed signal for opening; but he failed to "watch for the return signals from the bridge tender described in paragraphs 11, 12, and 13, and be governed accordingly," as directed by rule 10. The bridge tender failed to hear his signal, and therefore did not return it. But the captain did not comply with the direction of rule 10 that:

"If a return signal should not be received at once the vessel shall be checked down prepared to stop before reaching the bridge, and the opening signal shall be repeated."

He did not check down his vessel, so that he could stop it before reaching the bridge; neither did he repeat the opening signal. He took his vessel on toward the bridge at the same speed, until he came so near to it that he could not stop his vessel before reaching the bridge. Meanwhile the bridge tender had received notice by electric bell from the tender of another bridge that a train was approaching on the railroad to cross his bridge, and as he had not heard any signal from the Sonoma, and did not know that it was approaching, he proceeded to close his draw, and the collision occurred.

Counsel for the Steamship Company forcibly argue that the regulations which have been quoted are limited in their application to cases in which the bridges are closed and signals are required to cause them to be opened, and that they are inapplicable to cases where the bridges are open and the desire and intent of the masters of the ships is that they shall be kept open until the approaching ships can pass through them, and this was the view which the court below adopted. The argument is that the heading over rules 7, 8, 9, and 10 is "Signals for Opening Bridges"; that regulation 7 prescribes for the Wisconsin draw of the Northern Pacific bridge the signal "which shall be given as a signal for opening"; that regulation 2 prescribes that speed is to be reduced so as to enable an approaching vessel to stop before striking the bridge "in case the draw fails to open"; that regulation 10 states that "after giving the signal for opening the bridge the pilot should watch for the return signals"; that regulation 12 declares that upon receiving "a signal for opening the draw" the tender shall answer; and regulation 15 provides that the bridge shall be equipped so that the draw "can be opened promptly."

This argument may at first blush seem quite persuasive, but a careful study of the regulations and deliberate reflection have convinced that the construction this argument is presented to sustain is too narrow and literal. These regulations have the legal effect of statutes upon the subjects of which they treat, and they should be interpreted by like rules. In their construction the cardinal rules that the intention of the Secretary who made them should be ascertained therefrom and given effect, if possible, that the mischief he was seeking to remedy, the purpose he was endeavoring to accomplish, the consequences of differing permissible interpretations may be considered to ascertain his intention, and that when it is ascertained it should

be given effect, notwithstanding the dry words and literal terms of the regulations, unless that effect is clearly contrary to any permissible construction of them; that a reasonable, sensible interpretation of them should be given, and if consonant with their terms they should have an interpretation which will advance the remedy and repress the wrong. Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185.

The harbor of Duluth in July is a busy place. Engines and cars are frequently, it may almost be said constantly, passing over the bridges therein across the St. Louis river, and vessels are frequently, it may almost be said constantly, passing through the draws of these bridges in the night as well as in the day. The Secretary and all the parties to this suit, and their employés and agents who had to do with the operation of the steamship and the bridge, knew these facts well, and that, however keen the lookout of the captain, the pilot, and the bridge tender, this lookout was not sufficient to protect vessels, bridges, and railroad trains from the dangers of a lack of coordination and coaction between them. It was accordingly undoubtedly the intention and purpose of the Secretary, by these regulations, to require such communications by means of the signals he prescribed between the masters or pilots of vessels and the bridge tenders that no vessel would undertake to pass through any bridge in this harbor referred to in these regulations until the master of it had given notice of his intention to pass and had received a signal from the bridge tender that it was safe for him to do so.

The mischief the Secretary was seeking to remedy was the attempt of masters of vessels to pass through these bridges before they had given notice of their intention to pass by the signals he prescribed, and had received the answering signals he fixed from the bridge tenders to the effect that it was safe for them to do so. The Secretary, the parties to this suit, and their responsible employés in this case, knew that the mischief and danger of an attempt of the captain, pilot, or master of a vessel to pass through an open draw in one of these bridges, without the notice signal and the answering safety signal from the bridge tender, were as great as an attempt to pass through a closed bridge without such danger signals. Indeed, the truth is that the mischief and danger were greater in the former case because the masters of vessels can see a closed bridge and can know that the obstruction is there, and then can and naturally will stop before they reach it. But where the draw is open it is liable to be closed at any moment on a signal from the approaching engine or train seeking to cross it, without any notice or knowledge that it is to be closed by the master of the vessel, and unless the masters of vessels give signals, and get safety signals from bridge tenders in return, where the draws are open, they are liable to suffer at any moment from the mischief and danger that it was the object of the regulations of the Secretary to avoid.

A construction of these rules that they are inapplicable to cases in which masters of vessels are approaching open draws in this harbor leaves the mischief and danger in such cases without the preventive safeguards the Secretary sought to provide, while an interpretation that they include and are applicable to such cases effects his intention, accomplishes his purpose, represses the mischief he sought to avoid, and advances the remedy he provided. A careful perusal of all these regulations and a thoughtful consideration of their purpose and effect satisfies that they are not so inconsistent with a construction which shall accomplish this end that it ought not to be given them. And our conclusion is that the true interpretation of regulations 10 and 12 is that they require the masters of vessels approaching open draws in the bridges in Duluth harbor specified in those regulations, for the purpose of passing through those bridges, to give the opening signals prescribed therein for the purpose of keeping those draws open until their vessels can pass through, and to secure the return safety signals there prescribed from the bridge tenders before attempting to pass.

The act of the captain of the Sonoma in giving the opening signal as he approached the bridge which he knew was open indicates that he was not oblivious of the danger of attempting to pass without giving that signal, and having given it he fell directly under the provision of rule 10 that he should watch for the return signal from the bridge tender, and that if the return signal was not received at once he should repeat the opening signal and check down his vessel, so that he could stop before he reached the bridge. These things it was his plain duty to do. If he had done them, the collision in all probability would not have resulted. His failure to do them directly contributed to cause the collision, and it was error to render a de-

cree in favor of his employer, the Steamship Company.

The decree below must therefore be reversed, with costs, and the case must be remanded to the District Court, with directions to render a decree in favor of the defendant; and it is so ordered.

GREAT NORTHERN RY. CO. v. BLAINE COUNTY, NEB., et al. (Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

No. 5061.

COURTS \$\iff 405(5)\$—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION

Where suit was dismissed by District Court solely on ground of want of jurisdiction over subject-matter, Circuit Court of Appeals is without jurisdiction to review such decree,

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit by the Great Northern Railway Company against Blaine County, Neb., and others. From a decree dismissing the suit, complainant appeals. Appeal dismissed.

Sanford H. E. Freund, of St. Paul, Minn. (E. C. Lindley, of St. Paul, Minn., on the brief), for appellant.

Willis E. Reed, Atty. Gen. (George W. Ayres, Sp. Asst. Atty. Gen., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. Great Northern Railway Company, a corporation, brought a suit in equity against Blaine county, Neb., and its county treasurer, as such officer and as an individual, against 13 other counties in that state, and their respective county treasurers as such officers and as individuals, and against each of the members of the state board of equalization and assessment of the state of Nebraska, to enjoin them from collecting certain taxes for the year 1914 levied against the complainant in the 14 counties, aggregating \$16.40. The complainant alleged, as grounds of jurisdiction of the court below, diversity of citizenship and the threatened violation of the Fourteenth Amendment and other parts of the Constitution of the United States, by the proposed collection by the defendants of these taxes which it averred were illegal and void. Regarding the amount involved in the suit, it alleged the amount of the taxes levied against it in each county, from which it appears that the largest amount levied in any county was \$2.97; that the defendants have proceeded to make like illegal and unconstitutional levies for the year 1915, and that they will continue to make and collect such levies unless enjoined; that these levies have been made against it, although it does and has done no business in that state, has no property, and has operated no cars in that state, because, pursuant to a contract it has with the Pullman Company, it temporarily loaned to that company during the year 1914, and that company operated across the state of Nebraska, 10 of its sleeping cars in through interstate trains on the Chicago, Burlington & Quincy Railroad, 4 for a single round trip, 1 for 3 round trips and 5 for 12 round trips; that the complainant's failure to perform its contract with the Pullman Company would injure it in excess of \$5,000; that the defendants threaten to seize one or more of its cars in order to collect these taxes, thereby rendering it impossible for the Railroad Company to furnish cars pursuant to its contract with the Pullman Company; that each of its sleeping cars is worth \$10,000; that any seizure of one of them to collect these taxes would be an interference with and a deprivation of its right under the Constitution and laws of the United States to loan its cars to the Pullman Company for temporary passage across the state of Nebraska in continuous trips in interstate commerce; and that the value of that right to loan its cars in the way provided in its contract is in excess of \$10,000. The complainant alleged carefully and in detail the statutes of Nebraska and the proceedings of the officers of that state under which these taxes were levied, and the facts showing that the complainant was without any adequate remedy at law; but in the view this court is compelled to take of this case it is unnecessary to recite these averments.

The defendants moved to dismiss this suit upon the ground that the complaint did not state facts sufficient to constitute a cause of action in favor of the complainant and against the defendants, or any of them, and upon consideration of this motion the court below rendered a final decree, the material part of which is in these words:

"The court finds that the suit does not really involve a controversy within the jurisdiction of this court, and the suit is therefore dismissed for lack of jurisdiction, at plaintiff's costs."

The complainant appealed and assigned as error: (1) That the court erred in dismissing the suit; (2) that it erred in dismissing the suit for lack of jurisdiction: (3) that it erred in ruling that the amount in dispute in the suit was less than \$3,000; and (4) that it erred in ruling that the amount in dispute in the suit was not sufficient to give the court jurisdiction.

From the facts which have now been stated it clearly appears that this is a case which was dismissed by a final decree of the District Court for want of power of that court as a federal court to take jurisdiction of its subject-matter, without considering or deciding any other question, so that the only issue of law presented by the record for review is this question of the jurisdiction of the court below. When the case was argued in this court the question whether or not this court had jurisdiction to review the decision of the court below of this question of that court's jurisdiction at once suggested itself and was called to the attention of counsel for the plaintiff, and they have cited, in support of the jurisdiction of this court, Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335, 342, 27 Sup. Ct. 90, 51 L. Ed. 209, American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, Baltimore & Ohio R. R. Co. v. Meyers, 62 Fed. 367, 371, 10 C. C. A. 485, Rust v. United Waterworks Co., 70 Fed. 129, 132, 17 C. C. A. 16, and The Presto, 93 Fed. 522, 35 C. C. A. 394. The opinions in these cases have been read and carefully considered, but they have failed to convince that the case in hand is within the jurisdiction of this court. This rule is so firmly established by repeated and controlling decisions of the federal courts that in our opinion it is not now open to discussion or debate.

In every case in which a party is defeated by a final judgment, order, or decree of a United States District Court, on the sole ground that that court has no jurisdiction as a federal court of the parties or of the subject-matter, and the record discloses the fact that the jurisdiction of that court was decided, and no other question was decided, so that the only question the record presents for review is the jurisdiction of the United States District Court, the Supreme Court has exclusive jurisdiction, and the Court of Appeals has no jurisdiction to review that judgment or decree. The case in hand falls under this rule. Davis & Rankin Bldg. & Mfg. Co. v. Barber, 60 Fed. 465, 9 C. C. A. 79; Cabot v. McMaster, 65 Fed. 533, 13 C. C. A. 39; United States v. Jahn, 155 U. S. 109, 114, 15 Sup. Ct. 39, 39 L. Ed. 87; Davis v. Cleveland, C., C. & St. L. Ry. Co., 156 Fed. 775, 777, 84 C. C. A. 453, 455; Davis v. C., C., C. & St. L. Ry. Co., 217 U. S. 157, 169, 171,

172, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196, 197, 60 C. C. A. 80, 81; Evans-Snider-Buel Co. v. Mc-Caskill, 101 Fed. 658, 660, 41 C. C. A. 577, 579; Dudley v. Board of Com'rs of Lake County, 103 Fed. 209, 43 C. C. A. 184; Hays v. Richardson, 121 Fed. 536, 537, 57 C. C. A. 598; Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 73 C. C. A. 260, 262; Morrisdale Coal Co. v. Pennsylvania R. R. Co., 183 Fed. 929, 939, 944, 106 C. C. A. 269, 279, 284.

In the leading case of United States v. Jahn, 155 U. S. at page 114, 15 Sup. Ct. at page 41 (39 L. Ed. 87), the Supreme Court laid down certain rules for determining the jurisdiction of that court and of the Courts of Appeals to review decisions on the jurisdiction of the District Courts rendered by those courts, the first two of which read in this way:

(1) "If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court." (2) "If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it."

Turning now to the cases cited by counsel for the plaintiff (American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 283, 21 Sup. Ct. 646, 45 L. Ed. 859, and Baltimore & Ohio R. Co. v. Meyers, 62 Fed. 367, 371, 10 C. C. A. 485), they do not rule the case in hand, because the facts in those cases bring them under the second rule, while the facts in this case place it under the first. Again, it is an established rule, for the determination of the jurisdiction of the Courts of Appeals and the Supreme Court to review decisions by the District Courts of their jurisdiction, that where the final decree or order challenged adjudges the jurisdiction of the District Court alone, and no other question, the Supreme Court has jurisdiction; that where it adjudges the jurisdiction of the District Court and other questions, the Courts of Appeals have jurisdiction to review both the jurisdictional question and the other questions determined. For example, a general order or decree for the plaintiff or the defendant, without more, is an adjudication of the question of jurisdiction and all other questions in the case. Indian Land & Trust Co. v. Shoenfelt, 135 Fed. 484, 487. 68 C. C. A. 196, 198. From such a decree the Court of Appeals might take jurisdiction of and decide both the question of jurisdiction and all the other questions necessary to a determination of the validity of the decree. The cases of Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209, and Rust v. United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16, are of this class, and they do not govern the decision in the case at bar, because in this case the record and the decree of the court conclusively show that the only question decided or adjudged by the court below was the question of the jurisdiction of that court, and all the other questions in this case were left without decision or adjudication.

In The Presto, 93 Fed. 522, 35 C. C. A. 394, the only other case cited by counsel for the plaintiff, there was a libel in rem; the claimant excepted on the grounds that the court had no jurisdiction and that there was a misjoinder of parties. The District Court sustained the first exception, and the Court of Appeals of the Fifth Circuit, without discussion of the legal issue, remarked that it was of the opinion it could entertain jurisdiction, because the exceptions in the lower court involved other questions than that of the jurisdiction of that court, although those other questions were not decided below, and then it dismissed the appeal for lack of an appeal bond. This decision was rendered in 1899, and, so far as the court can ascertain, has not been followed. In view of the great weight of authority to the contrary, to which reference has been made in this opinion, this court is unwilling to be the first to follow that lead. The remarks of Circuit Judge Gilbert in Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 109 Fed. at page 498, 48 C. C. A. at page 350, stated the law applicable to this case, as it has long been established, when he said:

"It is a case in which the question of the jurisdiction of the Circuit Court only is in issue. That question was decided in favor of the defendants, and the case was thereby disposed of. Although there were other questions pending before the court at the time of ruling upon the question of jurisdiction and dismissing the suit, those questions have not been determined, and are not involved in the present appeal. They are questions upon which the judgment of the Circuit Court has not been taken. It cannot be assigned as error that the Circuit Court failed to deny the appellees' motion for an extension of time within which to take testimony, or that it failed to allow the appellant's motion for a decree upon the pleadings. There has been no decision of any question in the case except the question of jurisdiction. The act creating the Circuit Courts of Appeals does not give them jurisdiction to review a judgment of a Circuit Court which sustains objection to its jurisdiction, and on that ground dismisses the suit. The question which is before us is not affected by the fact that the Circuit Court, at the time of ordering such dismissal, had before it other motions and questions which, for the reason that it denied its own jurisdiction, it never decided."

Finally, the Supreme Court has decided that it has jurisdiction on a direct appeal to or writ of error from it to review an order or decree of dismissal of a suit by the District Court on the sole ground that it has no jurisdiction of the suit because the amount involved is less than the amount required. Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682. The unavoidable conclusion is that this court is without jurisdiction to review or determine the validity of the decree which dismissed this suit on the sole ground that that court had no jurisdiction thereof, and decided no other question.

The appeal must therefore be dismissed; and it is so ordered.

# BOEHMER v. PENNSYLVANIA R. CO. (Circuit Court of Appeals, Second Circuit. May 10, 1918.)

#### No. 113.

- 1. Master and Servant = 111(1)—Safety Appliance Act—Grabirons.

  Safety Appliance Act March 2, 1893, § 4 (Comp. St. 1916, § 8608), requiring railroads to provide cars used in interstate commerce with secure grabirons on the ends and sides of each car, was not violated by using a car having a grabiron at each side at one corner for use while operating the pin lever, and grabirons on each end of the car opposite to the pin lever.
- 2. Master and Servant \$\iiint 155(3)\$—Safety Appliance Act—Negligence—Warning.

A railroad's failure to warn either an experienced brakeman or a green hand that some cars of an older style had grabirons on only two corners, while others were equipped on all four corners, was not negligence, as such warning would have added nothing to their observation, and as it might assume either that they would not act without looking or had already learned that they could not rely upon a safe support.

3. Master and Servant \$\infty 235(1)\$—Safety Appliances—Contributory Negligence—Defense.

A student brakeman, attempting to board a car to reach the brakes, and who at one corner of the car put his hands and feet where he supposed there was a grabiron and sill, but where the car had grabirons on only two corners, was guilty of contributory negligence, which, the case in that aspect being at common law, was a defense to his action for injury.

In Error to the District Court of the United States for the Western District of New York.

Action by Michael U. Boehmer against the Pennsylvania Railroad Company. From a judgment dismissing the complaint, plaintiff brings error. Affirmed.

Writ of error to a judgment of the District Court for the Western District of New York (Thomas, J., presiding), dismissing a complaint after trial for failure of proof. The jurisdiction of the District Court depended upon diverse citizenship and on the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605-8612]). The action was for injuries caused to the plaintiff by one of the defendant's cars while he was in the defendant's employ, through the supposed negligence of the defendant. The specific failures charged were the improper equipment of the car with grabirons and sills in accordance with the statute, and in failing to instruct the plaintiff that the defendant would operate such cars along with those properly equipped. The facts disclosed upon the trial were that the plaintiff engaged with the defendant as a brakeman in September, 1915, had taken a student trip, so called, over the entire system, and at the time of the accident, in the night of November 8, 1915, was employed in switching freight cars at Brockton, N. Y. A refrigerator car, not the property of the defendant, stood upon the Nickel Plate tracks, and was to be transferred into a freight train being made up by one of the defendant's engines and crew, to which the plaintiff was detailed. It became necessary to take this car out of the train where it stood and drill it into the proposed train. At some stage of this maneuver the car was shunted along the track, and the plaintiff tried to board it, so as to get to the top and put on the brakes. He chose one corner of the car at which there was no grabiron and no sill, putting his hands where he supposed the grabiron would be and his foot where he supposed the sill would be. He fell under the car, and his foot was crushed and had to be amputated. It was dark at the time, and he carried a lantern. The car in question had a grabiron on each side of the car at one corner, where the pin lever for coupling and uncoupling extends along the end nearly to the corner. It had other grabirons on each end of the car at the side opposite to the pin lever, and had two ladders, one on each end of the car at the same side as the pin lever.

Two charges are made: First, that the car was not properly equipped under the Safety Appliance Act; and, second, that the defendant ought to have warned the plaintiff that some of the cars which it handled were not equipped according to the more modern requirements which provided that there should be two grabirons on each side of the car, with sills beneath them.

Sullivan, Bagley & Wechter, of Buffalo, N. Y. (Thomas A. Sul-

livan, of Buffalo, N. Y., of counsel), for plaintiff in error. Rumsey & Adams, of Buffalo, N. Y. (H. J. Adams, of Buffalo, N. Y., of counsel), for defendant in error.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] The only statutory requirement applicable to this car at the time in question was that of section 4 of the act of March 2, 1893 (Comp. St. 1916, § 8608), which provides as follows:

"Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

The first question is whether this provision was not fulfilled. At each end of the car there was a pin lever operating the automatic coupler. This pin lever came out nearly to the corner. At each side, near to these corners, was a grabiron and a sill, so situated that a man could use them while operating the pin lever. There were also grabirons on each end of the car opposite to where the pin levers were. It appears to us that the language of the section was complied with. It is clear that the number of grabirons was not specified and it is only by the act of April 14, 1910 (36 Stat. 298, c. 160) as amended by that of March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397), that the number of grabirons could be prescribed by the Interstate Commerce Commission. Since that time the Interstate Commerce Commission has provided that there shall be grabirons on both ends of each side of the car, with sills under them, and ladders on each side of each end of the car. This, however, is a new provision, and not in effect on November 8. 1915.

Section 4 of the act of 1893 was designed to promote the safety of the "men in coupling and uncoupling cars," and the grabirons on the side were probably included to give some hold while the men operated the pin levers. We do not see, however, how a grabiron on the side of the car away from that towards which the pin lever extended could by any construction be of assistance in coupling and uncoupling. If a man was coupling or uncoupling on the side opposite to that at which the pin lever came out, he could do nothing without going between the cars, as there was no other way in which he could reach the coupling devices. While in there he was entitled to the protection of a grabiron at the end of the car, which he had in this case; but a grabiron at the side of the car at that point would have been absolutely no protection to him, as he could not possibly have reached it in case of emergency. So it seems to us that the only grabirons on the side of the car contemplated by the act of 1893 were the two actually in place on the car in question. The later provision for four grabirons on the sides of the car goes along with the requirement for two ladders on each end of the car, so that a man may swing to the sill and mount the ladder; but it could not be a protection in coupling and uncoupling cars. We therefore conclude that the act

of 1893 was not violated by the car in question.

[2, 3] The remaining question is whether the defendant owed the plaintiff a duty to inform him that some of the cars had grabirons on only two corners while others had not. The proportion between those cars equipped on all four corners and those equipped on two does not appear. We have only the statement of the engineer that he saw several such cars every day, which we accept as equivalent to saying that any man in the service of the company would encounter them daily several times. Therefore, as to men whom custom had familiarized with the existing conditions, it can hardly be said that instructions would have added anything to the facts patently and repeatedly before them. If that very custom betrayed them in a given instance, it was for lack of an equipment which should respond to the inevitable inattention that long custom breeds, and such equipment happily now exists. Instructions would not help in such a situation, and we cannot charge the defendant with what would have been an idle thing.

As to green men the case is different. I have some doubt whether we should assume that they would necessarily observe such relatively exceptional equipment. While it was a most unexpected thing to happen, it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in fixing fault. The parties did not stand upon an equality in knowledge, and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that, as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or, if he had got so far as to establish instinctive habits, he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence, which, the case in this aspect being at common law, is a defense.

None of the authorities that are mentioned by either party seem to us to have any place in the discussion. Of course, we do not assume that the act of 1893 was abrogated by the act of April 14, 1910, or of March 4, 1911. Illinois Central Ry. Co. v. Williams, 242 U. S.

462, 3/ Sup. Ct. 128, 61 L. Ed. 437, United States v. Norfolk & Western (D. C.) 184 Fed. 99, and United States v. B. & O. Ry. (D. C.) 184 Fed. 94, do not decide that handholds and grabirons are necessary on both ends of each side of the cars, as the plaintiff contends. Judgment affirmed, with costs.

### WHITTAKER v. BRANNAN et al. \*

(Circuit Court of Appeals, Fourth Circuit. April 30, 1918.)
No. 1607.

1. Constitutional Law \$\infty 80(2)\$—Prisons \$\infty 13\$—Judicial or Ministerial Function—Transfer of Prisoners.

The provision of Act March 2, 1911, c. 192, authorizing transfer, by direction of the commissioners of the District of Columbia, from jail to workhouse of prisoners sentenced to jail, enters into the sentence, and so is not a grant to administrative officers of judicial power, extending to changing sentence.

- 2. Constitutional Law \$\iff 42-\text{Persons Entitled to Raise Question.} Validity of statute, as requiring prisoners awaiting trial to work, cannot be questioned by persons not so situated.
- 3. HABEAS CORPUS =113(12)-APPEAL-FACTS NOT PROVED.

A fact on which petitioners in habeas corpus had the burden of proof, not having been proved, cannot avail them on appeal from an order in their favor, based on another ground.

4. PRISONS 5-13-TRANSFER OF PRISONERS-WRITTEN ORDER.

No statute requiring it, order of proper officials for transfer of prisoners from one penal institution to another need not be in writing.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Alexandria; Edmund Waddill, Jr., Judge.

Habeas corpus by Eunice D. Brannan and others against W. H. Whittaker. From an order in favor of petitioners, respondent appeals. Reversed.

Conrad H. Syme, Corp. Counsel, and F. H. Stephens, Asst. Corp. Counsel, both of Washington, D. C., for appellant.

Matthew E. O'Brien, of Washington, D. C., for appellees.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. The appellees, Mrs. Eunice D. Brannan and others, were convicted on November 15, 1917, in the police court of the District of Columbia, of unlawful assembly, and sentenced to pay a fine of \$25 each, and in default of payment, to be committed to the Washington asylum and jail, to serve a term of imprisonment. The duration of imprisonment of nearly all the appellees was limited to 15 days. On default of payment of fine, by an oral direction of the commissioners of the District of Columbia, the appellees were delivered to the custody of the superintendent of the workhouse at Occoquan, Va., to be there imprisoned for the term of their respective sentences.

While imprisoned in the workhouse, they applied to the District Judge for the Eastern District of Virginia, under habeas corpus proceedings, to be released from confinement in that institution, on the grounds: First, that the transfer to the workhouse was unlawful, because the act of Congress under which it was made was unconstitutional; second, that some of the defendants were carried to the workhouse for confinement before their confinement to the asylum and jail had commenced; third, that the transfer was made on the mere oral direction of the commissioners of the District; fourth, that the treatment of the appellees in the workhouse was cruel and illegal. No question was made as to the jurisdiction of the police court or the legality of the sentences.

Upon the petition, return, and evidence taken, the District Judge held that the transfer to the workhouse and confinement therein were illegal, because made on the mere oral order of the commissioners, and on this ground ordered the petitioners to be returned to the Asylum and jail. Whittaker, the superintendent of the workhouse, appeals.

At the argument, it was conceded that the terms for which the majority were sentenced had expired, but three of them, Mrs. Brannan, Mrs. Butterworth, and Miss Weeks were released by the District Court on recognizance conditioned to abide the judgment of this court. It follows that a reversal of the judgment would be effectual only as to these appellees, and those appellees, if there be any, whose terms of imprisonment have not expired.

In the appropriation bill for the District of Columbia of the 2d of March, 1911, under the head of "Workhouse," an appropriation is made, "in connection with removal of jail and workhouse prisoners from the District of Columbia to a site acquired for a workhouse in the state of Virginia." The enactment here involved is as follows:

"Provided, that the Supreme Court of the District of Columbia, the Attorney General, and the warden of the District of Columbia jail, when so requested by the commissioners of the District of Columbia, shall deliver into the custody of the superintendent or the authorized deputy or deputies of said superintendent of said workhouse, male and female prisoners sentenced to confinement in said jail, for offenses against the common law or against statutes or ordinances relating to the District of Columbia, and, in the discretion of the Supreme Court of the District of Columbia and the Attorney General, male and female prisoners serving sentence in said jail for offenses against the United States, for the purposes named in the law authorizing the acquisition of the site for said workhouse and such other work or services as may be necessary, in the discretion of the commissioners of said District, in connection with the construction, maintenance, and operation of said workhouse, or the prosecution of any other public work at said institution or in the District of Columbia: Provided further, that, on the direction of said Commissioners, male and female prisoners confined in any existing workhouse or in the Washington asylum and jail of the District of Columbia, shall be delivered into the custody of said superintendent or the authorized deputy or deputies of said superintendent aforesaid, to perform similar work or services to those hereinbefore required of male and female prisoners serving sentences in the District of Columbia jail." Act March 2, 1911, c. 192, 36 Stat. 1002.

[1] The constitutionality of the statute is attacked on the ground that it vests in the commissioners of the District of Columbia judicial

power extending to the point of changing a sentence to confinement in the asylum and jail to confinement in the workhouse. This position is based on a misapprehension. The two institutions are parts of the statutory penal system of the District of Columbia, provided for the confinement and care of its criminals. A sentence after conviction of crime has impressed on it, as a part of it, every existing statutory enactment relating to its execution. The provision of the statute authorizing transfer to the workhouse by direction of the commissioners was attached by law to the sentence, and had the same effect as if the court, under statutory authority, had expressed in the sentence that the convict might be transferred to the workhouse under order of the commis-The transfer of prisoners under sentence from one penal institution to another, when authorized by statute law in force at the date of the sentence, and when the transfer imposes no hardship beyond that contemplated by the sentence, is the exercise of a ministerial function. Denial by the courts of the power of the Legislature to confer this discretion to transfer from one prison to another on ministerial officers charged with the management of prisons would be judicial usurpation, resulting in great injustice, not only to the public, but to the convicts themselves. This case is illustrative, for it affirmatively appears that the asylum and jail would have been so crowded that the appellees could not have been properly taken care of in that institution. The statute does not impose greater hardship of imprisonment in the workhouse than in the asylum and jail. Indeed it negatives such an intention by providing that prisoners transferred to the workhouse may be required "to perform similar work or services to those hereinbefore required of male and female prisoners serving sentence in the District of Columbia jail."

[2] The appellees, not being persons imprisoned and awaiting trial, are not in a position to assail the statute on the ground that it requires such prisoners to work before conviction, even if that construction

could be placed on the statute.

[3] Nor is the technical point that they were taken direct to the workhouse after sentence, before they had been confined in the asylum and jail, even if meritorious, available to the appellees before us. The burden of proving that they were of the number who were not actually transferred from the asylum and jail was on the appellees. Holden v. Minnesota, 137 U. S. 483–492, 11 Sup. Ct. 143, 34 L. Ed. 734; 21 Cyc. 322. It was affirmatively proved that Mrs. Brannan was transferred from the asylum and jail, and no proof was offered that Mrs. Butterworth and Miss Weeks, or any of the appellees whose sentences have not expired, were taken to the workhouse without being first confined in the asylum and jail.

[4] The proposition that the direction of the commissioners to transfer the prisoners to the workhouse was invalid, because not made in writing, is without support in principle or authority. No doubt it is desirable to keep a record of all such orders, but lack of a record does not impair the validity of the action. No statute requires the direction of the commissioners for the transfer to be in writing. Writing adds nothing to the force and effect of individual or official action,

unless writing is expressly or by necessary implication required by law. United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; United States v. Fillebrown, 7 Pet. 41, 8 L. Ed. 596; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Denver v. Arizona R. Co., 233 U. S. 601, 34 Sup. Ct. 691, 58 L. Ed. 1111. It was proved beyond doubt that the commissioners were acting together in their official capacity when they directed that the appellees should be transferred to the workhouse.

The District Judge did not pass upon the effect of the allegation of the petition that the appellees were improperly treated in the workhouse, and counsel for appellees did not maintain at the argument that the appellees were entitled to release on that ground.

Reversed.

## LUDLOW et al. v. CITY OF LUDLOW et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1918.)

No. 3077.

1. Courts ⇐=366(1)—Federal Courts—Construction of State Statutes.

The construction of a state statute by the highest court of the state must be accepted by the federal courts,

2. MUNICIPAL CORPORATIONS €==414(2)—"ORIGINAL CONSTRUCTION"—EXPENSES.

Where a highway has been constructed by certain municipalities, and taxpayers have contributed to its cost in order to complete the improvement, the main expense having been borne through a bond issue, and not by the abutting lot owners, the construction was not an original one, under Ky. St. § 3564, so that, on the passage of an ordinance to improve such highway, the cost may be imposed as for "original construction" upon abutting landowners, instead of upon taxpayers generally, under section 3565.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Original Construction.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by William S. Ludlow and another against the City of Ludlow and others for injunction. From a dismissal of the petition as not stating a cause of action, plaintiffs appeal. Motion to dismiss sustained.

Myers & Howard, of Covington, Ky., for appellants. Herbert Jackson, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This case concerns the validity of an assessment proposed to be levied for a street improvement, and is determinable according to a distinction existing in Kentucky between original construction and reconstruction of municipal highways. The first of these terms signifies an improvement made at the expense of the abutting property holders, and the second denotes subsequent maintenance at

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the expense of the general taxpayers. Plaintiffs seek to enjoin the first method, and to enforce the second, with respect to the improvement in question. Defendants moved to dismiss the petition, for the reason that it does not state facts sufficient to constitute a cause of ac-

tion. The motion was granted, and plaintiffs appeal.

The petition alleges that the highway was laid out, opened, and constructed pursuant and according to the provisions of a statute entitled "An act to provide for the construction of a public highway in Kenton county, Ky., by the cities of Covington and Ludlow and the town of West Covington, at the cost of said municipalities." Chapter 1559 of Acts of 1889-90, vol. 3, p. 817. That the statute provided that the aggregate cost of the improvement should not exceed \$24,000, that the municipalities-Covington, West Covington, and Ludlow-were to provide for payment of the sums respectively required of them through the issue of bonds not to exceed the sum of \$8,000; that upon completion of the highway the portions lying within the respective municipalities were to become public streets thereof and be kept in repair the same as their other streets. That the sum so provided to meet the entire cost of the improvement was insufficient; that the plaintiffs, relying upon a provision of the statute requiring the municipalities to keep their several portions of the highway in repair, "gave in materials and money" more than \$8,000 toward the construction of the improvement; and that the "highway could not have been completed otherwise." That the city of Ludlow has permitted its portion of the highway to become and for a long period of time to remain out of repair. and has passed an ordinance providing for the improvement of the highway, designating the improvement as an original construction, with "brick, bitulithic, or granite at the sole cost and expense (except so much as the street car company operating thereover is required to pay) of the owners" of the lots and parcels of land abutting thereon.

[1, 2] The controlling question is whether, in view of the plaintiffs' contribution toward the cost of opening and constructing the highway, the city is entitled to provide for defraying the cost of the proposed improvement through special assessment upon the abutting property, or is bound to provide therefor through general taxation. The applicable statutes have been construed by the Court of Appeals of Kentucky, and the general rule is that the construction of a state statute by the highest court of the state must be accepted by the federal courts. Under the very statutes here involved, including the one under which this particular highway was opened and constructed, the right of the city of Ludlow to impose the special assessment in dispute has been twice sustained by the Court of Appeals. Carran v. City of Ludlow, 174 Ky. 529, 530, 192 S. W. 526; McCoy v. Carran, 179 Ky. 590, 201 S. W. 463. In the McCoy Case it was claimed that the plaintiff's "ancestors and predecessors in title donated a portion of their property for the purpose of constructing the Ludlow highway." 179 Ky. 593, 201 S. W. 464. Further, it was alleged in that case, as it is in the instant case, that the earlier Carran suit was brought "at the instance of the city and the city agreed to pay the cost of the litigation," but this was disposed of in the McCoy Case upon the ground that "there was a real

controversy between the parties" to the case. 179 Ky. 593, 201 S. W. 464. The most that can be said of the donation made by the ancestors and predecessors in title of Mrs. McCoy and the contribution made in the present case is that the former was property and the latter materials and money; but both were in principle the same and were voluntary. Under the rule of decision prevailing in Kentucky, the test at last of the city's right to provide through special assessment to pay for the proposed improvement is whether, as respects this highway, such an assessment has ever been imposed before; it manifestly has not. The rule applicable to such a case was stated and supported by Judge Cochran. His opinion is approved, and the decree affirmed. The opinion follows:

COCHRAN, District Judge. This cause is before me on defendant's motion to dismiss the bill. The plaintiffs own real estate in defendant city abutting on the Covington, West Covington, and Ludlow highway, and the relief they seek is an injunction against the improvement of the portion of the highway within the defendant city under an ordinance adopted May 11, 1916, whereby it is provided that the cost and expenses of the improvement shall be assessed against the abutting property owners, including plaintiffs. The defendant city is a city of the fourth class. By section 3564 of Kentucky Statutes, a portion of the charter of cities of the fourth class, provision is made for the original construction of any street or road in such cities at the exclusive cost of the owners of lots abutting thereon. And by section 3565 it is provided that the cost of reconstructing public ways, streets, or alleys or repairing same shall be borne exclusively by the cities.

The ground upon which the relief is sought is that such improvement is not original construction, but reconstruction. It is claimed that the original construction was had when the highway was first built under chapter 1559 of Acts of 1889–90, vol. 3, p. 817, at the joint expense of the three cities and of plaintiffs, who voluntarily contributed an equal amount with each of these cities to its building. But it is well settled by decisions of the Kentucky Court of Appeals that such building was not original construction within the meaning of section 3564, and that within its meaning there is never any original construction until there has been a construction at the expense of the abutting lot owners. This is so held in the cases of Sparks v. Barber Asphalt Paving Co., 129 Ky. 769, 112 S. W. 830, 22 L. R. A. (N. S.) 877, 130 Am. St. Rep. 419, and City of Louisville v. Stoll, 159 Ky. 138, 166 S. W. 811.

It is unnecessary to consider any other decisions of the Court of Appeals, as there is no doubt as to what is held in those cases, and they are decisive. The fact that the three cities involved were required by the act under which the highway was built to keep it in repair after it was built can make no difference. Nor can the fact that plaintiffs contributed largely to such building make any difference.

The motion to dismiss is sustained.

### PETERS v. DELAWARE & H. CO.

(Circuit Court of Appeals, Third Circuit. June 4, 1918.)

No. 2363.

MASTER AND SERVANT \$\isim 289(23)\$\to Action for Injury to Servant\$\to Contributory Negligence.

Whether a freight conductor required by the rules to inspect brakes "as frequently as possible," and who was injured while setting the brake on a car being switched by the breaking of the stem, was chargeable with contributory negligence, *held*, on the evidence, a question for the jury.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by Henry N. Peters against the Delaware & Hudson Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James H. Torrey and W. J. Torrey, both of Scranton, Pa., for plaintiff in error.

E. A. De Laney, W. J. Fitzgerald, and Joseph O'Brien, all of Scranton, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. Henry N. Peters, a citizen of Pennsylvania and a conductor employed by the defendant, a corporation of New York, brought suit against that company, to recover damages for injuries sustained by him while employed by the defendant, through the latter's alleged negligence. On the trial the defendant company asked for binding instructions in its favor, on the ground that plaintiff was guilty of contributory negligence. This request the court refused, and submitted the question of such contributory negligence, and as well also the defendant's negligence, to the jury. The jury having found for plaintiff, the defendant, on entry of judgment thereon, sued out this writ, and assigned for error the court's refusal to give binding instructions.

The plaintiff was, at the time of the accident, the conductor of a freight train engaged in switching cars into and out of colliery switches, between the defendant's Carbondale yard and the Jermyn transfer. Among the seven or eight cars of his train at the time of the accident was a gondola car. The engineer gave this detached car a kick to push it into a switch, and Peters mounted such moving car and attempted to use the brake; but the brake stem broke and he was thrown to the ground and received the injuries complained of. The alleged negligence of the railroad was its failure to inspect the brake, and as there was evidence tending to sustain this charge of negligence, and the jury found that issue against the defendant, the verdict must stand, unless the evidence disclosed some defense of bar which constrained the court to give binding instructions for the defendant. This bar,

the defendant contends, was the contributory negligence of the plaintiff, and consisted in Peters' failure to himself inspect the brake at and immediately before the accident, which inspection the defendant alleges Peters, as conductor of the train, was, under rule 707 of the railroad, bound to make.¹ That contributory negligence of a plaintiff is an affirmative defense, which a defendant must prove, and that it is, when the facts are in issue, a question for the jury, are principles settled by many decisions. When, however, the contributory negligence of plaintiff is clear under the proof, it is the duty of a trial judge to so hold as a matter of law. It follows, therefore, that the question before us, as it was before the court below, is whether Peters' contributory negligence was, under the proofs, so clear that the trial

judge would and should adjudge it as a matter of law.

Whether this rule 707 applied at all to a situation like the one here involved is a question not before us, and therefore not decided. It suffices to say the court below held the rule was applicable, and that it applied to the time when the brake was being put into use by Peters. The defendant, therefore, had the benefit of the rule it contended for, and the plaintiff makes no complaint that the rule was so applied; but, lest our silence might be misconstrued, it is proper to say that substantial contention may be made that the rule had no application to the situation here involved, namely, where Peters' duty required him to climb on a moving, detached car and hurriedly apply its brake. Obviously, the general purpose of that rule, inter alia, was to require a freight conductor to take certain preliminary precautions when he took charge of his train and before starting. For example, he was "to report for duty at the appointed time, with his trainmen." He was "to assist in making up his train when necessary." It was made his duty to "see that the engine and train are provided with full sets of signals." He was required to "see that the couplings and brakes are in good order." And in addition to all these things—which were to be done before starting the train—the rule imposed upon him the further duty "to inspect them as frequently as possible."

Now, while the evidence is not very satisfactory as to when and where this particular car came into the train, it would seem that it was not a part of the train made up before starting, but it was picked up at a siding. It further appears that it stood on such siding at grade, and its brake was holding it on grade, and was seemingly in working order. Such being the proof, the course the trial took was to treat the duty of inspection imposed upon Peters by the rule as of the time of the accident, or, as expressed in the point asking binding instructions,

¹ The pertinent parts of rule 707 are: "Freight Conductors. \* \* \* He must report for duty at the appointed time with his trainmen; assist in making up his train when necessary; see that he has the proper waybills for the cars to be moved; see that the engine and train are provided with full sets of signals; see that the couplings and brakes are in good order before starting, and inspect them as frequently as opportunity permits; see that the trainmen occupy their proper places on the train, handle freight with care, using every effort to prevent loss or damage, keep the car doors fastened, except when loading or unloading, and not permit unauthorized persons to enter the cars or handle freight or ride upon the train."

the refusal of which is assigned for error, "at and immediately before the accident to plaintiff." It will thus appear that both court and counsel regarded the time of the accident as the time when Peters should have inspected. What the court charged—and to this charging no objection was made—was:

"Under the rules of the company, as well as under the law, the plaintiff was required to make such reasonable observation of the car and brake, with which he had to do, as the circumstances of the occasion would admit. Though he had the right to presume that the company had done its duty and made proper inspection, and placed into his hands cars equipped with reasonable safe appliances, nevertheless he was also bound to use his senses to guard against danger. Did he did so in his attempt to set this brake, or could he by the use of due care and observation of the brake before him, having in mind his duties as a conductor and trainman, the manner in which he approached and applied the brake, have detected for himself this defect in the brake shaft, if you conclude that the same was open and visible to inspection. If he could, and you conclude that he did not act as a reasonably prudent man would under the circumstances in the use of this brake, and believe that he might have avoided the accident by the exercise of due care, he is guilty of contributory negligence, and your verdict should be for the defendant."

From the above, taken in consideration with the proofs, it is clear that, if any question of contributory negligence on the part of Peters was involved in the case, the determination of that question was not one for the court, but could only be passed on by the jury, and, as the form of that submission was not questioned, we see no reason to interfere with the judgment entered on the verdict, which, as we have seen, established the negligence of the company.

Such judgment is therefore affirmed.

NILES, Collector of Internal Revenue, v. CENTRAL MANUFACTURERS' MUT. INS. CO.

SAME v. OHIO UNDERWRITERS' MUT. FIRE INS. CO.

(Circuit Court of Appeals, Sixth Circuit. June 10, 1918.)

Nos. 3119, 3120.

Internal Revenue \$\infty\$19(1)—Stamp Tax on Insurance Companies—Mutual Companies.

A mutual fire insurance company, organized under the law of Ohio, without capital stock, and insuring property only of its members, is within the exemption of Act Oct. 22, 1914, and not subject to the stamp tax on its policies imposed thereby, although under the state statute it may and does charge a cash premium in advance, and maintains a reserve, on which it incidentally earns interest.

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Actions by the Central Manufacturers' Mutual Insurance Company and by the Ohio Underwriters' Mutual Fire Insurance Company against Frank B. Niles, Collector of Internal Revenue for the Tenth

District of Ohio. Judgments for plaintiffs, and defendant brings error. Affirmed.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and Edwin J. Lynch, Asst. U. S. Atty., of Toledo, Ohio, for plaintiff in error.

Vorys, Sater, Seymour & Pease, of Columbus, Ohio, and H. L.

Conn, of Van Wert, Ohio, for defendants in error.

Francis B. James, of Cincinnati, Ohio, amicus curiæ.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. The two cases are alike, except as to the amounts involved. The sole questions raised by the demurrers of plaintiff in error to the petitions of defendants in error for return of moneys paid under duress is whether policies issued by a fire insurance company, incorporated under the laws of Ohio, without capital stock or stockholders, doing only a mutual fire insurance business, and that only with its members, all of whom, and who alone, are its policy holders, must be stamped for one-half of one cent on each dol-

lar of premium, under Act Oct. 22, 1914 (38 Stat. 762, c. 331).

The precise question is whether such a company comes within the exemption clause of the act, reading, "Provided, that purely co-operative or mutual fire insurance companies or associations carried on by the members thereof for the protection of their own property and not for profit, shall be exempted from the tax herein provided," notwithstanding that, under the laws of Ohio, the company (a) is required to and does charge a cash premium payable at the time of delivery of the policy; (b) is required to and does maintain an unearned premium reserve of a definite percentage of the cash premiums on unexpired risks; (c) is permitted to and does maintain a surplus in excess of this reserve, as an additional security to the policy holders; (d) earns interest on this reserve and surplus by investing them, as required by the law of the state, in interest-bearing securities; and (e) for further security of the members makes the cash premium in excess of the amount estimated as sufficient for protection and payment of losses, paying the member, at the expiration of each policy, so much of the cash premium paid by him as is not absorbed by losses and expenses.

The statutes of Ohio authorize the incorporation of at least two kinds of mutual fire insurance companies—those like defendants in error, carrying reserves and requiring premiums in advance of loss; and those which levy only such assessments as are necessary to meet specific losses sustained and specific incidental expenses. But, while there are radical differences in character, both kinds of companies are mutual; both are purely co-operative, in that they have no stock or stockholders and include in their membership only policy holders; both are carried on by the members solely for the protection of their own property, in that neither kind insures the property of any one else.

There is, however, this difference between them: The one class always has a safety fund in hand; the other depends upon the personal security and solvency of the membership. Purely incidental to the existence of such a fund is the interest earned thereon; this interest

may be conceded to be a profit that accrues to the members from the enforced investment, a profit that would not ordinarily be earned by a company that levies its assessments solely for immediate distribution. And yet even such a company might earn some slight interest on daily bank balances, because of the practical impossibility of making immediate distribution of daily receipts from assessments.

While, in companies like defendants in error, the earning of this interest is more clearly foreseen and contemplated, nevertheless in the one class, as in the other, the business is not "carried on" for this incidental profit, which merely operates slightly to reduce the cost of protection, to diminish the amount to be taken from the premium deposits in order to meet losses; the object of the business in each class is, not to undertake investments on behalf of the members, but

solely to protect more effectively the members' property.

The distinction drawn in the act is between those mixed mutuals. which, though commonly called mutuals, are in fact also doing a nonmutual business for profit, and the strictly mutual companies; not between the mutuals which carry a reserve and surplus, and those which levy assessments only after each loss. A mere incidental profit earned by way of interest on its invested safety funds, or on its bank balances, does not change the purely mutual character of the company, or indicate that its business, though thus earning a profit, is "carried on for profit." And if the text or context of these words could be deemed to create an ambiguity, as in our judgment they cannot, the doubt would be resolved in favor of the taxpayer; the question is not, as in Perry v. Norfolk, 220 U. S. 480, 31 Sup. Ct. 465, 55 L. Ed. 548, that of an alleged contractual exemption from general taxation laws, but, as in Eidman v. Martinez, 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697, that of the class of corporations intended by the act to be included in or exempted from its special tax provisions.

Under a similar provision in the Spanish War Tax Act of June 13, 1898 (30 Stat. 448, c. 448), mutual fire insurance companies like defendants in error were not required to pay the tax, except in two or three sporadic cases; the Treasury rulings in these few cases could not, under these circumstances, be deemed to have established a contrary uniform settled practice and contemporaneous departmental construction of the act.

Judgments affirmed.

## ORTH v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1918.)

No. 1600.

1. ESCAPE \$\infty 5\to Assistance\to Offense.

An escape from a federal penitentiary was complete, when the physical control over the convict was ended by his flight beyond immediate active pursuit, and one subsequently aiding and assisting him to escape discovery and arrest was not aiding his escape, within Criminal Code, § 141 (Comp. St. 1916, § 10311).

2. CRIMINAL LAW \$\infty\$ 1175—ERRONEOUS CONVICTION ON COUNT—EFFECT AS TO CONVICTION ON ANOTHER COUNT.

An erroneous conviction under Criminal Code, § 141 (Comp. St. 1916, § 10311), for assisting a convict to escape from a federal penitentiary, did not affect a conviction on a second count thereunder for harboring and concealing the convict, and would not require a new trial, where the only prejudice to defendant was a cumulative sentence of twelve months, which was in excess of the statutory maximum of six months for a single offense.

3. Indictment and Information ← 129(1)—Separate Criminal Acts—Single Transaction—Counts.

Separate criminal acts in a single transaction may be split up into as many counts relating to the transaction as the United States attorney may think necessary, so that, if the proof is insufficient for a conviction on one count, the government may have its benefit on another charge to which it is applicable.

4. CRIMINAL LAW \$\ightharpoonup 971(1)\$—Conviction—Separate Counts—Arrest of Judgment.

A conviction on all of the counts, charging separate criminal acts in a single transaction, is not available as a ground for arrest of judgment.

5. CRIMINAL LAW 533—CONVICTION—SEPARATE COUNTS—NEW TRIAL.

A conviction on all of the counts for a separate criminal act in a single transaction is not available as a ground for a new trial.

6. CRIMINAL LAW @==1188-APPEAL-REMAND-SENTENCE-REDUCTION.

On an erroneous conviction on a count for aiding a convict to escape from a federal penitentiary, and on a proper conviction on a count for harboring and concealing the convict, both parts of a single transaction, within Criminal Code, § 141 (Comp. St. 1916, § 10311), imposing an imprisonment of not more than six months for each related offense, where there should have been but one sentence, not exceeding six months, defendant, sentenced to imprisonment for twelve months, was entitled to have the case remanded for sentence according to law.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Albert Orth was convicted of the statutory offense of aiding a federal convict to escape, and of harboring and concealing such convict, and he brings error. Remanded for resentence.

Paul M. Macmillan, of Charleston, S. C., for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The defendant was convicted and sentenced under an indictment charging violation of the following statute:

"Whoever shall rescue or attempt to rescue, from the custody of any officer or person lawfully assisting him, any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or shall, directly or indirectly, aid, abet, or assist any person so arrested to escape from the custody of such officer or other person, or shall harbor or conceal any person for whose arrest a warrant or process has been so issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person,

<sup>←</sup>For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both." Criminal Code, § 141 (Act March 4, 1909, c. 321) § 141, 35 Stat. 1114 (Comp. St. 1916, § 10311).

The first count charged that the defendant aided, abetted, and assisted Robert Fay, a person under arrest and convicted under the laws of the United States, and in the custody of the warden of the United States penitentiary at Atlanta, to escape from that custody. The second count charges that the defendant harbored and concealed the convict, Robert Fay, so as to prevent his discovery and arrest. The defendant was convicted under both counts, and sentenced to imprisonment for twelve months and a fine of \$1,000 and the costs of the

prosecution.

- [1] Fay escaped from the Atlanta penitentiary on August 29, 1916. On September 23, 1916, he appeared in Charleston, S. C., where the defendant lived, and as the evidence tended to show was by the defendant aided and protected, and assisted to leave Charleston. Under this state of the proof, the defendant's counsel requested the District Judge to direct a verdict of acquittal on the first count of the indictment. The motion was refused, and the defendant was convicted on both counts. We think the motion should have been grant-The evidence furnished no foundation for conviction of the charge of aiding Fay to escape from lawful custody. When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete. After that aid to the fugitive is no longer aiding his escape. 2 Wharton, Cr. L. 2606; 1 Russell on Crimes, 467; 10 R. C. L. 579; Smith v. State, 8 Ga. App. 297, 68 S. E. 1071; State v. Ritchie, 107 N. C. 857, 12 S. E. 251. The evidence is clear that Fay had escaped altogether from the Atlanta penitentiary, and was at large entirely free from custody for some days before the defendant, Orth, rendered him assistance in Charleston.
- [2] But this conclusion does not effect the conviction on the second count charging that the defendant harbored and concealed Fay. Nor does it require a new trial, for the only prejudice to the defendant was in the cumulative sentence of twelve months, which was in excess of the statutory maximum for a single offense.
- [3-5] Separate criminal acts in a single transaction may be salit up into as many counts relating to the transaction as the United States attorney may think necessary, so that if the facts as proved turn out to be insufficient for conviction on one count the government may have the benefit of them on another charge to which they are applicable, and a verdict of conviction on all of the counts is not available as a ground for arrest of judgment or for a new trial. United States v. Dickinson, 2 McLean, 328; Fed. Cas. No. 14,958; Reg. v. Truman, 8 Car. & P. 727; United States v. Howell (D. C.) 65 Fed. 402, and authorities cited.
- [6] In this case under a single state of facts and a single course of conduct, the defendant was charged in one count with aiding, abetting, and assisting Fay to escape, and in the other with harboring and concealing Fay as an escaped convict, so as to prevent his discovery and arrest. The punishment for both offenses is precisely

the same. The conviction being under the same statute denouncing related offenses and being based on one act or course of conduct, there should have been but one sentence, not exceeding the maximum fixed by the statute. But the only relief to which the defendant is entitled is to have the case remanded, so that the sentence may be imposed according to law. Stevens v. McClaughry, 207 Fed. 18, 125 C. C. A. 112, 1 L. R. A. (N. S.) 390; Halligan v. Wayne, 179 Fed. 112, 102 C. C. A. 410; Munson v. McClaughry, 198 Fed. 72. 117 C. C. A. 180, 42 L. R. A. (N. S.) 302; O'Brien v. McClaughry, 209 Fed. 816, 126 C. C. A. 540; Williams v. United States, 168 U. S. 382–398, 18 Sup. Ct. 92, 42 L. Ed. 509; Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127.

It is therefore adjudged that the case be remanded to the District Court for resentence of the defendant.

#### ORTH v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1918.) No. 1601.

1. ESCAPE \$\infty 5-AIDING ESCAPE-OFFENSE.

Defendant, who, after the completed escape of a convict from a federal penitentiary, harbored and concealed him, so as to prevent his discovery and arrest, was entitled to a directed verdict of acquittal on a count under Criminal Code, § 141, for aiding and assisting the convict to escape.

2. CRIMINAL LAW \$\ightharpoonup 1168(1)\to Harmless Error\to Refusal of Direction to Acoust.

The erroneous refusal to direct an acquittal on a count under Criminal Code, § 141, for aiding a convict to escape from a federal penitentiary, was not prejudicial, where a conviction under a second count thereunder for harboring and concealing the convict to prevent his discovery and arrest was supported by the evidence, and the sentence was not in excess of the maximum provided for that offense.

3. Criminal Law \$\sim 393(1)\$—Self-Incrimination.

In a trial on an indictment under Criminal Code, § 141, for aiding one K., a convict, to escape from a federal penitentiary, and for harboring and concealing him, the admission of defendant's testimony in his own behalf as to his assistance to K., given on his trial for aiding one F., another convict, was not a violation of defendant's constitutional right not to be required to testify against himself, where he was under no compulsion to testify in the other trial.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Albert Orth was convicted of the statutory offense of aiding a convict to escape from a federal penitentiary, and of harboring and concealing the convict, and he brings error. Affirmed.

Paul M. Macmillan, of Charleston, S. C., for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOODS, Circuit Judge. The defendant was convicted and sentenced under an indictment charging violation of the following statute:

"Whoever shall rescue or attempt to rescue, from the custody of any officer or person lawfully assisting him, any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or shall, directly or indirectly, aid, abet, or assist any person so arrested to escape from the custody of such officer or other person, or shall harbor or conceal any person for whose arrest a warrant or process has been so issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both." Criminal Code (Act March 4, 1909, c. 321) § 141, 35 Stat. 1114 (Comp. St. 1916, § 10311).

The first count charged that the defendant aided, abetted, and assisted William Knobloch, a person under arrest and convicted under the laws of the United States, and in the custody of the warden of the United States penitentiary at Atlanta, to escape from that custody. The second count charged that the defendant harbored and concealed the convict, William Knobloch, so as to prevent his discovery and arrest. Knobloch escaped from the Atlanta penitentiary on August 29, 1916. Some time in September, 1916, he appeared in Charleston, S. C., where the defendant lived, and, as the evidence tended to show, was by the defendant aided and protected, and assisted to leave Charleston. Under this state of the proof, the defendant's counsel requested the District Judge to direct a verdict of acquittal on the first count of the indictment. The motion was refused.

[1, 2] The defendant was convicted on both counts of the indictment, but was sentenced only to pay a fine of \$100 and imprisonment for two months. This was less than the maximum penalty provided by the statute. We think the motion should have been granted in accordance with the views expressed in the opinion this day filed in No. 1600, 252 Fed. 566, — C. C. A. —, a similar case against the same defendant. But, as we held in that case, there was no prejudicial error in refusing to direct a verdict of acquittal on the first count or in the sentence; for the conviction under the second count was well supported by the evidence, and the sentence was not in excess of the maximum provided for the offense.

[3] The defendant testified in his own behalf on his trial for aiding Fay concerning the assistance he gave to Knobloch when he came to Charleston in September. Against the objection of the defendant, the court allowed this testimony to be introduced in this case, as in the nature of an admission or a confession. It is earnestly insisted that this was a violation of the constitutional right of the defendant that he should not be required to testify against himself. The point is not well taken. The defendant was not under constraint or compulsion to testify in his trial for aiding Fay, and therefore his testimony in that case was admissible in any other legal proceeding, just as any other confession or admission would have been.

Affirmed.

#### ZIMMERMAN v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3160.

1. RAILBOADS \$\iiistrightarrow 350(6)\$—Crossing Accident—Failure to Blow Whistle or Ring Bell.—Question for Jury.

In automobile driver's action against railroad for injuries at crossing, evidence that train crossed a city street at the rate of 30 miles an hour without having blown whistle or sounded bell made the question of negligence one for the jury.

2. RAILEOADS \$\sim 350(28)\$—ACCIDENT AT CROSSING—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was guilty of contributory negligence in crossing track in automobile, without first stopping or looking to right or left, the flagman being temporarily absent, thus permitting the inference that there was an implied invitation to cross, held, under the evidence, for the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenbaver, Judge. Action by Katherine Zimmerman, administratrix of the estate of John F. Zimmerman, deceased, against the Pennsylvania Company. Judgment for defendant on directed verdict, and plaintiff brings er-

C. W. Dille, of Cleveland, Ohio, and Anderson, Mathews & Wall, of Youngstown, Ohio, for plaintiff in error.

ror. Reversed, and cause remanded for new trial.

Hollis E. Grosshans and Harrington, De Ford, Heim & Osborne, all of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Plaintiff, as administratrix of the estate of the late John F. Zimmerman, brings this action to recover damages for the wrongful death of the decedent. The defendant maintains and operates a railroad in the city of Alliance, and the decedent met his death May 7, 1915, at the crossing of the railroad over Park avenue in that city. Park avenue runs north and south and the railroad east and west. Decedent was driving north on Park avenue in an automobile, and when his machine reached the south rail of defendant's southerly track it was struck and he was killed by the locomotive of one of defendant's passenger trains bound east. Defendant maintained a shelter for a watchman in or near Park avenue adjacent to the north side of its northerly track, and the watchman was seen in the shanty, as it is called, shortly before the collision. Decedent was driving his machine at a moderate speed, estimated at the rate of 7 or 8 miles an hour, and this rate was materially reduced as the machine approached the south rail. He was looking directly north, and might well have had the watchman in view when nearing the point of danger, though it is not shown that the watchman was on duty at the moment the collision occurred.

[1, 2] At the close of the plaintiff's testimony defendant moved for a directed verdict, and the motion was granted. We agree with the learned trial judge that the evidence tended to show negligence on the part of the defendant, in that neither the whistle nor the bell of the locomotive was sounded as the train approached the crossing, and that at the time of the collision the train was running at the rate of 30 miles an hour. The court concluded as matter of law, however, that the decedent was not in the exercise of ordinary care as he approached the crossing. It is true the testimony tends to show that the decedent did not stop his machine, or look to the right or the left, before driving upon the track; but the view in the direction from which the train was coming was obstructed by buildings on the west side of Park avenue to a point within 14 or 15 feet of the southerly track. Considering these obstructions, in connection with the control under which the automobile was being operated, as well as the other testimony relating to decedent's conduct, we are impressed with the belief that it might fairly have been inferred, under the motion to direct, that, instead of maintaining gates, the defendant was accustomed to keep a watchman at this crossing, and that his absence, as well as his presence and conduct, might practically have operated as a token of safety in crossing, and as an invitation in that behalf to persons familiar, as decedent was, with the custom observed at the crossing. The situation would seem to have been similar in principle to that of open gates at a railroad crossing, and the implied assurance and invitation their position signifies to persons approaching and intending to pass over the crossing. Erie R. Co. v. Schultz, 183 Fed. 673, 675, 106 C. C. A. 23 (C. C. A. 6); Erie R. Co. v. Weber, 207 Fed. 293, 296, 125 C. C. A. 37 (C. C. A. 6). The defendant's negligence and the obstructions to the view westwardly lend emphasis to the situation.

Another circumstance is deserving of notice. The watchman was not seen after the collision; and yet his presence shortly before the collision gives rise to a presumption that he overlooked alike the proximity in time of the coming of the train and its actual approach. Enough was therefore shown to exact of the defendant an explanation. in a word to put it to its proofs; indeed, we think fair and impartial men might reasonably draw different conclusions touching the question of care or negligence on the part of the decedent. It is scarcely necessary to add that in such circumstances the question of contributory negligence is one of fact, not law. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 378, 9 C. C. A. 526 (C. C. A. 6); Otis Steel Co. v. Wingle, 152 Fed. 914, 917, 82 C. C. A. 62 (C. C. A. 6); Cary Bros. & Hannon v. Morrison, 129 Fed. 171, 181, 163 C. C. A. 267, 65 L. R. A. 659 (C. C. A. 8); Pa. R. Co. v. Bacza, 187 Fed. 770, 109 C. C. A. 518 (C. C. A. 3); United States Express Co. v. Kraft, 161 Fed. 300, 302, 88 C. C. A. 346, 19 L. R. A. (N. S.) 296 (C. C. A. 3).

The judgment must be reversed, and the cause remanded for a new trial; and an order will be entered accordingly.

#### BETSCH et al. v. UMPHREY et al.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

#### No. 3123.

1. MINES AND MINERALS \$\infty 26-Pleading-Admissions.

A relocation of a claim located by another admits the validity of the original location.

2. MINES AND MINERALS \$\sim 38(12)\$—PLEADING—SUFFICIENCY.

An allegation, in an answer in action to quiet title to mining claim, that "defendants are the owners in fee," etc., will not be held insufficient, on motion for judgment on the pleadings, by reason of the fact that it did not allege that they were the owners when the action was commenced.

3. Pleading \$\sim 343\to Judgment on the Pleadings.

The granting of a judgment upon the pleadings on motion is not regarded with favor by the court.

4. Mines and Minerals \$\iff=38(12)\to Pleading\to Sufficiency.

In an action to quiet title to a mining claim, where complaint set forth affidavit of assessment work done by defendants at a certain time, but alleged that defendants had abandoned the claim, and the answer denied the allegation of abandonment, the pleadings showed a prima facie case in favor of defendant on the question of possession, although the answer did not state that defendants were in possession at the commencement of the action.

Appeal from the District Court of the United States for the Second Division of the District of Alaska; J. K. Tucker, Judge.

Suit to quiet title to mining claim by Fred Umphrey and Fred Harrison against Chris Betsch and Joe L. Jean. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

The appellees brought a suit in the court below to quiet title to a mining claim, and in their complaint they alleged that they were in possession of the claim, that they acquired title thereto by relocating on April 1, 1917, a claim known as "Creek Claim No. 5 above Discovery, West Fork of Willow Creek," located by Ben Blanker on July 4, 1914. They further set forth that on April 4, 1917, the defendants recorded an affidavit in the records of the district in which the claim was located, in which it was stated that they had expended more than \$1,500 in labor on the Blanker claim during the month of October, 1916, for the assessment work of the current year 1916, and the complaint alleged that the statements contained in that affidavit were untrue, and "that if said defendants ever did have any right or interest in said mining claim, which these plaintiffs do not admit, but deny, they abandoned and forfeited the same before the entry of the plaintiff Umphrey upon the said claim." The answer denied that the appellees relocated the claim by staking or marking the same or recording a certificate of location, denied that the appellees owned the claim or were in possession thereof, denied that the affidavit for assessment work was untrue, and denied the allegation of forfeiture and abandonment, and for affirmative answer and defense alleged that the appellants "are the owners in fee, subject only to the paramount title of the government of the United States, of the ground and premises described in the plaintiff's complaint, and are in the possession and entitled to the possession of the whole thereof." The reply denied all the affirmative allegations of the answer. On these pleadings the court below sustained a motion of the appellees for judgment on the pleadings.

O. D. Cochran, of Nome, Alaska, and William A. Gilmore, of Seattle,

Wash., for appellants.

De Journel, Nye & De Journel, of Fairbanks, Alaska, F. De Journel, of San Francisco, Cal., and Roy V. Nye, of Monrovia, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1-3] The appellees, by alleging that their claim was a relocation of the claim located by Blanker on July 4, 1914, admitted the validity of the original location. Zerres v. Vanina, 150 Fed. 564, 80 C. C. A. 366, and cases there cited. Although the appellants do not allege in their answer that they claim title and possession under Blanker's location, sufficient appears in the complaint to show that such is the case, for the complaint presents the affidavit filed on April 4, 1917, on behalf of the appellants to show that the assessment work was done for the year 1916, and that they asserted ownership of the Blanker claim. The complaint alleges, however, that before the appellees made entry on the claim the appellants had abandoned and forfeited any interest which they might have had in the claim. That allegation was denied in the answer, and thereby an issue was presented for trial. But, say the appellees, the appellants, instead of averring in their affirmative defense that they were the owners in fee at the time when the action was commenced. alleged their ownership in the present tense, and thus admitted that they were not the owners at any prior time. If that had been the only allegation bearing upon that feature of the case, it would still have been error to enter judgment on the pleadings, for it was evidently the intention of the appellants to allege their title as of the date of the commencement of the suit. The granting of a judgment upon the pleadings on motion is not regarded with favor by the courts. "The pleading must be clearly bad, in order to justify a judgment in favor of the other party; and if there is any reasonable doubt as to its sufficiency, judgment on the pleadings will not be rendered. So the defect must be substantial and not merely formal or technical." 31 Cyc. 607.

[4] It sufficiently appears, however, from all the pleadings in the case, that the appellants were in possession during the year 1916 under a mining location which could only have been the Blanker location. for the relocation notice admits that location and its validity, and the appellees, by setting forth the affidavit of the assessment work done by the appellants in the year 1916, identified that assessment work and the possession of the appellants with the Blanker location, and admitted possession by the appellants in that year. That possession, so admitted, must be deemed to have continued until shown to have been discontinued. It is true that the appellees allege its discontinuance by their averment that the appellants abandoned and forfeited the mining claim, but that allegation was denied. In short, upon the appellees' own showing the appellants were in the quiet and undisputed possession of the premises in 1916, under a valid location, and those facts constitute a prima facie case, which can be overcome only by a proof of abandonment or forfeiture, or other divestiture, and the acquisition of a better right or title by the appellees. Hammer v. Garfield Mining Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. It was error, therefore, to enter a judgment upon the pleadings.

The judgment is reversed, and the cause is remanded for further

proceedings.

#### NEER v. LANG.

(Circuit Court of Appeals, Second Circuit. May 15, 1918.)

No. 243.

 CORPORATIONS \$\infty\$=116—Sale of Stock—Offer and Acceptance—Terms of Acceptance.

Where defendant offered to sell certain stock at a certain price, "subject to previous sale," plaintiff's acceptance of the stock, with direction to ship with draft attached and wire to that effect imported into the acceptance new provisions as to the place of delivery and payment, so that it was not identical with the offer, and prevented the making of a contract.

2. Contracts 6-16-Offer-Construction.

An offer must not be uncertain or ambiguous.

Customs and Usages ⇐==13—Offer and Acceptance—Customs of Business.

An offer relating to a trade or business assumes that all the usages and customary incidents of such trade or business shall be part of the agreement, and they need not be expressly stated in the written or oral offer, as the law implies them.

4. Sales \$\infty 79\text{-Sale of Stock-Place of Delivery.}

The law implies that the delivery of stock offered to be sold shall be at the place of the seller, nothing appearing to the contrary.

In Error to the District Court of the United States for the Southern District of New York.

Suit by William A. Neer against Frank R. Lang. Judgment for

defendant, and plaintiff brings error. Affirmed.

The plaintiff is a citizen of the state of Michigan. The defendant is a citizen of the state of New York, and a resident of the Southern District thereof. The plaintiff brought suit against defendant to recover damages in the amount of \$17,000 for the breach of an alleged contract to sell plaintiff 20 shares of the capital stock of a corporation known as the Saxon Motor Company.

Winter & Winter, of New York City, for plaintiff in error.

I. Balch Louis, of New York City (Henry C. Burnstine and A. Joseph Geist, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The right to maintain this action depends upon whether a contract was ever made as alleged. The plaintiff relies on certain correspondence which passed between defendant and himself, and which he claims constituted a contract, and involves

a breach. The plaintiff on October 9, 1915, received the following letter from the defendant:

"Fort Leavenworth, Kansas, Oct. 7, 1915.

"Wm, A. Neer & Co., Detroit—My Dear Mr. Neer: Will you keep me posted on the Saxon Motor common market. Would like to buy 10 or 15 shares at around 300, subject to confirmation, or would sell 20 shares at 400, subject to previous sale.

"Sincerely,

[Signed] F. R. Lang, Major, U. S. Army."

The plaintiff, upon the receipt of the letter, sent the following telegram to defendant:

"Western Union Telegram.

**"10—9—1915.** 

"To Major F. R. Lang, Fort Leavenworth, Kansas: We accept twenty Saxon at four hundred ship with draft attached and wire when you have done this.
"Wm. A. Neer & Co."

This telegram plaintiff followed with a letter as follows:

"10-9-1915.

"Major F. R. Lang, Fort Leavenworth, Kansas—Dear Sir: Upon receipt of your letter offering us 20 Saxon Motor common at 400, we immediately wired you as follows: 'We accept 20 Saxon at 400 ship with draft attached and wire when you have done this.' We trust we will receive your confirmation on this transaction very soon.

"Very truly yours,

Wm. A. Neer & Co."

The defendant, upon receipt of plaintiff's telegram, sent to plaintiff the following letter:

"Fort Leavenworth, Kansas, October 9, 1915.

"Wm. A. Neer & Co., Detroit—Gentlemen: Saxon stock sold before receipt of your telegram. Seems to be much demand for it. Think I may be able to locate ten and possibly twenty-five shares more. What is best offer you would make for this and for how long a period is bid open?

"Very truly, [Signed] F. R. Lang, Major, U. S. Army."

The statement in the above letter, "Saxon stock sold before receipt of your telegram," plaintiff claims was false, and was made with the purpose of taking advantage of the condition in his letter of October 7th that the offer there of 20 shares at 400 was subject to previous sale. The court below held that the correspondence disclosed no contract and dismissed the complaint.

[1-4] If a contract exists, it is to be found in the letter of October 7th and the telegram of October 9th. The letter contains an offer to "sell 20 shares at 400, subject to previous sale." The telegram "accepts twenty Saxon at four hundred." If nothing more had been added, a valid contract would have resulted, provided the defendant had not previously sold the shares. But the telegram contained something more, and that was, "Ship with draft attached and wire when you have done this." This imported a new item into the acceptance and prevented a contract from being made. Every agreement is the result of an offer and an acceptance thereof. An offer must not be uncertain or ambiguous, and it was not in this case as respects the 20 shares of Saxon, for it is not impossible for a court to say just what the language used meant. But an acceptance is required to be identical with the offer, or there is no meeting of the

minds, and no agreement; and in this case the offer and the acceptance are not identical.

Every trade or business has its usages, and persons who make offers relating thereto assume that all the customary incidents of such callings shall be part of the agreement, and they do not need to be expressly stated in the written or oral offer, as the law implies them. The law implies that the place of delivery of the stock shall be at the place of the seller, nothing appearing to the contrary; that is to say, in this case the place of delivery under the offer as made was Ft. Leavenworth, Kan. But under the acceptance delivery was to be made at Detroit, Mich., where plaintiff resided. The law implies from the terms of the offer that payment was to be made in cash on delivery at Ft. Leavenworth. But the acceptance provided for a payment by draft on delivery at Detroit. The defendant was required to part with possession of his stock before actual payment.

In Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571, an offer was made to sell stock at 33 cents on the dollar, subject to the right to sell to other parties. The alleged acceptance was in a telegram reading, "I accept offer; 33 for all your stock; draw three days' sight draft with stock attached." This was held to be a variance from the offer, and the interposition of a term not embraced in the original offer, and therefore not binding. And see Greenawalt v. Este, 40 Kan. 418, 19 Pac. 803; Sharp v. West (D. C.) 150 Fed. 458;

Lacey v. Thomas (C. C.) 164 Fed. 623.

As there was no contract, and therefore no right to sue for a breach, the other questions raised need not be considered.

Judgment affirmed.

#### GULDEN et al. v. HIJOS DE JOSE TAYA S. EN C.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

#### No. 219.

1. Shipping \$\infty\$106-Bill of Lading-Condition of Cargo.

Where a bill of lading recited that a shipment of olives was received in apparent good order and condition, and there was no qualification, except that the vessel should not be responsible for the contents of the parcels, the admission is sufficient prima facie, in a suit for injuries to olives due to the breaking of the barrels in which they were packed, that such barrels were in good condition when received.

2. Shipping \$\iff 123\$—Liability for Damage to Cargo—Improper Stowage.

A ship held liable for damage to olives packed in barrels, from the breaking and leaking of the barrels, on the ground that it was caused by improper stowage.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit by Frank Gulden and others against Hijos de Jose Taya S. en C. From a decree for libelants (243 Fed. 780), respondent appeals. Affirmed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 252 F.—37

Appeal from a decree in admiralty of the District Court for the Eastern District of New York (Chatfield, J., presiding), adjudging the defendants liable for injury to four hogsheads and two barrels of clives stowed upon the ship Asuarca, of which the respondents were the owners. The hogsheads and barrels, along with some 500 others, were shipped upon a vessel of the respondents from the port of Seville, Spain, bound for Cadiz, and were there transshipped to the steamer Asuarca, bound from Cadiz to New York, and arrived on the 31st of January, 1916. They were shipped under the usual bill of lading, which contained an exception for breakage, leakage, bad stowage, and the like. The bill of lading also contained the provision that the respondent

should not be responsible for the contents of the packages.

When they arrived in New York and were discharged, it was found that the staves of the hogsheads and barrels in question, 6 in all, had been broken, so that the brine leaked out, and the olives had been dried and destroyed. Two witnesses for the libelants proved that they had seen the casks before they had been discharged, and that the bungs were not all upright, but that they had been stowed in various angles to the perpendicular. One witness for the respondents was called, who swore of the barrels and hogsheads as follows: "They were stowed in the blige with their bungs up, some of them, and some of them were stowed amidships crosswise." He also swore that a breakage of 6 out of 500 would be a good cargo, and that if there had been poor stowage there would be more than 6 casks in poor shape. He was in the habit of having four or five ships discharging at a time and could not remember specifically the consignment to the libelants. The respondents also produced the certificate of the wardens of New York that the cargo had been surveyed and found to be well stowed.

The district judge found that the libelants had shown affirmatively that the ship was guilty of negligence in the stowage, and for that reason gave

judgment.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for appellant.

Francis Bertram Elgas, of New York City (George H. Gilman, of

New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] The appellant's first point is that the libelants have not shown that the cargo was shipped in good condition. The bill of lading recites that they were received "in apparent good order and condition," and there is no qualification to this admission, except that the ship shall not be "responsible \* \* \* for the contents of the parcels." The appellant contends that under The Lyra (D. C.) 231 Fed. 250, and Vanderbilt v. Ocean S. S. Co., 215 Fed. 886, 132 C. C. A. 226, this qualification of the admission makes the libelants' proof insufficient. We do not agree. In both these cases, as in The Ismaele (D. C.) 14 Fed. 491, and Henderson v. 300 Tons of Iron Ore (D. C.) 38 Fed. 36, the qualifying language was "weight unknown," or "weight and contents unknown." The phrase "not responsible for contents" is not an equivalent. It affects to relieve the ship for the condition of the contents; but the contents are not here in question, at least not its condition at the time of shipment. The material question is of the condition of the hogsheads themselves, since the proof makes it clear that the condition of the contents resulted from the injury to them, and, if they were sound when shipped, so were the contents. Admitting that the hogsheads were apparently in good order, the condition of the contents at that time necessarily followed. The exception touching the contents did not qualify that admission at all, assuming, indeed, that it qualified the existing quality of the contents

in any event.

[2] The case therefore turns simply upon whether the libelants succeeded in proving bad stowage. That is a question on which we are not disposed to disturb the ruling of the District Judge, who saw the three witnesses concerned. It is true that the two witnesses for the libelant did not go down into the hold; but they saw the cargo from the deck before it was discharged, and they testify absolutely that some of the bungs were not upright, which is conceded by both sides to be bad stowage, and the only thing in contradiction is the certificate of the port warden, upon which we think the District Judge properly laid small weight, and the testimony of Leisegang, whose recollection was obviously uncertain, and whose testimony we do not feel to be wholly unambiguous, even if taken literally.

The main strength of the respondent's position really lies in the fact that so few of the casks were injured; but, while the stowage of casks with bungs at an angle to the perpendicular was improper, we cannot say that it inevitably involved a crushing in of the staves whenever it is practiced. Whether these hogsheads were of unusual strength, or whether it is only in a small percentage of cases that bad stowage will result in breakage, we do not know. There is no evidence in the case which would excuse the respondent, upon the theory that bad stowage must have resulted in a higher percentage of injury. Moreover, although the witnesses for the libelants do say that many of the casks were improperly stowed, they do not profess to give the number. Out of the 600 we have no means of knowing whether 20 per cent., or more or less, were badly stowed.

Seeing no reason to disturb the finding of the District Judge on

this question of fact, we think the decree should be affirmed.

M. B. FAHEY TOBACCO CO. v. SENIOR et al. SENIOR et al. v. M. B. FAHEY TOBACCO CO.

(Circuit Court of Appeals, Third Circuit. July 27, 1918. Rehearing Denied September 20, 1918.)

Nos. 2383, 2384.

1. TRADE-MARKS AND TRADE-NAMES 24-WHAT CONSTITUTE.

Where the distinctive feature of complainant's device was a reproduction of the photograph of complainant's predecessor, coupled with his name and the name and description of cigars sold, the words and picture together, in view of Act Feb. 1905, § 5 (Comp. St. 1916, § 9490), lack no element of a valid trade-mark, and should be so treated.

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Appeal from the District Court of the United States for the Eastern

District of Pennsylvania; Edward G. Bradford, Judge.

Suit by the M. B. Fahey Tobacco Company against Joseph Senior and another, who filed a cross-bill. From the decree, which granted complainant only part of the relief sought (247 Fed. 809), both parties appeal. Affirmed on defendants' appeal, and reversed, with directions, on complainant's appeal.

Trevor T. Matthews, of Philadelphia, Pa., for plaintiff.

George H. Stein, of Philadelphia, Pa., and John J. Bollinger, of York, Pa., for defendants.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this suit, brought by the M. B. Fahey Tobacco Company against Joseph Senior and H. N. Heusner, the company charged unfair competition and the infringement of a trade-mark. The principal question was the ownership of the device; Heusner asserting that he and not the company was the exclusive owner, and on this ground asking in his answer for affirmative relief. On the charge of unfair competition the District Court found in favor of the company, but seems to have held—the opinion leaves us in doubt on this point—that the device in question was not a trade-mark and to have decided for this reason that the company could not recover profits, but was confined to damages. Each party has appealed from the decree, and as the whole dispute has been argued before us we incline to dispose of it at this stage of the controversy, although the account has not yet been taken. The hearing was in open court and the facts are fully stated in Judge Bradford's opinion. 247 Fed. 809.

The evidence relating to the ownership of the device is conflicting, and we have considered it with attention, but without seeing reason to interfere with the findings below. We accept the conclusion of the learned judge that M. B. Fahey in his lifetime was the owner of the device, and that the company has succeeded to his right. And we also agree (1) that the company was not so far privy to the proceeding in the York county court as to be bound now by the decree of that tribunal under the rule of res judicata; and (2) that under the facts proved the doctrine of clean hands does not prevent the company from recovering in this action. But, if the opinion below is to be understood as deciding that the device is not a trade-mark, and that the company is therefore confined to the recovery of damages for unfair competi-

tion, we cannot agree with that part of the decision.

[1] The distinctive feature of the device is the reproduction of Fahey's photograph. This is coupled with his name—"Fahey's" Special [cigar], Havana Filler—and we think the words and the picture, taken together, lack no element of a valid trade-mark. The device is arbitrary, not descriptive or generic, and points unmistakably to a particular individual as the source of the goods, giving not only his name, but his features also, so that no other "Fahey" is likely to be confused with the original of the picture. We do not wish to add another to the elaborate discussions of this general subject with which the reports abound, and shall therefore refer merely to Hopkins on Trade-

Marks (3d Ed.) §§ 64 and 72, and 38 Cyc. 695 et seq., and cases cited. An English decision in point is Rowland v. Mitchell [1897] 1 Ch. Div. 71, 85 Law Times Rep. N. S. 498.

Moreover, in addition to the general rules governing the subject, the

act of February 20, 1905, has declared in section 5 that:

"No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless" the mark falls within either of two described classes. 33 Stat. 725, c. 592 (Comp. St. 1916, § 9490).

The first class is not relevant, and the second class by plain implication allows the registration of an individual's name if the name be associated with his portrait (a condition that is fulfilled in the present case), merely requiring the individual's written consent to such use of his portrait, a further requirement that was also fulfilled. No question is now presented under the act, but Congress has plainly declared its will concerning devices like that now involved. Davids Co. v. Davids Mfg. Co., 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046.

[2] Therefore, since the defendants have infringed the plaintiff's trade-mark, profits as well as damages are recoverable, and the decree should be modified accordingly. Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629; Hanover Co. v.

Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713.

We therefore affirm the decree on the defendants' appeal and reverse it on the plaintiff's appeal, with instructions to modify it in accordance with this opinion.

## BAILEY v. MISSISSIPPI HOME TELEPHONE CO. (Circuit Court of Appeals, Third Circuit. August 3, 1918.) No. 2370.

- 1. Corporations \$\iff 433(2)\$—Contracts—Ratification—Question for Jury.

  Whether a corporation had ratified a parol contract made by one of its officers without antecedent authority held a question for the jury.
- 2. Monopolies \$\infty\$-Contracts-Legality.

A contract by a public service corporation to pay a commission for sale of its property to a competitor, which was prohibited by a law of the state, is not necessarily illegal, where it was contemplated, and an effort was made, to first secure a repeal of the law.

In Error to the District Court of the United States for the Middle

District of Pennsylvania; Chas. B. Witmer, Judge.

Action by John R. Bailey against the Mississippi Home Telephone Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

John J. Reardon and Geo. E. Sands, both of Williamsport, Pa., for plaintiff in error.

J. Fred Schaffer, of Sunbury, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

PER CURIAM. In this action between citizens of different states John R. Bailey sued to recover compensation for services rendered in bringing together the buyer and the seller of property. He set up a parol contract providing for compensation, but was nonsuited in the District Court. As the learned judge gave no reason for his judgment, either when he entered the nonsuit or when he refused to take it off, we cannot know what was in his mind and are not disposed to speculate. But we have examined the record with care in order to discover what questions were disputed, and to find, if possible, a satisfactory ground for supporting the judgment. We regret to say we have not been successful in finding such a ground; but, as the case must be tried again, we shall state our conclusions briefly and in general terms, so as to avoid the appearance of deciding questions now with finality that may wear a different aspect after all the evidence has been heard.

- [1] The leading questions in dispute seem to have been two: First, whether the defendant had authorized or ratified the contract; and, second, whether the plaintiff must fail because the contract was against public policy, and therefore void. On the first point we shall only say that, as the agreement (if made) was by parol, its terms and its scope were for the jury under proper instructions. As there was no such submission, the court must have held that the terms were of no importance, and that in no event was the company bound. So far as appears, the agreement was made by one of its officers without antecedent authority, and therefore the company could only be bound if the evidence showed ratification with knowledge of the transaction. On this point there was submissible evidence, and if the case was decided on this question there was error in taking it from the jury.
- [2] But it may have been decided on the ground that the contract was against public policy, and this requires a few additional remarks. The property to be sold was the defendant's business in Mississippi, and the proposed buyer was a corporate competitor, to whom a sale was forbidden by a general law of the state. Just what the parties to the contract intended is rather obscure, the evidence being somewhat meager; but the jury might have found that no sale was contemplated unless the Legislature should change the law, and that, although the parties intended to urge the change, no improper means to that end were in view. It is not unlawful to seek by proper argument and application to persuade a Legislature to repeal or modify a statute, and, if nothing more were in contemplation here, we see nothing to blame in such an effort. As it turned out, the effort was not successful, and the defendant's property was afterward sold in bankruptcy to certain of its own officers, who immediately conveyed it to a subsidiary of the proposed corporate buyer, thus accomplishing the result for which the plaintiff's services had been engaged. This might have presented another question. If the sale was a subterfuge to avoid paying the plaintiff's compensation, it would not prevent recovery; but if the sale were bona fide, without such a purpose, the plaintiff would have to bear his own loss. But this question also would have been for the jury, and was not submitted.

In a general way we have outlined the situation, and further evidence may throw a good deal of light on the dispute. The case should have been fully heard, and (so far as we can see now) should have been left to the jury with proper instructions.

No question concerning the effect of the bankruptcy proceedings was raised below, either by the pleadings or during the trial, and none

is now considered.

The judgment is reversed, and a new trial is granted.

#### THE BRITANNIA.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.) No. 246.

1. Towage =19-Fastening of Tow-Negligence.

A tug taking to a slip a barge, having no master or crew on board, was bound to fasten her in a seamanlike manner, and where it fastened her alongside libelant's barge in such a manner that, when the wind rose, the corner of the barge pounded against the side of libelant's barge, it was at fault.

2. Towage 519-Negligence-Contributory Negligence.

Where a tug took a crewless barge into a slip and negligently fastened her to libelant's barge, as known to her captain, who understood the danger to his barge should the wind rise, and was able to go aboard the barge and properly fasten the lines, so as to prevent injury from its pounding, he was negligent in not doing so.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the Arthur Ackerman Lighterage Company against the steam tug Britannia, her engines, etc.; Edward M. Timmins, claimant. Decree for libelant, and the claimant appeals. Decree modified.

The tug took the barge Sea Beach to a slip at the Bush Docks, and there left her. The weather at the time was fair, the slip very crowded, and, as the Sea Beach had no one on board, the crew of the Britannia made her fast alongside libelant's barge Paulina in such a manner that (as alleged in libel) when the wind rose during the following night "the corner of the Sea Beach pounded against the side of the Paulina," inflicting damage, to recover for which this suit was brought.

The court below held the Britannia solely liable, because (1) the method of fastening the Sea Beach was negligent, and (2) that boat was left without

a master in charge. Claimant appealed.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellant.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of

New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. [1] It is urged that The Thos. Quigley, 130 Fed. 336, 64 C. C. A. 582, supports the holding below. If the owner of the Sea Beach were complaining of an injury traceable wholly or partly to the absence of the accustomed scow captain, the decision would apply. Here it makes no difference whether the crew

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of scow or tug arranged the fasts; the duty of adjusting them in a seamanlike manner was the same, and fell upon whoever performed the work—in this instance, the Britannia.

The fault alleged is that, instead of laying the Sea Beach smoothly or evenly alongside the Paulina, she was so disposed that her square corner ground into the latter's side as soon as, with the rising wind, the slip full of boats began to "churn." On very conflicting evidence the trial judge held that this plainly faulty arrangement existed, and was the doing of the Britannia. We are not disposed to differ from

such a finding of fact; therefore the tug was at fault.

[2] But this initial negligence produced a situation about which there was nothing mysterious; it was patently wrong to the eye of any boatman, including the Paulina's captain, who admittedly saw what was done, disapproved of it, and understood the danger to which his boat was thereby subjected. Further it was entirely within his strength, power, and skill to correct the whole matter by going aboard the Sea Beach and hauling her straight and refastening her lines. The testimony of this man substantially admits that he did nothing of the sort, because he thought it no part of his duty to go on another man's boat.

This is carrying modesty too far; it was his duty to protect his own boat, and nothing prevented his performance of such duty. Certainly the crewless Sea Beach offered no impediment. This was a failure of duty, which is negligence.

Decree modified, so as to award half damages to libelant. Costs

below divided; appellant to recover costs in this court.

H. WARD LEONARD, Inc., v. MAXWELL MOTOR SALES CORPORATION. (Circuit Court of Appeals, Second Circuit. June 5, 1918. On Motion for Rehearing, August 1, 1918.)

No. 205.

1. Patents = 165-Limitation of Claims-Substitutes.

Though inventor is not confined to exact details of his disclosure, the extent of his contribution is limited to such substitutes for any disclosed element as the art needs no help to find.

2. PATENTS \$\sim 312(1)\top-Infringement\top-Burden of Proof.

In suit to enjoin infringement of patent, where plaintiff claimed that present commercial form of his invention was not departure from original disclosure, plaintiff had burden of proving that any journeyman of the art could turn from present form to former with any certainty of result.

3. Patents \$\infty\$101-Operation of Combination-Claim.

An inventor must do more than give cues for future experiment, and, unless he is dealing with elements whose action and reaction is known and certain, he must disclose how combination will operate.

4. Patents 528-Storage Battery Regulator-Infringement.

Leonard patent, No. 1,122,774, for regulator to prevent overcharge of storage battery, *held* not infringed.

5. Patents \$\infty 328-Storage Battery Regulator-Infringement.

Leonard patent, No. 1,157,011, for regulator to prevent overcharge of storage battery, held not infringed.

### On Motion for Rehearing.

6. Patents = 26(1)—Mechanical Combination "Invention."

A mechanical combination "invention" consists of selecting some elements for a combination which constitutes an independent entity, serviceable to the art and theretofore unknown.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by H. Ward Leonard, Incorporated, against the Maxwell Motor Sales Corporation. Decree for complainant, and defendant appeals. Reversed, and bill dismissed.

See, also, 246 Fed. 945, — C. C. A. —.

Appeal from a decree awarding the usual injunction upon patents to H. Ward Leonard, Nos. 1,122,774 and 1,157,011. The patents concerned a regulator to prevent the overcharge of a storage battery by a generator connected with the engine of a motor car. The system included the engine, the generator, the storage battery, and the lamps and other accoutrements requiring the energy of electricity. Two things were necessary to keep the system operative: First, an automatic switch between the generator and the storage battery, which should open when the generator was not in motion. This prevented a leakage of the stored energy from the storage battery back into the generator. It was fully disclosed in the patent, but was old, and does not come into this case, except incidentally. The second is the regulator designed to prevent the greater amperages, generated when the engine goes at high speeds, from "gassing" the battery. The disclosure effects this by disconnecting the generator from the engine at such speeds. The defendant reaches the same result by weakening the field current of the generator. This is done by throwing into series with the field coil a resistance, normally short-circuited. Several devices of similar purport were put in evidence, a sufficient description of which appears in the opinion. The claims in issue are: In patent No. 1,157,011, claims 1, 4, 5, 6, 7, 8, 9, 10, and 12; in patent No. 1,122,774, claims 2, 3, 4, 9, 10, 11, 16, 21, 22, and 24.

Drury W. Cooper, of New York City, and Edwin B. H. Tower, Jr., of Milwaukee, Wis., for appellant.

Clifton V. Edwards and Lawrence K. Sager, both of New York

City, for appellee.

Before ROGERS, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

LEARNED HAND, District Judge (after stating the facts as above). The problem before inventors was to prevent the charging of storage batteries by too high a current, resulting in the destruction of those accumulations in the cells upon whose creation the stored energy depends. If the current be too large, which in this instance also means a current of too high voltage, these products, normally aggregated for future use, are turned into gas to the loss and injury of the battery itself. As the battery becomes charged, its voltage rises, and with it the voltage in the charging current, with which varies the amperage. Hence the amperage of that current is always the test. It must for safety be kept within predetermined limits. As the current varies with the energy developed at the armature of the generator, it necessarily depends upon the speed of revolution; i. e., the revolutions per minute (R. P. M.), of the shaft upon which the armature is fixed. Since the speed of the engine cannot for practical reasons be regulated to

the needs of the battery, it follows that either there must be a periodic disconnection or slip between the armature and the engine, which will result in the partial disconnection of the system from its prime motor, or there must be some way of damping or disconnecting the current created by the generator from the battery itself. No plan appears in the record for a periodic disconnection of the generator from the battery, and the alternatives are therefore limited to a disconnection or slip between the generator and its prime motor and the damping of the electromotive force (E. M. F.) of the generator. One of the points of the case, in our judgment a critical one, is whether these two methods of dealing with the problem are for purposes of invention to be deemed equivalent; but we pass this for the moment, assuming for the statement of the problem that they are to be treated as substantially interchangeable.

No one disputes that it was well understood among electricians that the electromotive force generated by the rotation of an armature within its field depended upon the current in the field and that a common device to reduce that current was by the introduction of a resistance in the field circuit. Such a resistance is shown in a system such as is here in question in the patents to Thomson and Moskowitz, though its effect is certainly gradual, and not inserted and withdrawn all at once. and at opposite phases of the main current. The new thing which Leonard devised, if anything, did not therefore depend upon the diminution of the current charging the battery, but in the way that that diminution was accomplished. That was as follows: When the current in the charging circuit rose to an amperage which sufficiently energized the magnet, 28, so that it attracted the armature 28', the circuit was broken, which energized the clutch magnet. This mechanically disconnected the clutch, and deprived the armature of all future energy from the engine. Any further rotation of the armature depended altogether upon the mechanical momentum theretofore acquired. This would soon be destroyed by the reluctance within the generator, and with it would disappear the current generated in the charging circuit. When that current had fallen enough to release the armature, 28', it would be snapped back by its spring, and, the clutch coils coming again into circuit, the clutch magnet would engage that member of the clutch which was always in connection with the engine. The mechanical connection between the engine and the generator would be re-established, and the engine would rotate the armature as before.

Now the magnetization of the magnet, 28, must be stronger to attract the armature than to release it because of the air gap, and the system independently of its inertia, has therefore a maximum current of one value at which the clutch is disconnected and a minimum of another at which it is connected. It is urged that the full corrective effect of the clutch becomes effective at once, either in connection or disconnection; and this is perfectly true, although it is not true that the effect is immediately translated into terms of current. The effect upon the current, on the contrary, is gradual, resulting in a pulsating or vibrating unidirectional flow.

A confusion of issues readily arises over the issue of the vibratory character of the current. From the aspect of the battery a constant current is quite as good as a pulsating; Thomson and Moskowitz would charge a storage battery quite as well as Leonard. The supposed advantage of Leonard's device was that his relay operated only at the two critical periods in the current, the maximum and the minimum, and then it operated all at once, and without any possibility of derangement by the jars and shocks constantly happening in a motorcar. The pulsations of the current are therefore taken, perhaps correctly, as a symptom of a system which operates at opposite critical phases in the charging or work current, and that, too, by the entire effect of the corrective. Nevertheless, unless it also appears that such a method of correction necessarily involves a structure which will not be deranged by jars and shocks, it would seem to follow that the advantages of Leonard's disclosure, if any, lie in something else than the mere principle of the sudden interposition of the entire corrective. It may lie in the "trembler" or "air-gap" relay, which is not of the "plunger" type, and which is sure to operate under all the trying circumstances of motorcar

Now it is quite clear that the claims do not cover this kind of relay As we shall later show, the Everett-Bliss regulator, even if it was not as it stood a mechanism which would interject the entire corrective at once, needed only the substitution of metal for carbon points to constitute an anticipation. Yet it had not Leonard's relay, but was of the plunger type, and was perhaps unfit for motorcar use. We may dismiss, therefore, any consideration of these details of the structure, merely observing that the utility of the patent by no means follows upon that element which eventually became the most prominent in the claims.

A pulsating or vibrating current may be a certain symptom of the sudden interposition of the entire corrective; at least for the purposes of this case we may assume so. The first difficulty which we find in the file wrapper is that no mention occurs of any pulsating current until January 31, 1912. This, it is true, would not be alone enough, if the original disclosure had already contained the suggestion of it. We do not mean to hold that an original disclosure may not be amended to specify features already appearing, even by intimation, though not thoroughly observed at the outset. The difficulty in the case at bar goes deeper, because it appears positively that a constant current, or as nearly constant as possible, was thought to be within the scope of the patent. Thus in Figures 4 and 5 Leonard disclosed mechanism which operated by the gradual interposition of a resistance coil into series with the field circuit. In the specification of Figure 5 it was expressly stated that the object was to "maintain constant" a current generated by a continuously driven armature. We may therefore be sure that at that time neither the symptom, a pulsating current, nor the cause. the sudden interposition of the entire corrective, were a part of the in-Nothing of the sort appears anywhere in the file wrapper until January 31, 1912, when Leonard first mentioned the "wide and rapid fluctuations of energy" which accompanied his disclosure of the clutch. On March 27, 1913, he canceled Figures 4 and 5 with their descriptions. This change of position, while for a time still uncertain in its details, in general Leonard maintained till the patent issued. It was an entire antithesis to the original disclosure and it is doubtful whether it could succeed, if the art had itself remained stationary.

However, the art did not remain stationary, because before January 31, 1912, it had already gone quite as far as the defendant now seeks Whatever the actual date when the Bishop-Delano regulator was put into practice, Delano's application was filed in May, 1910, long before the amendments in the file wrapper, and for that matter before Leonard had changed his own practice from a clutch to a resistance coil. Furthermore, Turbayne's regulator was in public use early in January, 1912. Each of these regulators was an anticipation of the form which Leonard now seeks to include. The whole corrective was suddenly thrown in and out of series with the field coil by a relay which operated upon the "trembler" principle. We do not understand that the contrary is seriously asserted; but, if so, we are entirely satisfied that the contention is without basis. The amendments are invalid which sought to anticipate these inventions by canceling out Figures 4 and 5, with their specifications, and by interjecting vague statements about the fluctuating nature of the current developed by the The general or abstract aspect of the invention upon which the subsequent claims depended had been altogether changed. Perhaps it is better to say that for the first time a more abstract aspect had appeared, but at the expense of much that had earlier been included as a part, thereafter an inconsistent part, of the original conception. This alone in our judgment is enough to limit the patent to the disclo-

Moreover, we think that Leonard's own conduct of his application shows that he was aware of the departure which his amendments introduced. He revised his commercial regulator in 1911, so that it conformed to Delano's principle, to Turbayne's, and to the defendant's. Yet from the beginning of 1912, when he sought to intrude into his application vague expressions of wide fluctuation and the like, he never avowedly attempted to amend his specifications by any disclosure of the new form which he had actually adopted, and which he then certainly meant to claim. Why did he not do this, if it was not because he recognized that such an avowal would be met at once by a refusal in the Patent Office? Such a refusal must have been based upon the ground that it was a departure from the original disclosure, as it certainly was. Instead of this more candid course, he contented himself with nebulous claims, and one or two rather cryptic allusions to possible alternative forms. We cannot accept the result; the place to disclose the invention, certainly if it has become already known and developed, is the Patent Office itself. After not disclosing it there, we cannot allow it to be introduced here, for our duty is to interpret the instrument, not to rewrite it.

[1] So far we have considered the amendments introduced into the specifications as though their final form was sufficient to support the claims in their wider scope. Assuming, as we do, that taken literally the language is broad enough to cover the defendant's regulator, the further question nevertheless arises whether the disclosure, as it

stands, will serve. An inventor is, of course, not confined to the exact details of his disclosure, else his patent would be of small value. The extent to which he may generalize it depends, not only upon the surrounding pressure of the art, but the extent to which the variations which he wishes to cover in his claims, are themselves within the initiative of a journeyman in the art. For the inventor's contribution must be a sufficient guide in itself, and its extent is limited to such substitutes for any disclosed element, as the art needs no help to find. The validity of these claims, when so extended, depends, therefore, upon the readiness with which a journeyman would have substituted a resistance coil for the clutch of the application. Put in another form, we may say that it depends upon whether it would take any invention to change Leonard's clutch into his second and present commercial form.

We are not ready to agree that to quench the current by means of a rheostat was the equivalent of disconnecting the generator from its prime motor. Bentley's opinion upon that subject invades the precise issue we must decide. Each method did, indeed, accomplish the same result; but they cannot be said to accomplish that result in the same way, and fail as equivalents under one of the most common tests. However, we should not necessarily treat this as final, doubting, as we do, the unconditional validity of any absolute tests of the kind. If it was apparent that one might freely and certainly borrow a resistance coil from the art as a substitute, we should not hestitate to call it an equivalent, though it was a new means. Yet we think that there are objective reasons to deny that the supposed substitution was of such a kind. First, we may notice that physically it would not have been enough merely to take out the magnetic clutch and substitute a resistance coil in its place; the coil would not have been in the field circuit, and more readjustment was necessary. Yet the necessary changes may have been immediately obvious, once the idea was suggested, and we shall assume that they were, for it is not respecting them that our doubts arise. In part we rest upon the conduct of Leonard himself, both in his original disclosure and in the development of his machine.

Figures 4 and 5, already mentioned, showed a rheostatic regulator, though it was gradually introduced and removed. But with these actually before him, if Leonard did have the idea of a similar regulator for motorcars, why did he not at least verbally suggest it in his specifications as an alternative to his clutch? We have the answer in his advertisements during the spring of 1910, after he had filed his application, and while he was first exploiting his invention. In these he clearly shows that he thought the rheostat an impracticable regulator for a motorcar. Thus in January he says:

"There is no resistance of any kind inserted in series with the field or armature, so there is no chance of the outfit not working on account of poor contacts, sparking, etc."

# Again in March:

"This [the regulation] should be done without the use of slipping friction clutches, speed gears, flyball governors, electrically operated rheostats, vibrators, slipping fields, etc., which are inherently troublesome."

Leonard supposed that he had found something better than a rheostat for use in motorcars. He had thought of the rheostat only to reject it, though he meant to use it for other purposes in a complicated mechanism, which contained both clutch and resistance. He did not think it applicable for a motorcar, and it was only by subsequent experiment that he came to change his mind. We start, therefore, with the reasonable assurance that Leonard did not find the two means at once substitutes for each other.

[2, 3] We shall show later that other inventors attempted to create a pulsating current by a resistance coil, and supposed they had succeeded. If they failed, which is in doubt, we can safely assume that success was not a certainty. At least, the plaintiff has not shown, and the burden rests upon it to show, that any journeyman of the art could turn from one to the other with any certainty of result. Unless it goes so far, it is not enough merely to say that the substitute would readily occur to the mind of any one skilled in the art. An inventor must do more than give cues for future experiment. Matheson v. Campbell, 78 Fed. 910, 24 C. C. A. 384. Unless he is dealing with elements whose action and reaction is known and certain, he is bound to disclose how the combination will operate. A patent is the reward of a tested contribution to the art, not of a pregnant surmise or a promising hypothesis. There is not the least reason to say that, if it had occurred to a journeyman in the art to substitute a resistance coil, he would at once have understood the complete effect of that substitution upon the system as a whole, whether it would operate as well or worse than the clutch. So far as any evidence is available, it was a matter which required further experiment. We have, it is true, in the final form of the patent certain vague statements that other substitutes for the clutch are open (page 1, lines 46-54; page 2, lines 26-30); but nowhere is the substitute set forth in detail, and we are not satisfied, on the facts in this case, that it could be left so in the air for the speculation of those who should use the patent. Upon this ground, also, we therefore think the patent too limited to cover the defendant's regulator.

[4, 5] Finally, the art of acknowledged priority either wholly anticipates the patent, or proves, as we have just said, that the result which Leonard now claims was not a mere corollary of what he disclosed. We refer to the Everett regulator (Bliss type F), which differentiates from the claims, if at all, only by reason of having carbon, instead of metal, contacts. We do not forget that the relays are of a different type, but for the reasons already given we do not regard that distinction as important. Bentley's theory of the gradual introduction of the resistance in this regulator depends upon the presence of the carbon contacts. Wray's college thesis bears him out, though we believe that Wray was himself probably wrong at that time. Bentley's theory omits, however, certain facts, which require an explanation. The tension springs which hold up the floating plunger were in practice set at a predetermined amount, which represented the desirable maximum in the work current, generally 50 amperes. This means that when the coil in the solenoid carried 50 amperes the plunger would be enough attracted against the spring as only just to remain in contact with its fellow;

any further increase in the work circuit effected a separation.

Now the work circuit was always broken until the automatic switch closed, and that could never be in the Everett regulator until the voltage in the generator equaled that in the storage battery. Frequently the current which closed the switch must immediately put the carbon electrodes just at the point of separation, and in those cases the regulator would at all periods operate by the intrusion of the entire corrective at once. Nevertheless, it is of course possible that the battery might be partially exhausted, in which case there would be theoretically an increase of resistance between the carbon electrodes from the time the automatic switch closed until the point of separation was reached. But this was a very small matter at most; in Sheldon's opinion quite too small to effect any regulation whatever. Bentley calculated that at the time of separation the resistance was .8 ohms, and Sheldon only .4 ohms. It makes no great difference which opinion we assume to be correct, though Sheldon's observations were taken under more nearly working conditions. The difference between the resistance at the time when the automatic switch closed and when the carbons separate is at most all that can be said to be graduated. It depended altogether upon the residual voltage found in the battery at the moment when the engine is put in motion.

At any rate, it follows, after the battery has once reached its proper charge, or, if it is already fully charged, at once after the generator starts, that the whole theory of the plaintiff is inapplicable, and the resistance moves in and out in the same way as though the contacts were of metal. This would in practice be the condition over much the greater part of the time. Even at the beginning the graduated resistance would be less than .5 ohms, while the resistance of the shunted coil was nearly .6 ohms. We regard these considerations as substantially disposing of the theoretical demonstration that the Everett regulator was not an anticipation.

We do not forget the presence of two resistances; but that seems to us of no importance, if there was one resistance continuously thrown in and out over a substantial range of armature speeds. We have, moreover, omitted one element considered by Bentley; i. e., what are the variations of resistance while the carbons are sparking? This is a phenomenon which occurs as well when the contacts are of metal as when of carbon, and there are no data which would allow us to pass upon the differences of the resistance from one spark and another.

There remain only the tests made by both sides. As is not uncommon, the tests of each favored his own side. Sheldon found that the amplitude of the Everett pulsations was nearly as great as, in some cases greater than, those of the plaintiff's system. On the other hand, the defendant's oscillograms show a very nearly even current line for the Everett regulator. The suggestion that Bentley's experiments may have been vitiated by the presence of a gold leaf fuse in the oscillograph ought to be valid for all those taken, including the oscillograms from the defendant's regulators and the Leonard clutch. It must be conceded that the case in this aspect is too doubtful under

the stringent rule of proof required, though we are rather disposed to accept the evidence proving that the pulsations took place than that they did not.

While, therefore, we are not disposed to hold that Everett mechanism is an anticipation of the pulsating current regulator, we think that it is a final answer to the adequacy of the disclosure actually made. More properly, perhaps, we should have discussed it with that point. There is no doubt that Everett and Bliss both thought it produced a pulsating current, and that Wray's suppression of that feature was due to Everett's injunction upon him. There is also no doubt that so experienced a man as Sheldon believed, and still believes, that it operates the same way. All the inventors meant to get a pulsating current; all thought they had; all supposed that the carbon buttons would effect that result. If they do not, the substitution of metal buttons will make the current pulsate. Now, whatever else all this shows, at least it shows beyond peradventure that it was not a mere journeyman's job to secure a pulsating current by the interposition of a rheostat. Competent men tried it before Leonard; if they succeeded. then there is nothing new in his invention, except the clutch and relay; if they failed, he is hardly in a position to say that his disclosure was enough to advise the art how to secure such a current, except by using his clutch. As we have already said, the precise form of the relays was not a part of the invention. One had no warrant in supposing that the invention lay in them. A "plunger" type is as much within the patent as a "trembler" or "air gap." In following the patent, therefore, there was no warning that the "air gap" was essential. If one used a "plunger," one might choose either metal or carbon contacts; Leonard's specifications said nothing about it. Even if we suppose that the "air gap" relay was a part of the disclosure certain to be followed, Leonard nowhere states that metal should be used for contact between the keeper 28' and the point 31. If carbon chanced to be used, as might well have been by an imitator, he would have had a graduated increase of resistance up to the point of separation. He would have known as little as Everett, Bliss, and Sheldon that it affected the result for which he was striving. There was not the least indication that one must follow their structure, or that the material made any difference.

We conclude that the patent as now presented to us is a very ingenious and plausible effort to extend a quite limited disclosure into a broad monopoly. It is clear that Leonard had nothing of the sort in mind until by subsequent experiments he had worked out his successful device. Meanwhile the art had already passed beyond him, and his only alternative was to file a new application or proceed with his own. We have, of course, nothing to say in criticism of his actual disclosure, and his claims so far as they are limited by that disclosure. There is not the least reason to question the validity of the invention of a clutch control. Only it is derived from a quite different method, that affecting the transmission of mechanical energy, not the transformation of mechanical energy into electrical.

The decree is reversed, and the bill dismissed for noninfringement, with costs in both courts.

## On Motion for Rehearing.

PER CURIAM. We see no reason to change the disposition originally made of this case. The difficulty with the patent as we view it does not rest in the language of the claims, which we are ready to treat as embodying the feature of the relay; but we think it clear that the principle of these claims was first introduced into the patent some time after the application was filed, and after the art had already independently reached the same stage of development. The case is not one where there was originally adequate disclosure, the full effect and advantages of which were not appreciated by the inventor, and the change was not the result of a more complete understanding of the operation of the invention first claimed, but of the substitution of a new mode of operation, which not only the applicant had not even intimated originally, but which a part of his specification actually contradicted.

[6] In elaboration of this thesis it may perhaps be of service to state in more general terms than we originally did the meaning of the term "invention" in this connection. The specification of a mechanical combination patent generally discloses a machine consisting of a large number of elements, most of them individually old in the art. The invention consists in the act of selecting some of these elements for a combination which constitutes an independent entity, serviceable to the art and theretofore unknown. It is always this choice of the proper elements in combination which constitutes the invention. Now, it is obvious that from even a few elements disclosed in such a specification an enormous number of possible choices may be made, and if an applicant were free to substitute new elements in his original combination from any of those disclosed, he might change his invention as he pleased. The final invention would not then date from the application, but from the issuance of the patent. So it has always been customary to insist that such substitutions must be limited, so as not to constitute radical departure from the combination first selected; and this is especially the case where the result is to anticipate inventions already made by others. It is true that under the term "radical" there is room for some deviation from the strictness of a rigid application of this rule, but the permissible latitude depends in large measure upon the intermediate growth of the art.

Now, in the case at bar, the elements selected before January, 1912, were, as we have shown, limited by the feature of the mechanical clutch. It was this which Leonard selected as the constant element in nearly all the claims which he proposed for his invention. Those in which it did not appear are remote from the case. To select the function of the relays as creating maximum and minimum variations in the charging current was a wholly new idea. It involved confessedly the abandonment of the clutch as a necessary element, and it substituted elements which not only he had not even suggested as essential, but which were actually absent from a part of the disclosure. It is idle to answer that

the Patent Office insisted that those parts of the disclosures from which the relays were omitted constituted independent inventions, which must be divided out. The important point is that their presence was irrefutable proof that Leonard himself did not consider them contradictory of the combinations on which he had relied. Unless we are to treat the application as wholly fluid until the final claims are evolved, we see no escape from the result already reached.

The motion for a rehearing is denied.

WILLAMETTE IRON & STEEL WORKS v. COLUMBIA ENGINEERING WORKS.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918. Rehearing Denied October 14, 1918.)

No. 3061.

1. Patents &=328—Infringement—Validity—"Pulley"—"Sheave."
The Beck patent, No. 807,994, for an improved pulley, which provided for a flaring sheave, held invalid, not showing invention in view of the prior art; a "pulley" being one of the elementary mechanical powers, consisting of a pulley wheel, called a "sheave," etc., mounted in a block. [Ed. Note.-For other definitions, see Words and Phrases, Second Se-

ries, Pulley.]

2. Patents \$\sim 19\text{--Invention--Change of Degree.}

A mere change in degree is not invention; and hence it does not show invention to take a small pulley and enlarge it.

3. Patents = 112(3)—Evidence—Presumption.

The issuance of a patent is of itself presumptive evidence, both of invention and patentability.

Appeal from the District Court of the United States for the District

of Oregon; Charles E. Wolverton, Judge.

Suit by the Columbia Engineering Works against the Willamette Iron & Steel Works to enjoin the defendant from infringement of letters patent No. 807,994, issued to Otto R. Beck, December 19, 1905, for an improvement in pulleys, of which the plaintiff is the owner by assignment. From a decree for complainant, defendant appeals. Reversed, with directions to dismiss bill.

John K. Kollock, of Portland, Or., for appellant.

T. I. Geisler, of Portland, Or., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. [1, 2] The claim of invention described in the patent in suit relates to certain new and useful improvements in pulleys. "A pulley" (as defined in the Standard Dictionary) "is one of the elementary mechanical powers, consisting of a grooved wheel mounted in a block, used to increase power and transmit it by means of a flexible cord or rope in a changed direction." "A sheave" (also defined in the same dictionary) "is a pulley wheel with a grooved edge, over which a cord or rope may run."

It is a matter of common knowledge that, if the groove on the edge of the wheel or sheave in a pulley block is sufficiently deep, it will carry a rope of a diameter slightly less than the groove without any corresponding opposite opening in the block in which the pulley is mounted; but with a corresponding opening in the block the groove in the wheel may be more shallow, and the rope pass through the groove with less friction than over a wheel with a deep groove. It is also apparent that, if the opening in the block is large enough, it will permit the passage of an enlarged section of a wrapped or spliced rope over the wheel, without danger to the rope or wheel. A further enlargement of the opening in the block may also permit the passage over the wheel of a hook or other attachment to the rope without danger to either.

It is at this point in the construction of the pulley block and wheel that appellee's device comes into play, and its operation is illustrated in the hauling of logs. The diagrammatical application of this operation appears in the drawing (Fig. 3) attached to the patent No. 807,994. The claims of the patent are as follows:

1. A pulley comprising a block having opposite cheek plates, and a sheave mounted for rotation between said plates, said plates having their upper portions flared outwardly from said sheave to form a wide throat, and the side portions of said cheek plates at the opposite ends of said throat being flared.

2. A pulley comprising a block having opposite cheek plates, and a sheave mounted for rotation between said plates, the side portions of said plates being flared to provide enlarged end portions to the throat of said block.

3. A pulley comprising a block, and a sheave mounted for rotation therein, said block being provided with a throat whose end portions are flared outwardly.

The primary object of the improvement, as stated in the specifications, is to produce a pulley which has but few parts, is comparatively inexpensive to manufacture, and is efficient in operation.

The defendant denies infringement and sets up three separate defenses: (1) Want of invention. (2) Want of novelty, because of prior

public use. (3) Want of novelty, because of prior patent.

Upon the trial of the case in the court below the appellee called William R. Phillips, a mechanical engineer, who testified that the pulley described in the patent in suit is so made that it offers the least possible obstruction to anything that may be attached to the line that is being drawn through; that the device had two purposes, one to keep the cable on the pulley, and the other to render the least obstruction to the cable; that the design of the inventor was to render the least obstruction to the cable; that there were other blocks that would hold the cable to the pulley; that the opening in the block opposite to the groove in the pulley flared in two directions, viz. perpendicularly and horizontally; that this flaring of the opening in the block was to admit of a more facile passage of the cable over the pulley.

There was evidence on the part of the appellant tending to show that certain prior patents and devices had the vertical flare, viz.: No. 57,425, issued to Alfred Hartz, October 16, 1894; No. 635,604, issued to Simon H. M. Seib, October 24, 1899; No. 638,772, issued to A. B. Tarbox December 12, 1899; No. 670,974, issued to A. B. Tarbox,

April 2, 1901. There was also evidence tending to show that patent No. 700,212, issued to W. Louden, May 20, 1902, and No. 743,840, issued to F. M. Eby, described devices having both the vertical and lateral flares.

The court below found there was no anticipation in the Louden patent, for the reason that there was no evidence of the lateral flare, either in the claims or the specifications of the patent, and that there was no lateral flare in the clothesline pulley of the Eby patent. We are constrained to disagree with the learned court with respect to these two patents. We think the specifications and claims of the Louden patent, as they are illustrated by the model introduced in evidence and by the drawings of the patent, describe both a vertical and lateral flare, and the same may be said of the Eby patent for the clothesline pulley. The objection to the clothesline pulley, that it is a small affair, does not seem to us to be sufficient to exclude it from consideration as an anticipating device. It is the same in operation, although not intended to accomplish the same purposes; but it did not require invention to enlarge the small pulley sufficiently to make it equally useful and effective in hauling logs. That would be a question of degree, and a mere change in degree is not treated as invention in the patent law.

But, passing by the question of anticipation as presented by these two patents, is there invention in giving a flare to the sides of the opening in the block over the sheave or wheel? It was probably found in practice that with perpendicular sides to this opening a hook or other attachment on the line passing over the sheave or wheel would catch on the one or the other of the sides of the block. If so, what was more simple than to enlarge the opening and give the sides a flare, so that the hook or other attachment would not catch on either side, but would pass freely through the opening in the block on over the wheel? For this change in the construction of the block mechanical

skill was clearly sufficient.

The claim is made by the appellee that the object of the flaring sides to the opening of the block in suit was to permit the use of a narrow sheave to save weight and cost, and that the advantage of a wide sheave, as shown in one form of appellant's block, had been attained by such flaring construction of the appellee's block with a narrow sheave. This claim is made primarily to point out the difference in two blocks manufactured by the appellant, one with a narrow sheave, claimed as an infringement of the appellee's patent, and the other with the broad sheave, not claimed as an infringement. Conceding that there is this difference in the two blocks, it does not follow that this feature of appellee's block is the product of invention.

[3] Here, again, we think the difference in construction is one merely of degree, and not of invention. It is true that the issuance of a patent is of itself presumptive evidence both of invention and patentability; but we think an inspection of the device, as shown by the model and described in the specifications and claims, overcomes this presumption, and, aside from the evidence of anticipation in the Louden and Eby patents, determines that the patent in suit lacks invention.

The judgment of the District Court is therefore reversed, with

direction to dismiss the bill of complaint.

WAGNER ELECTRIC MFG. CO. v. DISTRICT LODGE, NO. 9, INTERNATIONAL ASS'N OF MACHINISTS, et al.

(District Court, E. D. Missouri, E. D. June 6, 1918.)

No. 4883.

COURTS \$\infty\$293\\_FEDERAL COURTS\\_JURISDICTION.

A company manufacturing munitions for the United States out of supplies furnished by the United States, which were shipped in interstate commerce, etc., is acting under the authority of the laws of the United States to as full an extent as though it had been incorporated under and in pursuance of national laws, and the federal courts have jurisdiction of a suit by such company to enjoin a labor union from illegally interfering with its prosecution of government work.

In Equity. Suit by the Wagner Electric Manufacturing Company against District Lodge, No. 9, International Association of Machinists, and others. On motion to dismiss. Motion denied.

Leahy, Saunders & Barth and Charles A. Houts, all of St. Louis, Mo., for complainant.

Julian Laughlin, Edw. L. Rothganger, and Frank H. Haskins, all of St. Louis, Mo., for defendants.

POLLOCK, District Judge. This suit was instituted by plaintiff for the purpose of procuring an injunction against defendants, restraining them from conspiring to do certain threatened and wrongful acts, to the great and irreparable and special damage of the plaintiff, to its property and property rights, and property of the United States in its possession and use. At the institution of the suit a temporary restraining order was granted plaintiff, which has been continued in force and effect to this day. The defendants move to dismiss this suit for want of jurisdiction. This question of jurisdiction has been briefed, argued, and stands submitted for decision, and is the sole question now presented for determination.

As the plaintiff, a Missouri corporation, and defendants, are citizens of this state, it is too clear for argument no jurisdiction exists on the ground of the diversity of citizenship, and none is claimed. While the petition of plaintiff, and the supplemental petition filed herein, are too lengthy and verbose to admit of restatement, all matters material to the question under consideration may be bery briefly summarized, as follows:

Defendants are labor organizations, or officers or members of such organizations, in the employ of plaintiff at the time the acts complained of were done. The petition avers the plaintiff to be a very large manufacturing concern, located in the city of St. Louis, and having in its employ some 3,500 men. The business in which plaintiff is engaged is the manufacture of electrical appliances, largely on its own behalf, and the manufacture of munitions of war for the use of the government under contracts with the government. The annual amount of business done by plaintiff is averred to be about \$10,000,000. In order to facili-

tate the doing of the work required by the government to be done. there was constructed for the use and occupancy of plaintiff at its manufacturing plant, and at an expense to the government of over \$500.-000, a building occupied and used by plaintiff in the doing of its work for the government. Further, the government purchased materials and delivered the same to plaintiff, suitable to be employed in the doing of the war work of the government, of the value of \$750,000. All said materials so furnished plaintiff by the government were shipped to plaintiff in interstate commerce, and when manufactured by plaintiff are returned to the government in the same manner. Under its contracts with the government plaintiff is required to give preference to government work, which must be done within a time certain, in a certain specified manner, or, in default, plaintiff must pay heavy penalties. and the officials of plaintiff, on conviction, suffer extreme penalties provided by the law. Further, plaintiff keeps on hand at all times a considerable quantity of perishable food products with which to feed its employés at its plant, etc. It is further alleged in the petition, notwithstanding defendants, and each and all of them, knew these facts hereinbefore alleged, they confederated and conspired with each other and among themselves for the unlawful purpose of preventing plaintiff from keeping or performing its contracts with the government for war supplies, and from engaging in the shipment of manufactured munitions of war, and other materials, in interstate commerce, and to destroy and render stale and useless the accumulated food products which plaintiff had on hand, and to do unto plaintiff, through such conspiracy, other special and irreparable injuries and damages; and this defendants conspired to do by bringing on in plaintiff's plant a strike in which about 65 per cent. of plaintiff's employés, many engaged in the manufacturing of munitions of war, were to leave the employ of plaintiff, through threats, intimidations, assaults made by defendants on said employés, thereby compelling them to join in said strike, leave the employ of plaintiff in a body, and to refrain from remaining in the employ of plaintiff at the risk of their lives and the lives of members of their families, all, as is averred in the bill, for the purpose, in this violent, forceful, and unlawful manner, of compelling plaintiff to make its plant what is known as a "closed shop," and to compel plaintiff to grant in the doing of its own work and the work of the government an eight-hour day. Wherefore plaintiff contends this court has jurisdiction of this controversy, based on the ground a federal question is involved herein.

While it is the contention of the plaintiff the federal question so involved may be found in the provisions of the Sherman Anti-Trust Law, in the Pure Food Act, in what is known as the Sabotage Act, and the Sedition Act of the government, yet, in my judgment, the provisions of all of said acts need not be here now considered for the purpose of determining the jurisdiction of this court. From a reading and somewhat careful analysis of the controversy made by plaintiff in its petition and supplemental pleadings with defendants, I am of the opinion this court does have, and hence must retain, jurisdiction of this cause, and for the following reasons:

First, there can be no question whatever but that, as shown by the petition, plaintiff is engaged in a very large manner, and was at the time the acts done by defendants of which complaint is made, in interstate commerce, both in its private manufacturing capacity and in the performance of its public duties under contracts with the government. Further, that the petition in this case well pleads the joint acts of defendants, in the formation of their unlawful confederation, and the manner in which it was attempted to be carried out, has worked, and, unless restrained, will work, special direct and irreparable injury and damage to plaintiff and to the government of the United States, which, in my judgment, by reason of the provisions of the Sherman Anti-Trust Law, and in harmony with the common law against unlawful combinations in restraint of trade and monopolies, may be enjoined by plaintiff, for through such course of procedure alone lies any complete or adequate remedy against the unlawful combination and acts of defendants averred in the bill.

From a reading of the authorities it is uncertain whether a suit of the present nature raises a federal question sufficient to confer jurisdiction upon this court under the provisions of the Sherman Anti-Trust Act. See Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; and many other cases bearing on this much disputed question. However, as said by Mr. Justice Field in Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52:

"If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

But, be this question ruled as it may, I am convinced this court has and must retain jurisdiction of the controversy here presented on a much larger and broader ground than any claim of jurisdiction which may be asserted under the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209), or other act relied upon by plaintiff in argument, and for this reason: In the matter of the manufacture of munitions of war desired and demanded by the government, and which it must have to protect the very life of the nation itself, the petition avers there has been placed in the hands of the plaintiff by the government a vast amount of materials and property purchased by the government at its own expense, specially designed to be employed and used by plaintiff in the manufacture of such munitions. This property plaintiff holds for the joint use, advantage, and necessities of the government and plaintiff in a joint enterprise. The conspiracy of defendants, as alleged, to bring about a general strike of the employees of plaintiff occupying and using this property of the government, in the manner and for the purpose charged in this case, is fraught with such tremendous consequences, not alone to the property itself, but to the enterprise and war activities of the government, and also to plaintiff, the temporary trustee, occupant, and user of such property, that same may not be and will not be tolerated or suffered under existing circumstances obtaining in this country, without a right of resort to the courts in the protection and necessarily continued use and operation of said properties in the manner and for the purpose created by the government itself. Plaintiff, under its contracts with the government, so considered, and in relation to the property of the government in its hands, is to all intents and purposes an instrumentality or agency of the government itself, created and existing under national laws.

Why, then, it may be inquired, may not such an instrumentality or agency of the government, in the protection, not of its own property and property rights, but in the protection of the use, possession, occupancy, and enjoyment of property conferred to its hands by the government, under well-settled rules of law, resort to our national courts for the protection sought, instead of being compelled to resort to a court created under authority of and controlled by another sovereign, the state? In other words, in my judgment, in so far as plaintiff in this case is engaged in the doing of work for the government, not as an independent contractor with the government, but through the occupation of property of the government specially constructed and adapted to carrying out the business of the government in the manufacture of munitions of war from materials purchased and owned by the government, all in pursuance of existing laws, it is acting under authority of the laws of the United States to as full an extent as though it had been incorporated under and in pursuance of national laws. In the exercise of rights so granted, and in the performance of duties so enjoined by national laws, a federal question is involved, which confers jurisdiction on this court at the suit of one specially injured, as plaintiff well pleads it is in this suit.

I regard the question of the right of a corporation, organized and existing under national laws, or other instrumentality or agency of the government created under and in pursuance of national laws, in the protection or enforcement of its lawful rights, to resort to our national courts, too well established to admit of the citation of authorities in its support.

It follows the motion to dismiss for want of jurisdiction must be denied.

## MINOTTO v. BRADLEY, U. S. Marshal.

(District Court, N. D. Illinois, May 24, 1918.)

1. WAR = 4-Internment-Statute-Construction-"Native." Petitioner, who was born in Germany and lived there for many years,

held a "native" of Germany, and on the outbreak of war between the United States and Germany may be taken in custody by virtue of presidential warrant issued under Rev. St. § 4067 (Comp. St. 1916, § 7615), providing for the arrest, etc., of native citizens or denizens of hostile nations. [Ed. Note.-For other definitions, see Words and Phrases, First and

Second Series, Native.1

2. War &=4-Enemy Aliens-Internment-Presidential Warrant. Where the President, under Rev. St. § 4067 (Comp. St. 1916, § 7615). issues a warrant for a native, subject, citizen, or denizen of a hostile nation, the warrant need not disclose the grounds on which the President ordered such person to be taken into custody.

3. Constitutional Law &=252—Persons Protected—Enemy Aliens—Due Process.

One taken in custody by virtue of presidential warrant, under Rev. St. § 4067 (Comp. St. 1916, § 7615), as a native, subject, etc., of a hostile nation, has no recourse on the ground that he was deprived of his liberty without due process of law; the arrest being in accordance with the statute, etc.

4. WAR \$\infty 4-Enemy Aliens-Internment.

Notwithstanding Rev. St. § 4067 (Comp. St. 1916, § 7615), an enemy alien may be taken in custody by virtue of presidential warrant, without the filing of any complaint to some court or judge.

Petition by James Minotto for writ of habeas corpus to be directed to John J. Bradley, United States Marshal for the Northern District of Illinois. Petition denied.

The petition recites that petitioner is an Italian citizen, and is unlawfully held by the United States marshal by virtue of a warrant issued under a presidential proclamation made pursuant to sections 4067-4070 of the Revised Statutes (Comp. St 1916, §§ 7615, 7618). Petitioner urges that the writ should issue for the following reasons: (1) That petitioner is not an alien enemy, within the intent and meaning of the law of the United States and the proclamation of the President. (2) That he never has sworn allegiance, and never has owned allegiance, to Germany or any nation or country with which the United States is at war. (3) That he has committed no crime against the public safety, and violated no law of the United States; that he has not given aid and comfort to the enemy of the United States, and has done no act in violation of any regulation promulgated by the President. (4) That there is no reasonable cause to believe that he has been aiding the enemy, or to believe that he is about to violate any regulation promulgated by the President. (5) That the warrant was issued without any showing of probable cause, supported by oath or affirmation, as required by the Fourth Amendment to the Constitution. (6) That he was not given any hearing in advance of the issuing of the warrant. (7) That pursuant to said warrant he is to be confined for an indefinite period without a hearing. (8) That he is not an alien enemy, has violated no laws of the United States, and that no truthful evidence has been presented to the President of the United States, or to the Attorney General, tending to show that the petitioner is an alien enemy, or that there is any reasonable cause to believe that he is aiding or about to aid the enemy. (9) That the confinement of the petitioner is in violation of clause 3, section 2, article 3, of the Constitution of the United States, and the Fourth, Fifth, and Sixth Amendments of the Constitution. (10) That the direction in the warrant is contrary to the law, because under section 4069 of the Revised Statutes it is necessary that a sworn complaint be filed in some court having criminal jurisdiction, or before some judge of a court of the United States, and a full information and hearing had upon such complaint. (11) That the petitioner is a subject of the kingdom of Italy.

Section 4067 of the Revised Statutes reads as follows: "Whenever there is declared a war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of 14 years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases and upon what security their residence shall be permitted; and to provide for the removal of those who, not

being permitted to reside in the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary

in the premises and for the public safety."

Section 12 of the President's proclamation of April 6, 1917, reads as follows: "An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the states or territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jall, military camp, or other place of detention as may be directed by the President."

A. H. and Henry Veeder, Francis Baldwin and Sims, Welch & Godman, all of Chicago, Ill., for petitioner.

Charles F. Clyne and Robert T. Neill, Sp. Asst. U. S. Atty., both of

Chicago, Ill., for respondent.

CARPENTER, District Judge (after stating the facts as above). [1, 2] I think I do not care to hear from the attorneys for the government in this case. As I stated at the outset, the court is not neutral in this war, and any doubts which it may entertain as to the construction of the statutes and proclamations in question must be resolved in favor of the presidential warrant. Of the 11 reasons assigned here why the writ should issue we are concerned only, at least at the outset, with reasons 1 and 2. These two assignments seem to dovetail together, and if, under a construction of the act of Congress, a person comes within the definition of an alien enemy, clearly it was within the power of Congress to deal with such alien as it saw fit; and if the law has prescribed how an alien enemy should be dealt with, either by executive proclamation or through the various administrative agencies of the government, the petitioner cannot complain. The sole question, as I see it, is: Is the petitioner an alien enemy, as defined by Congress? If the petitioner is not an alien enemy, the writ in this case must issue.

It has been urged that the German law and the Italian law determine the status of the petitioner. We must construe the act of Congress according as the phrases and words used are construed in this country, according to our laws. We cannot assume that Congress, in legislating, is using words and phrases as they are used in the civil law or the Code Napoléon, as distinguished from the common law and statute law in this country. Whether, as between Italy and Germany, the petitioner was an Italian or a German, is not important here. The use by Congress of the four words "native, citizen, subject and denizen" indicates that each one of the words was to have a significant and different meaning. Counsel for petitioner admit that the words "subject" and "citizen" are broad enough to include the native German, born of German parents. It would appear, therefore, that the word "native" must have been used to define something else. As I said, by way of illustration, to Mr. Godman (attorney for the petitioner), the native-born German who moves to Switzerland and becomes naturalized is neither a subject nor a citizen of Germany. He is a native, however, of Germany, and would be so considered by any one. Indeed, a person born in Illinois, a citizen of the United States, is none the less a native of Illinois.

Counsel argues that to be "native" one must not only be born in a country, but owe loyalty and allegiance to that country. Allegiance is not born in the child of alien parents. Allegiance may well determine one's political status. Allegiance by birth and the place of birth may be two entirely different things. The derivation of the word "native" indicates the place of birth; a man's native town is the town where he was born; a man's native state, be it Wurttemberg or Massachusetts, is the state where he was born. He may be a citizen of a confederation of states, but his nativity is determined by the place of his birth. One born of foreign parents in this country owes perhaps a double allegiance; to a foreign nation because of his parents, and to this because of his birth. When, however, he becomes of age, he can elect which country shall have his sole allegiance. He is a native at all events of the United States.

This statute must be construed, as I stated during the argument, with the end which Congress had in view. We all appreciate the seriousness of the situation. We realize that a mistake, once made, cannot be remedied. The determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts. The courts, in the nature of things, are precluded from discussing those facts. If the President were required to disclose the basis for his warrant, the entire purpose of the statute might be frustrated. The only question to be settled here is whether, under the construction of this statute, the petitioner is a "native, citizen, denizen or subject" of a power with which we are at war. The petitioner could no more cease being a native of the place of his birth than I could cease being a native of the state of Illinois, when you are considering the place of birth.

Look at the history of this case. The petitioner was born in Germany. His mother was born in Germany. His father was born in Austria. The residence of the family was in Germany until within a very short time before the petitioner came to this country. The record shows that the family of the petitioner have no property in Italy, and have never lived there for any length of time. Under these circumstances it seems to me the court is not stretching the construction of this statute by holding that this is just the kind of a case that Congress intended to reach when it used the word "native." All the sympathies of one who was born in Germany, and who has lived there for 22 or 23 years, may be said to be with Germany. Whether they are or not in this case is not important. Suffice it to say that the language used by Congress apparently meets such a case.

It might be easy to find in this country thousands of men who were born in Germany and lived there for 25, 30, or 35 years, saturated with German institutions, all of their sympathies might lie with Germany, yet, if the argument for the petitioner is right, the President is helpless, and nothing can be done with them in this country at this time. If a friendly ally of this country is offended by the action of the President, because some one tracing his lineage back to Italy, but

born in Germany, was apprehended under the President's warrant, I have no doubt the matter will be brought to the attention of the State

Department and diplomatically adjusted.

[3] Inasmuch as Congress has the right at all times to legislate for aliens, clearly it has the right to legislate for alien enemies, and there can be no question here of violating the provisions of our Constitution. The claim that the petitioner is deprived of his liberty without due process of law has no place in the argument in this case. It is like the ordinary case of deportation. Congress confers upon an administrative body certain rights; it is told to do certain things; it determines the facts; it reports that the facts have been so determined. That is all there is to it. The alien has a right to have the courts of this country say whether or not he has been dealt with according to the law, according to the statute enacted by Congress. That having been done, he cannot get any additional rights by claiming that the Constitution, which gives him certain rights in our courts to sue and be sued and to enjoy the protection of our police regulations, gives to

our citizens greater rights.

[4] Section 4069, after referring to the presidential proclamation, requires the presentation of a sworn complaint to some court or some judge, and this procedure is made mandatory by this section of the Revised Statutes, which authorizes the several courts of the United States having criminal jurisdiction, after complaint and hearing, to cause alien enemies to be apprehended, confined, or removed. This section does not in any way limit the powers of the President, but furnishes an additional means to bring about the same result. If the information comes in the first instance to the President or his administrative officers, he may act. Section 4069 permits an information to be filed by any individual who believes that the law has been violated; and, as I have said before, the disclosure, by way of complaint or information, of the facts upon which the alien is apprehended, might in many instances destroy the effectiveness of the law. In this position I am supported by an able decision in a late case by the District Court in the Northern District of Alabama. Ex parte Graber, 247 Fed. 882. It is clear to me that, having given the President summary power, Congress never intended to take that away by authorizing complaints to be filed in the courts.

To summarize: As I view the situation, the sole question to be determined is whether, under section 4067 of the Revised Statutes, the petitioner comes within the description "natives, citizens, denizens or subjects" of a hostile nation. I believe that he does, and that therefore the President had a right to issue the warrant.

The application for the writ of habeas corpus must therefore be

denied.

# IOWA LOAN & TRUST CO. v. FAIRWEATHER et al.

(District Court, S. D. Iowa, C. D. September 16, 1918.)

COURTS == 284—FEDERAL COURTS—JURISDICTION—APPLICATION OF FEDERAL STATUTE.

Plaintiff's case being founded on the application to the facts of the congressional exemption of Liberty Bonds from taxation, and such application being in dispute, the federal court has jurisdiction.

2. Removal of Causes 3-State Legislation.

The jurisdictional facts for removal of a cause to a federal court, claim of exemption under federal statutes from taxation, existing, removal of the litigation, having its basis in attempted state taxation, cannot be defeated by form of judicial review prescribed by the state.

3. TAXATION 5-7-LIBERTY BONDS-BANK STOCK-STATE STATUTES.

Liberty Bonds, declared exempt from taxation by the statute under which they are issued, are indirectly taxed, in violation thereof and its underlying principles, when owned by a bank, by tax under Code Supp. Iowa 1913, § 1322, providing that its shares shall be assessed to its stockholders, the value thereof to be based on its capital, surplus, and undivided earnings, and its property not to be otherwise assessed; the bonds being considered in determining the value of the stock, and the bank's property being in truth assessed.

A federal court is not bound by the construction of statutes of a state by its highest court, where the inquiry is whether they as enforced effect results contrary to inhibition of federal statutes.

At Law. Action by the Iowa Loan & Trust Company against Thomas Fairweather and others. On motion to remand and to dismiss. Denied.

Sargent & Gamble, of Des Moines, Iowa, for plaintiff. H. W. Byers, of Des Moines, Iowa, for defendants.

WADE, District Judge. The questions presented under the motions to remand and to dismiss are important.

[1] 1. It is contended that the court has no jurisdiction. There is no diversity of citizenship, but the plaintiff contends that the case is one in which it is necessary to construe and apply statutes of the United States. This contention must be sustained.

The plaintiff claims that a certain tax is invalid because it is a tax upon bonds of the United States (Liberty Bonds) which were issued under an act of Congress which specifically provides that such bonds "shall be exempt, both as to the principal and interest, from all taxation," except estate or inheritance taxes. The whole case of the plaintiff is founded in this congressional exemption of these bonds.

Counsel for defendants contend that there is no dispute between the parties as to the law or its meaning, but there is a dispute as to its application; and wherever a right is asserted or exemption claimed, based upon a law of the United States, this court has jurisdiction.

It will not do to say that there is no controversy as to the meaning of the law, while the parties are in court to have determined the application of the law to a given state of facts. Cohens v. Virginia, 6 Wheat. 379, 5 L. Ed. 257; Osborn v. Bank, 9 Wheat. 822, 6 L. Ed. 204; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; McGoon v. Railway (D. C.) 204 Fed. 998. See especially as to jurisdiction, Greene v. Louisville Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Louisville Co. v. Greene, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97; Illinois Central Co. v. Greene, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. Ed. 1309; Louisville v. Rice (May 20, 1918) 247 U. S. 201, 38 Sup. Ct. 429, 62 L. Ed. 1071.

[2] 2. On the motion to remand I have so fully expressed myself upon the principles involved in Re Mississippi River Power Co. (D. C.) 241 Fed. 194, and in supplemental opinion in C., M. & St. Paul Ry. Co. v. Drainage District, 253 Fed. 496, that it is not necessary to consider

the same in detail.

Parties have a legal and constitutional right to a trial in the courts of the United States in cases involving the construction or application of the Constitution or laws of the United States. It will not do to say that the plaintiff instituted this litigation. As in the Ditch Cases, the litigation has its foundation in an attempt on the part of the taxing authority of the state of Iowa to levy certain taxes which the plaintiff, under the law, would be compelled to pay. In other words, a proceeding was started to take away from the plaintiff certain money for certain purposes. The state prescribed the procedure by which, under the claim of defendants, this was to be done. It authorized an appeal from the board of review, and a trial in court—a judicial proceeding to have the rights of the plaintiff determined. If the plaintiff, asserting a right under the laws of the United States, cannot have that question tried in the courts of the United States, it is because the Legislature, while giving the plaintiff the right to a trial in court, has so prescribed the conditions, or so named the parties, that this right has been

But the Legislature has no such power; having given the plaintiff the right to a trial in court, it could not limit the jurisdiction of the courts of the United States, nor the right of the plaintiff to a trial in

such courts, provided the jurisdictional facts exist.

[3] 3. The magnitude of the main question involved in this case cannot be overestimated. The nation is involved in a war which is taxing the resources of the nation in men and in money. The principal means of procuring the money with which to carry on this gigantic struggle is by the issuance of bonds which are sold generally throughout the country to individuals and corporations. More than eight billion dollars worth of these bonds have already been issued, and how many more billions may be necessary before the war is won cannot even be approximated. These bonds are issued at a low rate of interest, but are made attractive to buyers by a specific provision that they "shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes imposed by authority of the United States, or its possessions, or by any state or local taxing authority." This language is simple, definite, and imperative.

It is fundamental that, without any express exemption, it is beyond

the power of the states to impose a tax upon government bonds. The language of Chief Justice Marshall in Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481, 488, is conclusive:

"The American people have conferred the power of borrowing money on their government, and, by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restricting or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely."

The state can levy no tax in any amount. It is not a question of excessive taxation—it is an absence of power on the part of the state to impede in any manner the functions of the nation.

"The state cannot, by any form of taxation, impose any burden upon any part of the national public debt. The Constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded, or in any way affected, by the action of any state." Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901.

If a state had the power to impose a tax upon Liberty Bonds, it might impose such tax as to impede the operations of this government in the prosecution of this war. Furthermore, if each state possessed the right to tax Liberty Bonds, the amount of taxation in the different states would vary, and, inasmuch as the tax imposed would affect the value of the bonds, no uniformity of value could be maintained in the different states of the Union.

The plaintiff charges, and upon this motion the statements of the complaint must be accepted as true, that it was, during the assessment period in 1918, the owner of \$466,300 of the bonds of the United States, issued pursuant to the act of Congress and it is contended that a tax has been imposed upon such bonds by the assessor and the board of equalization of the city of Des Moines, contrary to the provisions of the act of Congress. The assessment complained of was made in the usual manner. The plaintiff made a statement to the assessor, as required by section 1322 of the supplement to the Code of Iowa, showing capital stock of the corporation, \$500,000; surplus, \$100,000; and undivided profits, \$383,489.40; and also, pursuant to section 1321 of the supplement to the Code of Iowa, included in said statement "the specific kinds and description thereof (bonds and stocks) exempt from taxation." It appears that, without reference to the claimed exemption of the Liberty Bonds, the assessor and the board of equalization made the assessment, including the value of said bonds in the sum of \$466,300 as aforesaid.

The defendants do not claim that the state has any power to impose a tax directly upon these bonds, but justifies the inclusion thereof in the value of property assessed under the contention that this assessment is not an assessment of property of the bank, but is an as-

sessment of the value of the shares owned by the stockholders of the bank.

Since the case of Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 18 L. Ed. 229, numerous states have, under the guise of imposing taxes upon shares of capital stock, actually assessed the value of government bonds, and in many cases such proceedings have been sustained upon the theory, which is now settled, that the stock of a bank and the property of the bank may be separate subjects of taxation.

The Supreme Court of the United States, in Home Savings Bank v. Des Moines, supra, settled the question that an assessment of a tax upon the property of a bank, including government bonds, is beyond the power of the state. So that the question in this case is narrowed down to the proposition as to whether or not, under the provisions of the statutes of Iowa, the tax nominally levied against the stockholders in this institution is in truth a tax upon the property held by the bank. This question cannot be settled by the mere statement that the tax is upon the stockholders, or upon the value of the stock; but it must be determined by the entire provisions of the enactments of the Legislature.

"Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect." C. O. & G. Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234.

"Nor can this inhibition upon the states be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly, cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and, if that would trench upon a power of the government, the law creating it will be set aside, or its enforcement restrained." Home Insurance Co. v. N. Y., 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025.

# In the same case the court further says:

"The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the state. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans v. Houston, 119 U. S. 265, 278 [7 Sup. Ct. 198, 30 L. Ed. 411], and Home Insurance Co. v. New York, 134 U. S. 594 [10 Sup. Ct. 593, 33 L. Ed. 1025], with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself."

So this brings us to a consideration of the statutes of Iowa, and the real purpose and intent and effect of such statutes.

[4] Ordinarily this court is bound by the construction of such statutes by the Supreme Court of Iowa; but it is not so bound in an

inquiry as to whether such statutes, as enforced, effect results contrary to the express language of the statutes of the United States.

Of course no one contends that these bonds are subject to taxation in the hands of private individuals; but, in the very nature of things, large amounts of these bonds must be taken and held by the banks, trust companies, and other corporations. If it is true that the value of these bonds held by banks, trust companies, and corporations may be taxed, then we have the unwarranted situation where the bond in the hands of the private individual is worth more than is the bond in the hands of the corporation, although each must purchase at the same price.

Under the Revision of 1860, § 1598, taxes were levied upon the property of the corporation, and "not upon the individual stockholders." Chapter 60, Acts of the Fifteenth General Assembly, provided:

"Taxes shall be levied upon, and paid by the banks, and not by the individual stockholders."

Chapter 39 of the Acts of the Twenty-Third General Assembly provided:

"All shares of the capital stock of banking associations organized under the general incorporation laws of this state, known as state or commercial banks, shall be assessed to such banks in the city or town wherein located, and not to the individual shareholders."

Under this legislation through many years it was the common practice to assess banks upon values which included government bonds, and such assessments were sustained by the Supreme Court of Iowa in many cases. Savings Bank v. Burlington, 118 Iowa, 84, 91 N. W. 829; National State Bank v. Burlington, 119 Iowa, 696, 94 N. W. 234; First National Bank v. Independence, 123 Iowa, 482, 99 N. W. 142; People's Savings Bank v. City of Des Moines et al. (Iowa) 101 N. W. 867. This latter group of cases, decided together by the Supreme Court of Iowa in 1904, was appealed to the Supreme Court of the United States, and under the title "Home Savings Bank v. Des Moines" was reversed on April 22, 1907. It was there emphatically held that the inclusion of government bonds in the value of "shares of stock," which under the law was then assessed to the bank, was in excess of the power of the state.

In 1911 the Legislature, evidently with the purpose of avoiding the limitation of the state's power, and at the same time getting the same results so far as taxing the value of government bonds was concerned, amended the law (Acts 34th General Assembly, c. 63), by providing that the shares of stock "shall be assessed to the individual stockholders"; but the basis of value for taxing purposes was left the same, and the act provided that "the property of such corporation shall not be otherwise assessed." Under this amendment the present tax is imposed. Counsel assume that the Legislature of Iowa has finally succeeded in getting the legislation in form so as to bring it

within what is claimed to be settled in the Van Allen Case.

Under the amendment the bank does in effect what was required before the amendment. The assessor's duties are the same, and the basis of the assessment valuation consists of exactly the same property. The corporation is required to furnish the statement which forms the basis of the assessment. The bank is required to show "separately" the amount of the capital stock and the surplus and undivided earnings. The same was required under the Code of 1897; and the important thing is that the assessor, in fixing the value of the stock for assessment, is required to base it "upon the capital, surplus, and undivided earnings" of the bank, exactly the same as under previous legislation, held void in the Home Savings Bank Case. In fact there is no substantial difference in the statutes except that the result of the acts done is called by another name. Under present legislation, it is the duty of the bank to pay the tax (with the right to compel the stockholders to reimburse), but no more so than it was the duty of the bank to pay the tax under section 1322, held void in the Home Savings Bank Case. In fact there is no substantial change except in form; the substance remains the same.

I am not discussing the well-recognized rule that the stock in a corporation may be, for taxing purposes, entirely separate and distinct from the property of the corporation. I am not referring to legislation in other states in which a tax upon stock of a corporation holding government bonds has been sustained; I am speaking only of

the situation under the peculiar laws of Iowa.

It might be said, however, in passing, that many expressions of many courts are based upon what appears to me to be an erroneous idea as to the foundation of the holding in the Van Allen Case, supra. While in that case emphasis is laid upon the distinction between the stock in a corporation and the corporate property, yet the decision rests upon the finding by the court that, under the enactment of Congress providing for the establishment of national banks, Congress had given its consent to the taxation of the value of government bonds in levying a tax upon the shares owned by the stockholders. Justice Chase in the dissenting opinion says:

"We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition. To do so would, in our judgment, deprive the decisions just cited of all practical value and effect, and make the exemption from state taxation of national securities held by banks as investments of capital wholly unreal and illusory. We will consider the question, therefore, as one of construction.

"The majority of the court hold that the act of Congress, rightly construed, subjects the shares of the national associations to taxation by the states, without regard to investment of a part or the whole of their capital in national securities; and that the act, thus construed, is warranted by the Con-

stitution."

It may be assumed that Congress has the power to consent to the imposition by a state of a tax upon government bonds; but here we are dealing with a case in which Congress has emphatically stated that these bonds shall not be subject to a tax by a state. There was no specific exemption by Congress of the bonds involved in the Van Allen Case.

But returning to the Iowa statutes: Under these statutes, what is taxed? What is taxed in any case? Not the thing, but the value of

the thing. A tax is assessed against the owner of property, but the tax is based upon, not the property, but the value of the property. A bond may be worth \$100 one year, and \$50 the next year. The tax is laid each year upon the value at that particular time.

So when the Iowa statute provides that shares of stock shall be assessed to the individual stockholder, and that the value to be assessed shall be measured by the property owned by the bank, the thing assessed is the value of the property of the bank (including these bonds). Here is a scheme for compelling the value of certain property to bear its just share of taxation. What is the property? Money, notes, bonds, accounts—held, it is true, not directly by individuals, but by a corporation, an agency employed by individuals. It happens that in this particular agency the interest of each individual is represented by a share or shares called "stock." The fact that stock is issued to each does not affect the ownership (indirect) of each in the value of the aggregate property. If the parties held the same property for the same purposes, and conducted the same business without incorporation, the interest of each in the aggregate property would be the same; the shareholders in the corporation having the advantage over the partners in the partnership of exemption, conplete or limited, from liability for corporate debts; but for taxing purposes, under the rule of equality of burdens (so far as practicable), what difference is there?

The policy of Iowa as to corporations has been not to attempt to levy a tax upon the stock and also upon the property of a corporation. This has been done in some states, and sustained, though confessed to be in the nature of double taxation. At times Iowa has taxed the shares of stock and exempted the corporation, and at times the reverse; but whichever method is employed, can there be any question as to what in fact furnished the basis of the tax? In each case it is the value of the property of the corporation, or the value of that portion of the property designated upon which the tax is laid. Under the Iowa statute held void by the Supreme Court of the United States exactly the same thing furnished the value for taxation which is made the basis of taxation in this case. This is not a case where the statute requires the assessor to assess the market value of stock—the specific things which he must use as the basis of value are fixed by the Legislature.

Not only this, but it affirmatively appears upon the record, as required by the statute, that the value thus to be fixed includes the value of the exempt Liberty Bonds. The statute requires the bank, in making its report, to include in its statement "the specific kinds and description thereof (stocks and bonds) exempt from taxation." What does this provision mean? It might possibly be construed as providing for a deduction of this exempt property; but, in any event, it clearly shows that when the assessor made the assessment he affirmatively took into consideration, as a basis of taxing value, the very bonds which Congress emphatically declares shall not be subject to general taxation by any state.

Not only this, but under the statute "the property of such corporation (the bank in this case) shall not be otherwise assessed." This pro-

vision of the statute cannot be sustained except upon the theory that the assessment provided for, nominally against the shareholders, is in truth a tax upon the property of the corporation.

What power has the Legislature to exempt the property of the bank from taxation in view of the plain provision of the Constitution of

Iowa? Section 2, art. 8:

"The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."

In the case of Hawkeye Insurance Co. v. French, 109 Iowa, at 588, 80 N. W. 660, the Supreme Court of Iowa said:

"Reduced to its last analysis, the question is a narrow one, and must find its solution in the construction of the constitutional provision relied upon by appellee. That provision not only requires that the property of corporations be taxed, but that it be subject to taxation the same as that of individuals. This does not mean, of course, that the methods should be identical, but that the property of corporations organized for pecuniary profit should assume the same burdens as are placed upon the property of individuals, and that the taxes should be for the same purposes and objects. It will not do to say that the constitutional provision is a mere grant of power to the Legislature to impose taxes on corporate property. That power would exist in the absence of any constitutional grant. Indeed, it is fundamental that a state Constitution is not a grant of power, but a limitation upon the powers of government."

Only by construing the assessment in this case as in effect being an assessment upon "the property" of this corporation can the legislation be sustained as constitutional. I cannot assume that the intention of the Legislature was to violate this provision of the Constitution. The unity of the property of the corporation and the property of the shareholders as a basis of taxation cannot be evaded; it is the same thing. This is in effect recognized by the Supreme Court of Iowa in the Sioux City Stock Yards Case, 149 Iowa, 5, 127 N. W. 1102.

Let us apply the test presented in the Home Insurance Case, supra. Can there be by the Iowa legislation (as defendants would have it construed) "an impediment interposed to the exercise of the power of the United States" in issuing these bonds? If not, why not? No one will question that a tax upon the value of these bonds in the hands of private individuals would constitute such "impediment." How can it be denied that the same "impediment" exists under the facts in this

case?

The Supreme Court of the United States says in this case:

"That which cannot be accomplished directly cannot be accomplished indirectly."

Under the proceedings now before the court, it is clear that the state is doing "indirectly" what it is conceded by counsel it cannot do "directly.

Again quoting from the Home Insurance Case:

"Through all such attempts the court will look to the end sought to be reached, and, if that would trench upon a power of the government, the law creating it will be set aside, or its enforcement restrained."

But what of the holding of the Supreme Court of Iowa in the Head Case, 170 Iowa, 300, 152 N. W. 600, and in the recent case of First

National Bank of Council Bluffs v. City, 161 N. W. 706. This court proceeds with the highest regard for the Supreme Court and for its views in these cases. It must, however, be borne in mind that in these cases the court was not dealing with the assessment of Liberty Bonds, which are by Congress specifically and emphatically declared exempt from taxation; nor does it appear that the question was presented or considered, as to whether or not, under the legislation of Iowa, the tax imposed was (notwithstanding the designation, by the statute, that it was an assessment against the shareholders) in truth an assessment against the property of the bank.

If I were convinced that the assessment in this case was, strictly speaking, an assessment of the value of the shares, entirely separate from an assessment of the property actually owned by the bank, I would reach the same conclusion announced by the Supreme Court of Iowa. I would do so, however, without being at the present time convinced that as to these bonds such conclusion is justified; but I would concur in such conclusion out of the respect which I must have for the opinions of the Supreme Court of Iowa, and opinions of the Supreme

Court of the United States, dealing with this question.

I cannot but feel that a tax upon the value of a share of stock, which share has its value wholly or partially because the corporation which issued the stock has purchased and holds bonds of the United States specifically exempted from taxation by the state, is contrary to the letter of the act of Congress and the spirit which underlies such enactment. Especially is it difficult to reconcile such an assessment with such an exemption where, as under the legislation of Iowa, the assessor consciously, knowingly, takes into consideration, in fixing such value, the bonds reported by the corporation to be exempt from taxation.

My holding in this case is that, under the legislation of Iowa, the tax levied in this case is in fact upon the value of the property of the

corporation, and in that view it cannot be sustained.

# OLD DOMINION TRUST CO. v. FIRST NAT. BANK OF OXFORD, N. C., et al.

(District Court, E. D. North Carolina. August 28, 1918.) No. 395.

1. COURTS \$\infty\$351\frac{1}{2}\$—Federal Courts—Dismissal of Bill—Grounds—Equity Rules.

Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) substituting motion to dismiss for demurrer to bill for defenses of law arising on the face of the bill, only facts appearing on the bill's face, including its exhibits, can be considered on the motion.

Curator of decedent's estate, having no greater right than an administrator, cannot by virtue of his appointment in one state sue in another state, even in federal court therefor, its jurisdiction being invoked only

on account of diversity of citizenship, unless the laws of the other state permit; but he may in the other state sue in his own name on a right accruing to him directly by contract or by judgment in action as curator.

3. JUDGMENT \$\sim 951(4)\$—EVIDENCE OF FORMER ADJUDICATION.

Record of suit by curator of decedent's estate for instructions *held* not to show a judgment in its favor against a bank on a certificate of deposit issued to deceased, within the rule that on such a judgment a curator may in his own name maintain suit in another state.

4. EXECUTORS AND ADMINISTRATORS €==122(1)—CURATORS—ACTION IN FOREIGN STATE—CONTRACT.

Transaction by debtor of deceased with one who was curator of deceased's estate and trustee for another, to bring about a payment to the cestui que trust through the debtor, the administrator, and the heir of deceased, gave the curator no right by virtue of such capacity to maintain action in a state other than that of his appointment.

5. Equity \$\infty 39(1)-Retention of Jurisdiction-Complete Relief.

The rule that a court of equity, taking jurisdiction of a controversy for one purpose, will dispose of all such matters in controversy, so as to render complete relief, does not mean that it will pass on claims based on a different matter, asserted in a different capacity and entirely unrelated to the subject of the primary equity.

6. EXECUTORS AND ADMINISTRATORS =122(1)—CURATORS—ENJOINING PROCEEDINGS TO COLLECT TAX.

Curator may not maintain suit in a state other than that of his appointment to enjoin collection of tax against the estate; if the property sought to be taken is in that state, the administrator appointed therein is the proper party, and if it is in the curator's state, that is the proper jurisdiction.

In Equity. Suit by the Old Dominion Trust Company, in its own right and as curator of the estate of W. H. Gooch, deceased, against the First National Bank of Oxford, N. C., and others. Dismissed in part.

S. S. F. Patteson and H. M. Smith, Jr., both of Richmond, Va., for plaintiff.

A. A. Hicks, of Oxford, N. C., and T. T. Hicks, of Henderson, N. C., for defendants First Nat. Bank of Oxford, N. C., and Hobgood.

CONNOR, District Judge. The bill and exhibits, filed by complain-

ant, disclose the following case:

W. H. Gooch, domiciled in Mecklenburg county, Va., married Margaret Corwin Radcliffe on or about the 14th day of October, 1915. On the same day he executed to the complainant a deed of trust, whereby he directed that, upon his death, his personal representative should pay to complainant the sum of \$50,000, to be held as a trust fund for the use and benefit of the said Margaret, investing the said sum and paying to her the interest thereon, subject to the provisions and limitations therein set forth, which are not material to the questions presented in this case.

On the 14th day of November, 1915, the said W. H. Gooch died intestate, leaving his widow, and Annie W. Suhor, his only child, by a former marriage, as his sole distributee and heir at law. Within a few days subsequent to the death of Gooch, his brother, the defendant J.

H. Gooch, was appointed administrator by the court of Mecklenburg county, Va., having jurisdiction in the premises, and a few days thereafter he was appointed and qualified as administrator of said W. H. Gooch, deceased, by the clerk of the superior court of Granville county, N. C.; the deceased leaving personalty in said county and state.

On December 22, 1915, the letters of administration issued to J. H. Gooch by the court in Virginia were revoked, and he was removed from said office. On the same day complainant, Old Dominion Trust Company, was, pursuant to the provisions of Code Va., § 2534, appointed curator of said estate, and qualified by filing bond as required by the statute. The appointment by the clerk of Granville county, N. C., has not been revoked, and defendant J. H. Gooch is, and was at all times since his appointment, the duly qualified administrator of said W. H. Gooch in respect to the personal estate of said deceased in North Carolina. The appointment of complainant, as curator, was affirmed by the Court of Appeals of Virginia. Gooch v. Suhor, 92 S. E. 843.

At the time of his death W. H. Gooch held a certificate of deposit issued by defendant First National Bank of Oxford, N. C., dated December 22, 1914, for the sum of \$80,300, which was found in the iron safe of said Gooch, and taken into possession by complainant, by virtue of its appointment. It is now, and has at all times since its qualification as curator been, in possession of said certificate.

On the 15th day of December, 1915, Annie W. Suhor, desiring to deposit with complainant, as trustee, pursuant to the provisions of the deed executed by her father, W. H. Gooch, the sum of \$50,000, pursuant to an arrangement made between the defendant Bank of Oxford, J. H. Gooch, administrator of W. H. Gooch, deceased, complainant, and herself, borrowed from the defendant Bank of Oxford the sum of \$50,000 and executed to said bank her promissory note, with the following provision written therein:

"As collateral and further security for the payment of this note, there is attached hereto my order on J. H. Gooch, administrator of W. H. Gooch, deceased, for the payment of the same."

On the same day, and in pursuance of said arrangement, Annie W. Suhor gave to the Bank of Oxford her order on "J. H. Gooch, administrator of W. H. Gooch, deceased, Stem, N. C." directing the payment to said bank of her note out of any moneys coming into his hands as administrator of W. H. Gooch. The said order set forth the purpose of Annie W. Suhor to be to provide for the payment to complainant, as trustee, of the amount provided for in the deed of trust, concluding:

"As heir of my father, and for the purpose of carrying out his said marriage contract, referred to above, I have borrowed the money from the First National Bank of Oxford, N. C., and made the payment."

This order was indorsed:

"I accept the above order.

"J. H. Gooch, Administrator of W. H. Gooch."

The defendant J. H. Gooch advertised in the newspaper of Granville county, N. C., notice of his appointment, as required by the laws of

said state. Said sum of \$50,000 was paid to complainant, trustee, by Annie W. Suhor, and received by it pursuant to the provisions of said deed of trust.

Margaret Gooch, widow of W. H. Gooch, filed a bill in the United States District Court, seeking to set aside said marriage contract, or deed of trust (244 Fed. 361, 156 C. C. A. 647; 248 Fed. 870, — C. C. A. —), which was decided adversely to her. Upon an appraisal made in accordance with the Code of Virginia, it appeared that W. H. Gooch owned, at the time of his death, real and personal property valued at about \$254,000, including the certificate of deposit issued by defendant Bank of Oxford, all of which was taken into possession of complainant as curator. Complainant avers that:

"A short time after the qualification of complainant as curator it sought to obtain from said Bank of Oxford some security for the said deposit, and informed said bank, if this security could not be obtained, that complainant would proceed to collect said certificate of deposit. As a result of the negotiations which followed, which were conducted on behalf of complainant by its vice president, Henry E. Litchford, and on behalf of said bank by W. H. Hunt, its president, the right of your complainant to collect this money and to demand security for its forthcoming was recognized, and a contract was made by which it was agreed between your complainant, the Old Dominion Trust Company, and the said First National Bank of Oxford, that the said First National Bank of Oxford would surrender to the said Old Dominion Trust Company, as security, for said deposit, the aforesaid note of the said Mrs. Annie Wayne Suhor for \$50,000. This agreement was entered into on February 11, 1916, and is set forth in the letter of W. H. Hunt to your complainant, bearing that date."

The bill sets out extracts from the letter which, after stating the inclosure of the note, in accordance with the conversation and understanding, contains the following:

"You are to hold Mrs. Suhor's note for our account and as protection to you on account of the certificate for eighty thousand three hundred dollars (\$80,300) issued by this bank to W. H. Gooch, and now held by you as curator for estate of W. H. Gooch, deceased."

Following this language is an agreement that Mrs. Suhor's note should bear, from that date, interest at 4 per cent., and all the other notes held by the bank against the estate of W. H. Gooch were to be chargeable with 4 per cent. interest from that day, "except any balance found to be due the bank should bear 6 per cent. interest." Complainant received from defendant bank, and now holds, the said note of \$50,000, pursuant to said agreement.

On the 7th day of August, 1916, complainant, as curator, filed its bill in the circuit court of Mecklenburg county, Va., "for conformity," making Margaret C. Gooch, Annie Wayne Suhor, and her husband defendants thereto. In this cause, among other orders, a decree was made by the court ordering "an account of the debts and liabilities [of the estate] to be taken before one of the commissioners of the court."

Chas. T. Reeks, Esq., commissioner, sat at Clarksville, Va., on August 14, 1917, for the purpose of executing the provisions of said decree. It is alleged that:

"The said First National Bank of Oxford, by its president, W. H. Hunt, and by its attorney, A. A. Hicks, appeared at Clarksville, Va., before said Commissioner Reeks and undertook to prove its claim to certain set-offs against said deposit of \$80,300; said set-offs consisting of certain past-due notes purporting to have been executed and given by W. H. Gooch during his lifetime to one Fletcher A. Benton and others, which said notes came into the possession of the Bank of Oxford, as admitted by it, after the death of said W. H. Gooch, all of which will more fully and at large appear by the testimony of said W. H. Hunt, given before said commissioner, which is hereto attached, marked 'Exhibit A-3,' and prayed to be read and considered as a part of this bill of complaint."

Complainant further alleges that the commissioner allowed some of said set-offs and disallowed others, referring, for the purpose of showing the proceedings before the commissioner, to a certified copy of his report attached, marked "Exhibit A-4," and asked to be read and considered as a part of the bill. While the allegations of the bill upon the motion to dismiss, must be taken as true, the report of the commissioner must be read in connection therewith, and called in aid by the court in ascertaining what was done by the parties and the commissioner upon the hearing.

Complainant further avers that the circuit court of Mecklenburg county, on October 17, 1917, "approved and confirmed said report of Commissioner Reeks, after carefully considering the testimony of the said W. H. Hunt, president of the First National Bank of Oxford, N. C., and ascertained the correct balance due your complainant, as such curator, to be \$80,300, with interest thereon, subject to a credit of only \$8,950.15, and directed your complainant to collect the same. A copy of the decree is attached to the bill marked "Exhibit A-5."

At the April term, 1918, of the superior court of Granville county, N. C., defendant Bank of Oxford instituted an action against J. H. Gooch, administrator of W. H. Gooch, deceased, and in its complaint therein avers that it was indebted to defendant's intestate in the sum of \$80,300 on account of the certificate of deposit referred to; that it holds certain notes executed by said W. H. Gooch, including the notes purchased of F. A. Burton, referred to in complainant's bill; and that it is indebted to defendant administrator on account of the transactions set forth in the sum of \$1,643.97, for which it tenders payment in full. It prays that judgment be rendered, etc.

Complainant's bill further alleges that the commissioners of Granville county, N. C., have assessed against the estate of W. H. Gooch taxes on said \$80,300, and charged against said estate certain penalties for five years, aggregating \$5,250, and have placed in the hands of defendant S. C. Hobgood, sheriff of said county, a list of said taxes and penalties, and that he has made demand on complainant as curator for payment thereof. It denies that W. H. Gooch had any personal property in Granville county, or subject to tax thereon, and avers that it has paid tax on said \$80,300 to the state of Virginia, etc. Defendant S. C. Hobgood, sheriff, files his answer, submitting to such

decree as the court may deem proper.

Complainant prays: (1) That a decree be made authorizing it to sell the note of Mrs. Annie W. Suhor and apply the proceeds to the payment pro tanto of the amount due it, as curator, by the defendant

Bank of Oxford, on account of the certificate of deposit or the balance due thereon. (2) That the Bank of Oxford be enjoined and restrained from prosecuting its suit in the superior court of Granville county against J. H. Gooch, administrator of W. H. Gooch, until the further order of the court. (3) That S. C. Hobgood, sheriff, be enjoined from interfering with the debt due it by the Bank of Oxford, etc. (4) For other and further relief, etc.

Defendant First National Bank of Oxford moves the court to dismiss complainant's bill: (1) For that the complainant, as curator, deriving its authority under and by virtue of the decree of the Virginia court, has no right or capacity to sue or maintain this suit in this court. (2) For that the facts stated in the bill do not constitute

any cause of action or basis for relief by this court.

[1] Defendant, in its motion, in writing, sets forth other grounds for dismissal, based upon alleged facts which do not appear on the face of the bill, but which are supported by affidavit. The motion must be considered and decided upon the facts appearing on the face of the bill, including the exhibits attached and made a part thereof. Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi); Hopkins, Fed. Eq. Rules (2d Ed.) 177.

[2] The bill is drawn to present complainant's controversy from several viewpoints. Counsel frankly concede that, unless the case can be brought within some one of the exceptions to the general rule, complainant cannot, as curator, by virtue of its appointment by the court of Virginia, bring or maintain this suit in the courts of North Carolina. The rule is very clearly stated by Judge Hook in Moore v. Petty, 135 Fed. 668, 68 C. C. A. 306:

"The general rule undoubtedly is that an executor or administrator, in his representative capacity, cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, unless the right so to do is conferred upon him by the law of the forum."

See 13 A. & E. Enc. (2d Ed.) 916; 8 Standard Enc. of Procedure 748; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

. It is held in Hall v. So. Ry. Co., 146 N. C. 346, 59 S. E. 879, and cases cited in opinion by Justice Walker, that the laws of North Carolina do not permit a foreign administrator to sue in the courts of this state; nor does the statute permit a nonresident to be appointed administrator in this state. Revisal, § 5, subsec. 2. The jurisdiction of this court being invoked on account of diversity of citizenship, it follows that, unless the complainant could sue in the state court, it may not do so in this court. It is not suggested that complainant has any other right as curator that it would have as administrator. Its powers and duties are prescribed by Code Va. 1904, § 2534, which includes the power "to sue for, recover and receive all debts due to the decedent."

Complainant, conceding the general rule, contends that, in respect to the cause of action set out, it comes within the exception which is well stated by Judge Hook: "Whenever the cause of action declared upon by the foreign executor or administrator is one which involves an assertion of his own right rather than one of the deceased, or which has accrued directly to him \* \* \* rather than one of the deceased, or which has accrued directly to him through his contract or transaction, and was not originally an asset of the estate in his charge, he may maintain an action in another state for the enforcement thereof, although express authority to do so may not be found in a statute of the forum. The principle underlying this modification of the general rule is that, when the cause of action accrues directly to the executor or administrator, it is assets in his hands for which he may sue in his personal capacity, and, if he sues as executor or administrator, the words so describing him will be regarded as merely descriptive, and be rejected as surplusage."

See Croswell on Executors and Administrators, 158; 18 Cyc. 1240; Hare v. O'Brien, 233 Pa. 330, 82 Atl. 475, 39 L. R. A. (N. S.) 430, Ann. Cas. 1913B, 624.

The exception includes a case in which an administrator, having obtained judgment in a court of the state in which he was appointed, upon a debt due his intestate, may maintain an action on the judgment in the courts of another state, without taking out letters of administration in the state in which suit is brought. Talmage v. Chapel, 16 Mass. 71, cited by Judge Hook; Biddle v. Wilkins, 1 Pet. 690, 7 L. Ed. 315. This is based upon the theory that the original cause of action, accruing to the intestate, is merged into the judgment, and that this new cause of action vests in the administrator. The law, in respect to the effect upon the original cause of action, is stated by Mr. Freeman:

"A debt due the estate of a deceased person, if sued upon and recovered by an administrator, is, in law, the debt of him who recovers it, and in whose name the judgment is rendered. He holds the legal title subject to his trust as administrator. He may sue upon the judgment in his own name, without describing himself as administrator, and may therefore pursue the judgment debtor by an action on the judgment, in a different state from that in which the letters were issued, and there can scarcely be a doubt that a judgment rendered in favor of an administrator so merges the debt that it may be treated as his personal effects so far as to authorize him to maintain suit thereon in a foreign country, without there taking out letters of administration." Freeman on Judgments, § 217.

To what extent a judgment rendered in the courts of Virginia upon the certificate of deposit issued by defendant Bank of Oxford to W. H. Gooch, deceased, in an action brought by his administrator appointed by the court of that state, affects the rights of J. H. Gooch, administrator, in North Carolina, and the creditors of W. H. Gooch in that state, is not presented upon the motion to dismiss complainant's bill. It seems to be well settled that there is no privity between the Virginia and the North Carolina administrators; they derive their authority from different sovereignties and are governed by the laws of such states. 13 A. & E. Enc. 920; Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112. Hence it is held that a judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff, in another state, against an administrator, whether the same or a different person, or against any other person having assets of the deceased. Id.

The defendant J. H. Gooch, administrator of W. H. Gooch, does not join in the motion to dismiss, nor has he filed any answer herein.

[3] The first question presented upon this motion is whether, upon the face of the bill and the record of the circuit court of Mecklenburg county, Va., any judgment, in a legal sense, has been rendered in its favor against the defendant Bank of Oxford, which merged the original cause of action, vested in W. H. Gooch, deceased, by the certificate of deposit, into a new and independent cause of action in complainant, thus giving to it the right to maintain this suit. This invites a careful examination of the record, upon which no collateral attack can be made here.

Did the circuit court of Mecklenburg county, Va., have jurisdiction of the parties, and the subject-matter? Was the question of the liability of defendant Bank of Oxford to complainant curator and the estate of W. H. Gooch, deceased, upon the certificate of deposit, involved in the issue raised upon the pleadings in the bill of conformity pending in that court, and did the question of such liability become, by virtue of the judicial action of the court, res judicatum? If so, upon the authorities cited, the complainant may maintain its bill, and the court must deny the motion to dismiss, disposing of such contentions and issues as are open to defendant bank upon the coming in of the answer. If not, then complainant, from that viewpoint, has no status in this court, and defendant is not called upon to answer or litigate the questions suggested in the bill. Defendant bank denies that the Virginia court had jurisdiction of the parties or the subject-matter, or that it undertook to render any judgment vesting in complainant any new or independent cause of action, entitling it to sue in this court. It is manifest that the Bank of Oxford is not a party defendant to the suit; it is not named nor referred to in the bill, nor has any process issued, or been served, bringing it into the record. If it has become a party, so as to be barred by judgments or decrees rendered therein, such status is the result of its voluntary action, or the action of its duly authorized officers. It will not be seriously contended that its attorney had the power to make it a party to the record. If it has become such, it must be by the action of its president.

In the suit of complainant herein, as curator, are complainant and Margaret Corwin Radcliffe Gooch, Annie Wayne Suhor, and her husband, George L. Suhor, named as defendants? The bill sets out the the appointment of complainant, the death of W. H. Gooch, the relation of defendants, and the value and character of the estate; that no specific instructions are given complainant in the order of appointment; that complainant has taken into custody the personal estate; that when the investments were well secured complainant has deemed it best not to disturb them, and when they were not so complainant has collected them; that claims to the extent of \$50,000 have been duly filed with complainant; that complainant has thought itself without authority to make payment, except of the funeral expenses and tax bills; the court is informed in regard to the character, etc., of the real estate, and its attention called to the language of the statute

under which it was appointed; the attention of the court is called to the litigation pending in the federal court between the widow and the daughter of Gooch. Other matters are referred to, having no connection with the debits or credits of the estate. In view of the premises, the court is asked to instruct complainant respecting its duties in regard to renting the real estate, disposition of money on hand, rate of interest, and place of deposit; what debts, if any, it shall pay at this time; what settlement it shall make of taxes; what action it shall take in regard to pending litigation, or such as shall be instituted, allowance of counsel fees, etc. See opinion of Whittle, P., in Gooch v. Old Dominion Co., 92 S. E. 846.

It is worthy of note that there is no suggestion of a purpose to bring into the suit the litigation between debtors and creditors of the estate. It is quite clear that the statute does not contemplate that the curator shall administer and settle the estate. He is to "take care that the estate is not wasted, before the qualification of an executor or administrator. \* \* \* He may demand, sue for and recover all debts due to the decedent." There is no suggestion that he is to pay off or discharge debts. It must be assumed, although the bill does not so inform the court, that the bill was drawn with knowledge and in view of the fact that the defendant J. H. Gooch was the duly qualified administrator of the estate in North Carolina. It is alleged that Mr. Reeks was appointed commissioner to "take an account of the debts and liabilities of the estate." He filed quite an extended report of his proceedings in respect to the claim of the defendant bank against the estate of Gooch. It is made an exhibit. A condensed statement discloses that he gave notice in newspapers in Virginia and in Oxford, N. C., of the time and place at which he would sit, being Clarksville, Va., on August 14, 1917. He says that:

"On Saturday preceding the 14th day of August, he went to the town of Oxford, in Granville county, N. C., for the purpose, and for the purpose only, of ascertaining the status of the securities held by the estate of W. H. Gooch, being deeds of trust and mortgages upon the real estate in that county.

\* \* \* Knowing Mr. Hunt, and having heard that his bank held claims against Gooch's estate, but knowing nothing of their character or amount, he went to the bank, saw Mr. Hunt, and called his attention to the notice which he had published in a Richmond paper, and the Clarksville paper, and the Oxford Ledger, of the accounts to be taken in the town of Clarksville on the 14th day of August, deeming this an act of courtesy, and solely for the purpose of facilitating the execution of the decree and order of the circuit court of Mecklenburg. Mr. Hunt very courteously stated that he did hold notes against the estate of Gooch, and he made an exhibit of them to the commissioner."

He further states that he was satisfied there would be controversy about two notes held by the bank, amounting to about \$9,000 each, and so stated to Mr. Hunt. "He stated to Mr. Hunt that, under the Virginia law and practice, he would have to produce his evidence of debt before the commissioner and have them allowed and reported upon by the court." He states that, later on, he found that Mr. A. A. Hicks represented the bank, and "he went to his office and stated substantially what has been hereinbefore detailed." The record made by Mr. Reeks further states that on August 14, 1917, Mr. Hunt and

Mr. Hicks appeared at Clarksville and filed a list of notes held by the defendant bank against the estate of Gooch, whereupon "the deposition of W. H. Hunt and others was taken before the commissioner in regard to the claim of the First National Bank of Oxford, N. C., against the estate of W. H. Gooch."

Mr. S. S. P. Patterson, Mr. H. M. Smith, Jr., counsel for estate of W. H. Gooch, and Mr. A. Hicks, counsel for the bank, were present. Considerable evidence was taken, not material to the decision of the motion to dismiss. It appears that this testimony was taken on August 15th, and the commissioner states that:

He "understood that the case, so far as it concerned the First National Bank of Oxford, N. C., involving the F. A. Burton notes, was closed and submitted to the commissioner for his consideration"; that counsel could file briefs and argue the case, etc.; that some days thereafter the commissioner heard that certain witnesses could give important testimony regarding the F. A. Burton notes; that he thought it his duty to apprise counsel on both sides of what he had learned; that he was requested to summon the witnesses—he does not say who requested him. On the 14th day of September, 1917, he was ready to proceed, when Mr. A. A. Hicks, "representing the First National Bank of Oxford, stated that 'we appear specially in this matter, at the suggestion and request of the commissioner, who made a visit to Oxford to see Mr. Hunt. We did not put any evidence on the stand, but simply offered some evidence of debt, which we had when Mr. Hunt was placed upon the stand by the curator or its attorneys."

#### He stated that:

"Demand having been made upon the First National Bank of Oxford for a settlement of the funds in the hands of the bank belonging to the estate of W. H. Gooch, deceased, the bank has accordingly made such settlement with J. H. Gooch, administrator of said estate, in the state of North Carolina, by delivering to the said administrator the notes marked paid, produced before the commissioner, and sending him a check for the balance due the estate after deducting the said notes, principal and interest, and the \$50,000 heretofore advanced at said administrator's request. The bank has no claim against the estate, and withdraws the claim which it was requested to present at a former hearing, and the commissioner is requested to so report."

It was in consequence of this statement by Mr. Hicks that the commissioner made the statement in regard to his procedure. It is proper to state that the counsel for the curator made certain explanatory statements which are not material to the decision of this motion. They insisted that:

The Bank of Oxford "having submitted itself to the jurisdiction of said court for that reason alone, it is out of the question for said bank to make a settlement with the North Carolina administrator and ignore the Virginia court, and for itself ex parte to determine the legality of said notes after having knowledge of the fact that the notes were claimed to be spurious."

The commissioner filed his report, setting out the evidence and his conclusions of fact and of law, rejecting the four notes payable to F. A. Burton, amounting to approximately \$20,000. No reference is made in the report to the certificate of deposit held by W. H. Gooch, for \$80,300. The commissioner confined his investigation and report to the validity of the Burton and other notes held by defendant bank. Upon the filing of the report, the court rendered a decree,

confirming the conclusions of the commissioner. The decree contains the following:

"It appearing to the court that the curator holds a certificate of deposit of the First National Bank of Oxford, N. C., dated the 22d of December, 1914, for \$80,300, and payable to W. H. Gooch, and it also appearing that said bank holds against said estate of Gooch valid claims \* \* \* aggregating the sum of \$8,950.15. \* \* \* The four notes purporting to have been given by W. H. Gooch to F. A. Burton \* \* \* now held by the said First National Bank of Oxford and asserted in this suit as an offset to said certificate of deposit, being expressly disallowed, the court doth direct the said curator to proceed to make settlement of the said matters with the said bank, allowing it credit for the sum of \$8,950.15 only, with interest on the principal thereof from the 1st day of September, 1917, and taking such steps as it may be advised necessary and proper to accomplish such settlement and to collect the balance that may be so found due by said bank to the estate of said Gooch."

Does this record constitute a judgment, conclusive of the rights of the complainant and the defendant Bank of Oxford, vesting in complainant a new and distinct cause of action, upon which it may sue in this court? Did the Virginia court acquire jurisdiction of the Bank of Oxford? It is manifest that the conduct of the commissioner did not bring the bank within his jurisdiction; this is too plain for discussion. Was the president authorized by filing the claims befor the commissioner, to submit the bank to the jurisdiction of the court? The defendant bank relies upon the case of Riverside Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, and cases cited to sustain the contention that the president was not authorized

to submit its rights to the jurisdiction of the Virginia court.

Laying this question aside for the present, and proceeding to the consideration of the question whether, giving to the action of the president its full legal import, it empowered the circuit court of Mecklenburg county, Va., to do more than instruct the complainant, curator in that suit, not to pay the notes held by the Bank of Oxford. They were not filed as an offset to the certificate of deposit. It seems that this decree would not be res judicata in an action against the bank by the North Carolina administrator. The reason of the rule which requires the assets of an intestate to be administered in the country or state of their situs is to prevent them from being drawn out of such state, to the injury and inconvenience of domestic creditors who may have contracted with the intestate on the faith of such assets. Each country claims the power to administer those parts of the effects that are within it, for the security of domestic creditors. A. & E. Enc. 948, citing Leake v. Gilchrist, 13 N. C. 73, and Carmichael v. Ray, 40 N. C. 365. The Bank of Oxford could not set up a voluntary settlement with the curator appointed by the Virginia court, in an action by the North Carolina administrator. In the cases holding such payment to the domiciliary administration valid, there was at the time. no ancillary administrator. It is held that, where an ancillary administration is had, the administrator of the domicile cannot withdraw or dispose of the ancillary assets by direct or indirect means until the ancillary administration is settled, whether debts are found in the ancillary jurisdiction or not.

There is nothing in the bill which suggests that the court will pass upon and adjudge the validity or amount of debts due the estate of Gooch. There is nothing in the testimony, or such portions of it, filed in the exhibit attached, referring to the certificate of deposit held by the estate of Gooch against the Bank of Oxford. It is not within the scope of the bill filed by it for instruction, in respect to the discharge of such duties. The commissioner evidently did not regard the question of the liability of the bank to the administrator of Gooch, as within the scope of his power or duty. While it is often difficult to fix accurately the subjects which are included within the issues, and adjudged by the court, it is well settled that:

"A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question.

\* \* When the tribunal has not jurisdiction over the subject-matter, no averment can supply the defect; no amount of proof can alter the case;

\* \* neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act." Freeman on Judgments, § 120.

The circuit court of Mecklenburg did not, by its decree, undertake to do more than, upon the facts set out and the relief prayed, it was called upon to do-instruct the complainant, curator, in respect to its duty. It did not attempt to render a judgment or decree upon which process could issue for its enforcement; it simply said to the complainant that it should not pay, or allow as a set-off, the Burton notes held by defendant bank, but should proceed to collect the certificate of deposit, subject to the credit allowed by the commissioner. This, in no manner, affected or interfered with the liability of the bank to be sued in the North Carolina court, or the right of the administrator in that state to collect the certificate. These rights are fixed by the laws of North Carolina, and may not be disturbed, or changed, by the courts of Virginia. The rule generally adopted throughout the states is that an administrator appointed in one state has no power virtute officii over property in another. No state need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied. Baker v. Baker, Eccles & Co., 242 U. S. 394, 37 Sup. Ct. 152, 61 L. Ed. 386. So it is said in McLean v. Meek, 18 How. 16, 15 L. Ed. 277:

"These administrators were independent of each other; the respective administrators represented Meek, the deceased intestate, by an authority coextensive only with the state where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees according to the laws of the state granting the authority. No connection existed, or could exist, between them, and therefore a recovery against the one in Tennessee was no evidence against the other in Mississippi."

In Vaughan v. Northup, 15 Pet. 1, 10 L. Ed. 639, Judge Story says: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not de jure extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state."

Upon a careful consideration of the entire record in the suit of complainant in the circuit court of Mecklenburg county, Va., I am of the opinion that the court had no jurisdiction to render a judgment on the certificate of deposit, which entitles complainant, under the exception to the general rule limiting its power, to sue in its representative capacity, in courts of other states, nor to vest in it a new cause of action, upon which it may sue in its individual capacity. I am further of the opinion that the court did not undertake to render

such a judgment.

[4] Complainant insists that, however this may be, defendant Bank of Oxford has, by its conduct, entered into contracts relating to the matters in controversy with it, independent of its relation to the estate of Gooch, which it may, by reason of diversity of citizenship, have enforced in this court. This contention is based upon the dealings had with defendant in regard to Mrs. Suhor's note. This transaction began by the loan by defendant bank of \$50,000 to Mrs. Suhor to enable her, as the sole distributee of W. H. Gooch, to comply with the terms and provisions of the contract made by her father. It is manifest that the order which she gave on J. H. Gooch, administrator, was to be paid by him from the proceeds of the certificate of deposit, or used by him in making settlement with the bank. It was practically an application of that asset pro tanto. It was not within the power of the defendant bank to make any contract with complainant concerning the certificate of deposit, or interfering with its collection and administration by and through the North Carolina administration. The only effect of the deposit of Mrs. Suhor's note with complainant was to enable it to carry out the arrangement through I. H. Gooch. administrator, whose right and duty it was to collect the certificate. pay the debts of Gooch due to North Carolina creditors, and pay over to Mrs. Suhor the balance, using her note as a youcher in settlement with her. The transaction between complainant did not change this status. The defendant bank has not, by its letter, or otherwise, made itself the debtor of the complainant as curator, or in its individual corporate capacity, so as to affect the right of J. H. Gooch, administrator. Complainant does not own or hold Mrs. Suhor's note as curator: the possession of the note has no connection with its administration of that office. It suggests that it is necessary to invoke the aid of this court to enable it to sell the Suhor note. It does not allege that Mrs. Suhor, or I. H. Gooch, administrator, has refused to carry out the arrangement made with the Bank of Oxford, to whose rights, in that respect, complainant has succeeded. This may be done by the surrender of the note to Mrs. Suhor, and the execution by Gooch, administrator, to the bank of a receipt for that amount, on account of the certificate of deposit and a receipt by Mrs. Suhor to Gooch, administrator. Every one concerned is, so far as appears, ready, able, and willing to carry out in good faith this agreement. A decree could be made in this cause to that effect, if Mrs. Suhor was, or comes in and makes herself, a party.

[5] Complainant, however, insists that, having a status in this court for one purpose, it may invoke its aid to give force and effect to the

judgment which it alleges it obtained in the circuit court in Virginia. It is true that, if a court of equity takes jurisdiction of a controversy for one purpose, it will dispose of all such matters in controversy, so as to render complete relief. This doctrine, with its limitations, as imposed by the American courts, is stated and discussed by Prof. Pomeroy. Equity (3d Ed.) § 223 et seq.

Assuming that complainant may come into this court for the purpose of having a decree to foreclose the lien upon the collateral held by it, and bring such security to sale, it would by no means follow that this court would draw within its jurisdiction controversies based upon matters having no connection with the deposit of the collateral, or pass upon claims asserted in a representative capacity and entirely

unrelated to the subject of the primary equity.

The bill will be dismissed as to all matters alleged regarding the claims of complainant, either as curator or individually, to the certificate of deposit issued by the defendant Bank of Oxford to W. H. Gooch for \$80,300. If complainant so desires, Mrs. Suhor may be made party defendant, and a decree be made executing the agreement between her, the Bank of Oxford, and J. H. Gooch, administrator, in regard to the settlement of Mrs. Suhor's note of \$50,000. The motion for injunction, restraining the defendant Bank of Oxford from prosecuting its suit against J. H. Gooch, administrator, in the superior court of Granville county, is denied.

[6] In regard to the prayer for injunction against defendant, S. C. Hobgood, sheriff, it is sufficient to say that it does not appear that he has attempted, or is threatening or has any power to enforce the collection of the tax assessed by the commissioners against the estate of W. H. Gooch from, or interfere with, any property held by complainant as curator or otherwise. If he was doing so, the remedy is manifestly not in this jurisdiction. It is the duty of the North Carolina administrator to defend the property in his keeping against this claim. There is no suggestion that he will fail to discharge his duty. The bill, as to him, will be dismissed.

A decree will be drawn providing that, unless complainant desires to bring Mrs. Suhor in and have the decree suggested, within 10 days. the bill will stand dismissed at complainant's cost.

# THE MAIPO.

## (District Court, S. D. New York. July 8, 1918.)

The suggestion to an admiralty court that a ship sought to be libeled is the property and in possession of a foreign government may be made by the appropriate officer of our government, or by a duly accredited representative of the foreign government.

2. International Law &== 10-Vessels of Foreign Government-Immunity from Process.

A naval transport, owned by a foreign government and in its possession, through a naval captain and crew, although chartered to a private individual to carry a commercial cargo, is not subject to seizure under process of an admiralty court of the United States, in a suit by a shipper for damage to cargo.

In Admiralty. Suit by the Central Leather Company against the steamship Maipo. On motion for process against the respondent vessel. Denied.

Charles S. Haight and Wharton Poor, both of New York City, for the motion.

Roscoe H. Hupper and G. W. P. Whip, both of New York City, opposed.

MAYER, District Judge. This is in effect the renewal of an application that process be issued against this vessel, the Maipo. The vessel was recently here and ready to sail for another American port, when libelant sought process against her. It was necessary to decide quickly, and, while denying the motion for reasons outlined in a memorandum, leave was given to move again when the vessel returned here, so that a fuller consideration could be given to the questions involved. As the facts, especially in respect of the status of the vessel, are now quite clear, a brief restatement of the situation is desirable.

The libel is for cargo damages to hides shipped on the Maipo at Montevideo, Uruguay, to be carried to New York City. The shipper was the Argentine Central Leather Company, a New Jersey corporation, but the hides were owned by libelant, a New Jersey corporation, which is also the assignee of the bill of lading, and the Argentine Central Leather Company has assigned all of its rights to libelant. The bill of lading was of the usual commercial character on a Norton, Lilly & Co. form, containing familiar provisions setting forth, inter alia, for what acts and contingencies no liability would accrue. It provided that it should be signed by the master or agent of the ship, and was, in fact, signed by Vidal and Sattestin, "Maritime Agents," presumably the agents of the usual kind for the ship at the shipping port.

[1] As the Chilean Ambassador has recently died, ambassadorial duties are being performed by Senor Varela, the Chilean chargé d'affaires, and a suggestion has been made by him to the court in the following form (accompanied by the certificate of the Secretary of State of the

United States accrediting Senor Varela as the Chilean chargé d'affaires):

"Gustavo Munizago Varela, the chargé d'affaires of the republic of Chile in the United States of America, through Burlingham, Veeder, Masten & Feary, proctors appearing specially for the Chilean naval transport Maipo, respectfully suggests to the District Court of the United States for the Southern District of New York that said steamship Maipo at all the times mentioned in the libel was, and now is, owned by the government of the republic of Chile, being a transport in its navy, and in the possession of the government of the republic of Chile in the person of a duly commissioned officer of its navy, the master of said steamship, and wholly manned and operated by a crew employed and paid by said government, which said steamship is to carry back to Chile a cargo belonging to the Chilean government. \* \* \* Wherefore it is respectfully suggested and prayed that said steamship be released from any seizure and declared immune from process.

"Done at the embassy of the republic of Chile, Washington, D. C., July 1, 1918.

G. Munizago Varela, Chilean Chargé d'Affaires."

So much of the suggestion as states that the steamship "is to carry back to Chile a cargo belonging to the Chilean government" will be disregarded, because of the agreement of counsel that no facts occurring after the date when it was arranged that the motion should be adjourned were to be introduced for consideration. The suggestion is not open to question and must be accepted as made. The Parlement Belge, L. R. 5 P. D. 197, 210, 211.

While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the court, as here, by the duly ac-

credited official of the foreign government.

In response to an inquiry from proctors for the libelant and also for another shipper or consignee, our Department of State, through the Third Assistant Secretary, has replied "that the department has no intention of interfering with the legal proceedings to which you refer." I cannot assume that this communication is intended to have any significance. It means, as I read it, nothing more than that the question is one for the courts to dispose of in due course. Doubtless, the Chilean government has not deemed it necessary to bring the matter to the attention of the Department of State, but is willing, without further ado, that the points involved shall be passed upon by the court in orderly procedure without suggestion from our own government.

she, and therefore her sovereign owner, the republic of Chile, is engaged in trade so far as this voyage of the Maipo is concerned, and it is urged that, when a sovereign thus engages in commercial enterprise, he loses his immunity. I shall assume, because of the facts infra, that while, perhaps, the Chilean government is not directly trading, it is in effect using or permitting the vessel to be used for commercial purposes. So far as can be gathered from copies of the translated documents, it appears that the republic of Chile chartered the Maipo to one Sierra, as the result of public bidding. Capt. Soublette of the Chilean navy (the

officer now in command of the Maipo) was authorized to sign the charter party on behalf of his government.

The charter party dated December 1, 1917, was signed by Sierra

and Soublette. It provides, among other things, that:

"It is hereby agreed between Mr. Wenceslao Sierra and the captain of the Chilean navy, Mr. Guillermo Soublette, who represents the Treasury Department to charter the naval transport Maipo: \* \* \* No other cargo of any kind will be shipped than that which has been contracted for by the charterers or their agents, except that the Chilean government reserve freight space on the ship which will not exceed 400 tons. \* \* \* The charterers agree \* \* \* to pay \* \* \* to the order of the government representative, Mr. Guillermo Soublette, captain of the navy, for the charter of the transport \* \* \* so much per ton for the return trip to Chile from New York. \* \* The Chilean Navy Department will pay all port duties and other taxes assessed on the ship." And finally: "The government representative, captain of the navy is to be considered as the owner and exercise his privileges as such, in so far as the terms of this charter contract are concerned."

From the foregoing, it is apparent that the Chilean government intended that all of the acts of Soublette should be regarded as acts representing and on behalf of his government. It is further plain that the Chilean government intended that at all times this vessel, which it owned, should remain in its possession; and it is not unlikely that this course was taken for the very purpose of keeping the vessel immune in foreign ports. Even though the vessel was chartered by a private person for hire, and that private person contracted for freights for his personal profit, it might be argued with much force that, nevertheless, the vessel was used for a governmental purpose in so far as it enabled Chilean shippers to export their products to the United States and to bring back from here to Chile commodities needed by the people there.

But, laying aside all subsidiary questions, it is desirable squarely to determine whether the vessel is immune because of engagement in commercial enterprise. The view of the American courts, beginning with The Exchange, 7 Cranch, 116, 3 L. Ed. 287, has consistently been in the direction of holding immune the property of a sovereign owned in

his sovereign capacity and in his possession.

The precise point here under consideration has not been passed upon by the courts of the United States. The more important cases recently have arisen in tort, although I fail to see any distinction in principle between the wrong complained of, whether it grows out of a breach of contract or is caused by some tortious injury. Long v. The Tampico and The Progresso (D. C.) 16 Fed. 491; The Davis, 10 Wall. 15, 19 L. Ed. 875; The Luigi (D. C.) 230 Fed. 495; The Attualita, 238 Fed. 909, 152 C. C. A. 43; The Pampa (D. C.) 245 Fed. 137. The sole authority for libelant's view is The Charkieh, L. R. 4 A. & E. 59; but that case is no longer recognized by the English courts, having been overruled by The Parlement Belge, L. R. 5 P. D. 197, and having been pointedly disapproved in Mighell v. Sultan of Johore, 1894, 1 Q. B. 149, 154. The succinct statement of Willis, J., in the Court of Appeal justifies [for convenience] this quotation:

"It has been attempted in some cases—in that of The Charkieh, for instance—to say that a sovereign may lose his immunity and privileges by laying down his character as a sovereign and entering into trading transactions

as a private person in another country; and our attention was called to certain dicta (which were not essential to the decision of the case) of Sir Robert Phillimore in The Charkieh as supporting that view. But those dicta were dissented from in the judgment of the Court of Appeal in The Parlement Belge. In the final part of the judgment that court dealt with the very question of the amenability of a foreign sovereign to the process of our courts, and held that one objection, which was fatal to the attempt to bring the sovereign into the admiralty court by means of seizing a vessel, was that, quite independently of the right of the foreign sovereign to have the public property of his state respected, it was contrary to international law and the comity of nations that an independent foreign sovereign should be directly impleaded in the courts of this country. A considerable part of the judgment is devoted to dealing with the case from that point of view. It was said that the process of attachment in the Court of Admiralty by seizing a vessel was an indirect mode of impleading the sovereign, although the sovereign was not personally made a defendant in the action, and that that which could not be done directly could not be done indirectly, and therefore that such a process could not be allowed, on the broad general principle that a reigning sovereign is not subject to the jurisdiction of a foreign country."

From the foregoing it is plain that The Parlement Belge is regarded as authority by the English courts, and it seems to me that the propositions there laid down are peculiarly fitted to present conditions.

Finally, in respect of many other cases cited and arguments presented in explanation of their trend and meaning, it may be said that the sovereign, of course, may make concessions. He may permit suit to be brought against him and erect tribunals for that purpose, such as Courts of Claims.

In dealing with our internal as distinguished from international affairs, our courts have required, not only that the property shall be owned by, but also in the possession of, the United States. The Davis, 10 Wall. 15, 19 L. Ed. 875. But, when ownership and possession are both present, the res is immune, unless otherwise provided by some permissive or concessionary statute. Referring to the charter party to Sierra, the document imposes a number of familiar obligations on the Chilean government, acting through Soublette; but that fact does not change the immune character of the vessel in a foreign port. Sierra may possibly have redress in some Chilean tribunal in the event of breaches of the charter obligations by the Chilean government, very much as a contractor with the United States might sue in the Court of Claims or avail of some remedy granted by statute, if the United States breached its contract.

The final approach—and a proper one—is that which concerns the result and effect of holding such a vessel immune. It is said great loss and inconvenience may be visited upon the many kinds of people who deal with a vessel thus immune, and that American citizens will be put to the trouble and expense for claims, large and small, of seeking their relief in far-distant foreign jurisdictions. The answer is that, when one knows with whom he is dealing and the law applicable, he must arrange accordingly. This may be difficult, but in these days of rapid changes, accommodation to new conditions is accomplished effectively and expeditiously.

While diplomatic questions are beyond the court's province, yet practical considerations of comity are not to be lost sight of. The exigen-

cies and requirements of this extraordinary war may well lead (and possibly already has led) our government to man otherwise commercial ships with American naval officers and men, to the end that our ships may be protected while our needs in various directions may be supplied in foreign ports. These enterprises may, in some instances, be regarded (technically speaking) as commercial, but may, in substance, be of benefit to the people at large. Time is of vital importance to every ship, of whatever nationality, which sails the seas. To be detained by process at this time may cause damage not capable of money measurement. Indeed, it would not be surprising if at no distant date large numbers of vessels setting out from various ports of various countries would be manned as government vessels for the very purpose of assuring quick clearance and freedom from process. Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country.

It is not to be presumed, however, that any friendly government, or our own government, will fail to do what is just and fair in connection with operations of a commercial character. Both on authority and in

consideration of existing conditions, motion denied.

Since filing my previous memorandum, I have learned from Judge Learned Hand that he decided the same way (without opinion) in a case which by curious coincidence involved the status of a Chilean vessel similarly officered and manned and engaged in commercial enterprise.

#### In re J. C. WILSON & CO.

(District Court, S. D. New York. June 28, 1917.)

- 1. Equity \$\infty\$ 59--Maxims-Equality is Equity.

  Equity will treat alike those similarly situated.
- 2. Bankruptcy \$\instructure 140(3)\$—Stockholders—Unauthorized Pledge of Stock.

  Where stockbrokers made unauthorized pledge of stock belonging to their customers, part of which pledgee, upon bankruptcy of brokers, sold to satisfy brokers' indebtedness, a customer whose stock was not sold by pledgee is no better situated than customers whose stock was sold and can be successfully traced; former being entitled merely to prorate with latter.
- 3. BANKRUPTCY \$\iiiis 322-\text{Pledged Stock-Value-Closing of Stock Exchange.}

Where brokers made unauthorized pledge of customers' stock, and pledgee, upon brokers' bankruptcy, sold a portion of such stock to satisfy brokers' indebtedness, stock not so sold, in ascertaining amount of claim of owner thereof, will be valued as of the day upon which the first sale of similar stock was made on the Stock Exchange, where exchange had been closed because of war at time of filing of bankruptcy petition, and not opened until more than month later, during which time the stock had appreciably increased in value.

4. BANKRUPTCY \$\infty\$ 140(3)—STOCKBROKERS—TRACING SECURITIES.

Where broker at time of bankruptcy has stock belonging to customer, the latter, if he can trace and find his security, or securities of the same

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

kind, is entitled to that specific security, or its equivalent, or his prorata share, as the case may be.

5. BANKRUPTCY \$\inside 140(3)\$—STOCKBROKER—CONVERSION OF CUSTOMER'S STOCK —FOLLOWING PROCEEDS,

Where bankrupt broker has converted into money securities belonging to a customer, the latter, if he is to have a lien for amount thereof upon broker's bankruptcy, upon ground of unjust enrichment, must show that the proceeds of the conversion have gone into a particular fund, and must be able to identify those proceeds as a part of that fund.

- 6. Bankruptcy \$\iff 140(3)\$—Stockbrokers—Unauthorized Pledge of Customer's Stock—Sale of Pledged Stock—Inability to Trace Proceeds.

  Where broker made unauthorized pledge of customer's stock, which pledgee, upon broker's bankruptcy, sold to satisfy broker's debts, customer, who is unable to trace proceeds of the sale of such stock, is not entitled to lien for value of the stock, on the ground of unjust enrichment, and must be regarded as a general creditor.
- 7. Bankruptcy \$\iff 140(3)\$—Brokers—Violation of Stilwell Act.

  Penal Law N. Y. § 956, subd. 2, as added by Laws 1913, c. 500 (Stilwell Act), making conversion by broker of customer's stock or the pledging thereof without customer's consent a penal offense, cannot per se affect the equities between claimants to securities or their proceeds upon the broker's bankruptcy, though stockbroker's violation thereof, other things being equal, might place a claim in most favored class.
- 8. Bankruptey \$\iff 140(3)\$—Broker—Conversion of Stock—Pledged Stock. Where broker converts a portion of the long stock of a customer trading on margin, and latter, with notice of conversion, allows broker to remain in possession of his unconverted stock, which is hypothecated and upon broker's bankruptcy sold by pledgee, the customer's claim, no matter how much the value of the unconverted shares exceeded his debit balance, is inferior to those of customers whose stock was hypothecated without authority, and who can trace such stock or proceeds.
- 9. BANKBUPTCY \$\infty\$ 140(3) STOCKBROKER CONVERTED STOCK PLEDGED STOCK.

Where broker, having authority to hypothecate customer's stock, converts part thereof and pledges remainder, and with it pledges stock of other customers without their consent, and pledgee, upon broker's bankruptcy, sells such stock, the claim of the first customer, where result of conversion is net credit balance in his favor, is equal to claims of latter customers, whose stock was pledged without authority.

10. BROKERS \$= 26-STOCKBROKERS-MARGIN CUSTOMERS.

The margin customer is the owner of the securities which the broker is carrying for him, and they become his absolutely the moment he pays any amount outstanding against him.

11. Brokers ← 24—Stockbrokers—Hypothecation—Stock Owned by Customer.

While broker may not hypothecate stock of cash customer, he may do so with respect to stock of margin customer.

12. Brokers &=35—Stockbrokers-Conversion of Stock-Margin Customer.

Stockbroker has no right to convert to his own use the securities of a margin customer.

13. BANKBUPTCY \$\iff 322\$—Stock—Liquidation Statement—Value of Stock.

In making up the liquidation statement, or restating account of margin customer, a part of whose stock had been converted by bankrupt broker, the value of the securities should, generally speaking, be taken as of the date of the filing of the bankruptcy petition.

14. Bankruptcy \$\infty\$ 140(3)—Stockbrokers—Converted Stock—Presumption.

Where broker, before bankruptcy, converted a part of customers' stock, leaving unconverted a certain amount of similar stock, there is no presumption that he selected the stock of margin customers for conversion, leaving untouched the stock of cash customers.

15. Bankruptcy \$\infty\$140(3)—Stockbroker—Traced Stock—Margin Customer.

Where the number of shares of certain stock owing by bankrupt stockbroker to long customers, after deducting number of shares traceable by certificate, was 4,120, but broker at time of bankruptcy had converted all but 1,920 shares, margin customer, who can trace his 1,000 shares, is entitled to lien for 1000/4120 of the value of 1,920 shares of stock, but as to balance is a general creditor.

16. BANKRUPTCY €==140(3)—STOCKBROKERS.

Where bankrupt broker converted some of the shares of certain stock owing by him to long customers, the failure of certain customers to prove their claim for pro rata share of the unconverted stock, because of failure to trace their stock, cannot enlarge the pro rata share of those who have traced their stock.

17. Bankruptcy €==140(3) — Stockbroker - Traced Stock - Reclamation of Stock.

Though shares of certain stock held by bankrupt broker are insufficient to satisfy long customers for whom he held such stock, a customer who can identify his stock by certificate number is entitled to reclaim that stock or its proceeds.

18. Bankruptcy €==140(3)—Stockbroker-Presumption.

Where bankrupt stockbroker holds fewer shares of certain stock than are necessary to satisfy claims of long customers, having legitimately used stock under terms of agreement to cover short sales, the broker presumptively utilized only those securities which he had a right to lend, leaving unaffected securities paid for by cash customers.

- 19. Bankruptcy \$\iff 140(3)\$—Stockbrokers—Long Stock Held as Security.

  Though margin customer's long stock and cash balance were held by broker as security for short stock, the long stock was owned outright by customer, whose position upon broker's bankruptcy was no different from that of a cash customer, who had had no marginal transactions.
- 20. Bankruptcy \$\sim 340\subseteq Stockbrokers\subseteq Tracing of Stock\subseteq Additional Proof\subseteq Discretion of Court.

Where proof submitted to master failed to trace the stocks of customers of bankrupt stockbroker, whether master, after submitting report, shall take additional proof is discretionary with court.

21. BANKRUPTCY \$\sim 340\text{—Stockbrokers-Tracing of Stock.}

Where proof submitted to master in bankruptey proceedings of stock-broker consisted merely of accounting of bankrupt with company to whom stock had been pledged, where bankrupt's office was in San Francisco and hearing was in New York, and where many of the claimants lived a distance from New York and had merely filed their claims and given their depositions, court will allow master to hear additional proof and permit customers, who had failed to trace stock, to follow claim into pledgee's books.

22. Bankruptcy €=368—Stockbrokers-Proceedings-Trustee's Commissions-Costs.

On bankruptcy proceedings of stockbroker, trustee's commissions are calculated on funds which do not include either securities or their proceeds which claimants have successfully reclaimed.

23. BANKRUPTCY ==272-STOCKBROKERS-TRUSTEE'S ATTORNEY'S FEES.

On bankruptcy proceedings of stockbroker, allowance to trustee's attorney cannot be made out of securities or their proceeds, which claimants have successfully reclaimed.

24. BANKRUPTCY \$\infty 481\\_STOCKBROKERS\\_PROCEEDINGS\\_Costs\\_ALLOWANCE TO SPECIAL MASTER\\_STENOGRAPHER'S EXPENSES.

On bankruptcy proceedings of stockbroker, the allowances to the special master and expenses for stenographic minutes must come preliminarily out of the general estate; if that is not sufficient they should come pro rata out of securities or their proceeds available to least favored claimants, and, if not satisfied by such securities, out of securities of most favored claimants.

BANKBUPTCY ← 272 — STOCKBROKERS — PROCEEDINGS — EXFENSES — ACCOUNTANT'S FEES.

On bankruptcy proceeding of stockbroker, the expenses of engaging accountant to unravel details contained in the books of bankrupt's pledgee, so as to enable claimants to trace their stock, should be apportioned among claimants, except such as could trace stock without accountant's aid.

In Bankruptcy. In the matter of J. C. Wilson & Co., bankrupts. On objections to report of special master. Approved, except as set forth in opinion, and saving corrections in figures, which master may make, and any necessary recasting of accounts.

J. C. Wilson & Co. were stockbrokers doing business in San Francisco, Cal., with various branch offices in the United States and Canada, all of the business of the branch offices passing through the main office at San Francisco. Wilson held seats for the benefit of the firm in the New York Stock Exchange, the Chicago Board of Trade, and the San Francisco Board of Trade. J. C. Wilson & Co. did not trade directly on the New York Stock Exchange, but transacted all their Stock Exchange business through a New York correspondent, Harris, Winthrop & Co., who were also members of the New York Stock Exchange, and thus were entitled lawfully to divide commissions as fellow members. A private wire connected the two brokers' offices, J. C. Wilson & Co. took orders from their customers to buy or sell stocks and bonds on the New York Stock Exchange, and transmitted the orders to Harris, Winthrop & Co. by wire for execution, without the knowledge of the customer and without disclosing the customer's identity to Harris, Winthrop & Co. In addition, J. C. Wilson & Co. were themselves speculating on the New York Stock Exchange through Harris, Winthrop & Co. without distinction. far as Harris, Winthrop & Co.'s books show, J. C. Wilson & Co. were marginal customers of that firm and signed the usual hypothecation agreement, which permitted Harris, Winthrop & Co. to pledge the securities carried in the customers' margin account for any amount without notice, all transactions to be subject to the rules of the New York Stock Exchange. As soon as Harris, Winthrop & Co. reported to J. C. Wilson & Co. that an order had been executed, J. C. Wilson & Co. immediately notified their customer in the same manner as if they had executed the order and without mentioning Harris, Winthrop & Co.'s name. The customer paid J. C. Wilson & Co., if it was a "cash" order, a day or so after notice of the execution of the order, but not in all cases simultaneously. Owing to war conditions the New York Stock Exchange was closed on July 30, 1914, and so remained until December 12, 1914. On August 13, 1914, the suspension of J. C. Wilson & Co. was announced on the Stock Exchange. On November 7, 1914, a bankruptcy petition was filed against J. C. Wilson & Co. in California, and adjudication was had on November 24, 1914. On December 5, 1914, Mr. Solinsky was appointed receiver, and on December 21, 1914, was elected trustee. In aid of the trustee, Mr. Dexter was appointed ancillary referee on January 8, 1915, and subsequently special master to ascertain the rights of all parties in and to the

money, stocks, and other securities in the hands of Harris, Winthrop & Co., and in and to the proceeds resulting from the sale of the New York Stock

Exchange seat of J. C. Wilson & Co.

The report of the special master is now before this court, and numerous objections have been filed on behalf of various persons. When the New York Stock Exchange reopened on December 12, 1914, Harris, Winthrop & Co. sold the greater portion of the securities which they were "carrying" for J. C. Wilson & Co., and thus satisfied their lien for the unpaid debit balance of J. C. Wilson & Co., returning the surplus cash and securities to the Guaranty Trust Company to hold for the joint account of the trustee and of Harris, Winthrop & Co. The amount realized for the securities thus sold was the sum of \$481,113.64. There were left in the hands of Harris, Winthrop & Co. (1) \$13,218.03, the balance of the proceeds of the stocks sold, and (2) certain unsold securities which are set forth in detail in the special master's report. This cash and these securities constitute the fund now in custodia legis, in which the various claimants, all of whom were customers of J. C. Wilson & Co., are interested. The Stock Exchange appeared specially, denying the jurisdiction of this court, and, since the institution of this ancillary proceeding, the Stock Exchange seat of Wilson has been sold for \$67,000, but is still held by the Stock Exchange, which, however, does not make any adverse claims for itself, but only for its member, Harris, Winthrop & Co., until released. There are numerous claimants for the securities or their proceeds, and the special master has filed his report, passing on the claims presented to him.

The foregoing is a brief abstract of so much of the special master's report as is necessary to understand the general situation. Fuller details as to the

facts may be had by resort to the special master's report.

Harold Remington, of New York City, for trustee.

McElheny, Bennett & Sicher, Dudley F. Sicher, Reynolds, Richards & McCutcheon, George H. Richards, Robert F. Little, White & Case, Mr. Jenkins, Pruyn & Whittlesey, Henry B. Singer, Eli Thomas Scott, H. S. Marx, Paul R. Gordon, McDonnell & Lebett, Harold C. Mitchell, Charles L. Griffin, William L. Turner, David G. George, Henry W. Webber, William A. Ulman, Walter E. Meyer, Max Lowenthal, and Murray, Prentice & Howland, Duane R. Dills, Noble, Estabrook & Mc-Harg, and Arnon L. Squiers, all of New York City, for various claimants.

MAYER, District Judge (after stating the facts as above). The careful and comprehensive report of the special master renders unnecessary reference to many details. It will conduce to a clear understanding to point out in what respects there is agreement or disagreement with the views of the special master in respect of the principles of law involved, making such reference to particular claims as may be illustrative or otherwise regarded as desirable.

The master has allocated the claims of those urging reclamation into two general classes, viz. class A and class B, placing the claims of superior equity in class A, and those of inferior equity in class B, and in addition he has dismissed certain claims, leaving such claims in the position of general creditor claims. Apparently the fund is insufficient to satisfy all class A claimants, and thus at the outset an interesting question arises, which is well exemplified by the situation of the claim-

ant Rolph.

Rolph's Claim and the Doctrine of Pippey's Case.

As the result of transactions detailed in the testimony and in the master's report, it appears that on July 30, 1914, Wilson & Co. (hereinafter called Wilson) were holding 300 shares of Mexican Petroleum common for Rolph, for which Rolph had paid in full, and 100 shares of the same stock, upon which Rolph owed Wilson a debit balance. There is some controversy as to whether, in respect of the transactions, Rolph was a margin trader, or had bought these 300 shares outright. As I agree with the conclusion of the master that the 300 shares were bought outright and fully paid for, reference to the testimony is unnecessary. It may, however, be remarked, in addition to other facts which fully justify this conclusion, that the testimony shows that no interest whatever was credited Rolph on the cash balance arising from his several previous sales, although it was the invariable custom of Wilson to charge interest on a marginal account, if it ran only for a day. To those familiar with transactions of this character, this failure to credit interest is almost conclusive on the point that Rolph was not a margin trader. In regard to the last 100 shares purchased, upon which there was a debit balance against Rolph, I have no doubt that the master was right in holding that this purchase was in class B. and that Rolph could recover the proportion indicated by the master only on payment of his debit balance.

I will therefore leave this last purchase and proceed to consider the status of the 300 shares. These 300 shares were hypothecated by Wilson without authority with Harris, Winthrop & Co. (hereinafter called Harris). They were not among the securities sold by Harris to satisfy his pledge, and thus survived the liquidation. Rolph contends that

he is now entitled to these identical 300 shares.

[1] There are other claimants whose securities were fully paid for and hypothecated without right by Wilson with Harris, and these securities, having been sold by Harris after the filing of the bankruptcy petition, did not, therefore, survive the liquidation in kind. In respect of such cases the special master has held, where the claimant has successfully traced, that the claimant is in class A and entitled to a lien on the proceeds. Such claimants insist that Rolph is in precisely the same situation as they are, and that the mere accident that Rolph's 300 shares have survived liquidation does not give him equities superior to them. The proposition thus advanced by those opposing Rolph's contention seems obvious upon simple principles of equity, for nothing is better settled than that equity will treat alike those similarly situated. Rolph, however, presses the point that a different view was entertained by the Circuit Court of Appeals for this circuit in the case of In re T. A. McIntyre & Co. (Appeal of Pippey) 181 Fed. 955, 957, et seg., 104 C. C. A. 419.

In view of its importance in the pending controversy, I have thoroughly examined the record on appeal in Pippey's Case. In that case the involuntary petition against McIntyre & Co., stockbrokers, was filed on April 24, 1908. About March 4, 1907, McIntyre & Co. obtained a loan from the Metropolitan Trust Company of \$200,000 and

deposited as collateral thereto, a large number of stocks and bonds. On April 23, 1908, the day before the filing of the petition in bankruptcy, McIntyre & Co., without right, pledged Pippey's stock with the Metropolitan Trust Company as part of the collateral to the loan aforesaid. On April 25, 1908, Pippey demanded from the Trust Company his certificate of stock, which was still in the Trust Company's possession, and whose identity had been preserved. It is unnecessary to describe in further detail Pippey's efforts, which are sufficiently set forth in the opinion of the court in 181 Fed. at page 957 et seq., 104 C. C. A. 419.

The master reported (pages 39 and 40) that after the bankruptcy, and on April 24, 1908, the Trust Company applied certified checks for \$70,000 toward the payment of the \$200,000 loan, reducing the principal thereby to \$130,000 and thereafter the Trust Company from time to time sold the securities, applying the proceeds in reduction of the debt. On May 6, 1907, after applying the proceeds to the payment of the principal and interest on the debt, there was a cash credit to Mc-Intyre & Co. for their estate in bankruptcy of \$832.16 and the following securities: 300 shares of International Power Company common unclaimed, 200 shares of American Can Company preferred (Hudson), 18 shares of Pullman Company (Pippey), and 66 shares of United States Steel Preferred. This cash and these securities, by order of court were redeposited with the Metropolitan Trust Company, to remain subject to order of court. The task before the master was to determine the rights of the various claimants to this balance of cash and these shares of stock which had survived the liquidation by the Metropolitan Trust Company. The master then proceeded to examine each claim: Pippey (42). The master held that Pippey had identified his 18

Pippey (42). The master held that Pippey had identified his 18 shares of Pullman Company stock, and that this stock must bear its proportionate share of the burden of the loan, and that Pippey was entitled to share pro rata with others similarly situated in said surplus of money and securities. The Circuit Court of Appeals pointed out that the conduct of the stockbrokers in pledging Pippey's stock with the Metropolitan Trust Company amounted to larceny. The result was that Pippey had the highest kind of equity, and the Circuit Court of Appeals held that he was entitled to recover his stock or the proceeds free of any burden to share pro rata with others.

Ellen J. Sedgwick and Fred L. Bishop (45). The master awarded to these claimants 60 shares United States Steel preferred (10 to Bishop and 50 to Mrs. Sedgwick), under the same circumstances and principle under which a similar award has been made in this case by common consent to Allie M. Powell. There was no petition to revise

and no appeal from the master's order in this regard.

Charlotte B. Miller (47). On April 1, Mrs. Miller, through her son as her agent, bought through McIntyre & Co. 12 shares of United States Steel preferred, which stock was paid for on April 3, 1908. McIntyre & Co. were requested to have these 12 shares of stock transferred to the name of Mrs. Miller and thereupon to send same to her. Between April 7, 1908, and the date of the failure, April 24, 1908, Mrs. Miller's son called at the Syracuse office of McIntyre &

Co. on several occasions and asked for the certificate of stock. The last time he called was on the day before the failure. At the date of the bankruptcy the market value of these 12 shares was \$1,197. On May 1, 1907, a demand was made at the office of McIntyre & Co. in New York for the stock, but the stock was never received by Mrs. Miller. This stock was traced by Mrs. Miller into the Metropolitan Trust Company loan, and (without setting forth further details) the master held that Mrs. Miller had successfully traced her stock, and that her claim was \$1,197, and that she was entitled to share pro rata. So, also, the District Court held. Undoubtedly Mrs. Miller's status as matter of equity was equal to that of Pippey; but as she did not petition to revise, nor appeal, she was apparently satisfied with the disposition below.

Julia A. Stone (47). Mrs. Stone, through her husband, on April 20, 1908, bought 20 shares of Pennsylvania Railroad Company stock, and paid in full on April 21, 1908, when the certificates were delivered to McIntyre & Co. On the same day McIntyre & Co. pledged Mrs. Stone's stock with the Metropolitan Trust Company. The market value of the shares at the date of the bankruptcy was \$1,185. On April 29, 1908, the Trust Company sold Mrs. Stone's 20 shares of Pennsylvania stock for the net sum of \$1,211.05, and applied the proceeds in liquidation of the loan. On the date of the failure McIntyre & Co. owed to various customers in all 1,582 shares of Pennsylvania stock. The master held that Mrs. Stone had traced her stock, and, placing her claim at \$1,185, held that she shared pro rata. Here, also, undoubtedly, the position in equity of Mrs. Stone was equal to that of Pippey; but Mrs. Stone neither petitioned to revise nor appealed. (See below.)

Dyke Quackenbush (50). In regard to this claim it was held that McIntyre & Co. were authorized by Quackenbush to pledge his stock,

and the master correctly stated:

"The claims of Pippey and others, whose stocks were wrongfully converted by McIntyre & Co., are superior to any claim of Quackenbush, and the surplus money and securities are not sufficient to satisfy such prior claims. Claimant has therefore falled to establish any claim herein, and his petition must be dismissed, with costs."

So, also, held the District Judge, and from this there was no appeal. Mary H. Hudson (54). Mrs. Hudson was the owner of the 200 shares of American Can preferred, which were not sold by the Trust Company. The transactions with her are sufficiently described in 181 Fed. 959, 104 C. C. A. 419, not to require repetition. It will be noted, however, that the Circuit Court of Appeals treated her equity as inferior to that of Pippey.

It is not necessary to discuss the status of Connor (see also appeal of Grace), Amos, and others, because the Miller and Stone Cases are sufficiently illustrative, and Connor, Amos, and others did not petition

to revise nor appeal in this proceeding.

From the foregoing abstract it will be seen that the Circuit Court of Appeals had before it only the claims of Pippey and Mrs. Hudson. Both Pippey and Mrs. Hudson had traced their stocks, and those stocks, having survived the liquidation, were in existence and available,

Undoubtedly, the claims of Mrs. Miller and Mrs. Stone, for illustra-

tion, were equal in equity to the claim of Pippey.

As, however, those similarly situated with Pippey did not appeal, the Circuit Court of Appeals had no grievance before it on the part of those claimants. The case was not like Matter of Pierson, 233 Fed. 519, 147 C. C. A. 405, and 238 Fed. 142, 151 C. C. A. 218, where the general creditors via the trustee were before the court, and the court held that the mere fact that certain customers (like Cochran) had not made a claim, could not serve to increase the shares of those who did claim (under Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143), and to decrease a fund available for general creditors. In Pippey's Case, Pippey was claiming his specific Pullman stock by virtue of his title, and there was no other claimant before the Circuit Court of Appeals who was similarly situated.

If, however, Mrs. Miller or Mrs. Stone and the others similarly situated had also appealed, is it to be supposed that the court would have held that Pippey could reclaim all of his stock, and others similarly situated must leave the court empty-handed, because of the fortuitous circumstance that the pledgee after bankruptcy had sold the stock of Mrs. Miller and Mrs. Stone, for instance, and had not sold

the stock of Pippey?

It is true that the opinion of the court uses certain general language, but that language must be construed in respect of the facts before the court. The court was not called upon to adjust equities between Pippey and others similarly situated who did not complain. In the record on appeal there is a brief on behalf of Mrs. Stone, who takes the role of appellee. Mrs. Stone not only did not appeal, but, on the contrary urged the affirmance of the order below as follows:

"The order should be affirmed to the extent of awarding contribution to this appellee."

[2] No reference whatever is made in the opinion of Judge Lacombe to the brief or the argument on behalf of Mrs. Stone, and from this it is obvious that the court did not feel called upon to award relief to those who did not ask it, but who, on the contrary, were satisfied with the disposition below. It is true that the court held that the admiralty principle of general average was not applicable, and that the pledge should not be treated as a common adventure; but it did not disturb the proposition that it is the character of the equity which determines how any particular claim shall be classified. The case is quite different from one where a pledgee rightly sells collateral prior to a bankruptcy. In the absence of fraud or collusive arrangements, the result of such a sale is one of the hazards which may befall persons in a business of this character. If, however, it be held that, after a petition in bankruptcy has been filed, the pledgee, by selecting for sale some stocks and not others, can thereby save some stocks intact for the owners without the burden of contribution, and not others, it can readily be seen that the door will be opened for the most indefensible kind of favoritism, and possibly for corrupt bargains between the owners of securities and the pledgee. Indeed, a pledgee of his own motion, without any agreement with owners of securities, could easily safeguard his friends to the detriment of others who were strangers to him. I am fully satisfied, therefore, that Rolph is in the same position as other class A claimants.

[3] Rolph, however, should not be in a worse position than those whose securities were sold by Harris on December 12, 1914, or soon after. Since then Mexican Petroleum has appreciated in value. Ordinarily the value of the stock would be taken as of November 7, 1914 the date of the filing of the petition in bankruptcy. In this case, how ever, war conditions presented an extraordinary situation. There was not a true market between the closing and the opening of the Stock Exchange, and therefore the value must be ascertained by other than ordinary methods, more particularly as the first sale of Mexican Petroleum on the Exchange was not until December 15, 1914, three days after the Exchange opened. The last previous sale was on July 30, 1914. I think it is fair to hold, in the circumstances, that the stock must be valued as of December 15, 1914, to wit, 56, or, in money, \$16,800 for the 300 shares. Rolph, if he desires, may pay into the fund \$16,800 and have his stock, and upon the basis of \$16,800 as a class A claimant he may share and contribute in the fund. In re T. A. McIntyre & Co. (Appeal of Mary H. Hudson) 181 Fed. 959 et seq., 104 C. C. A. 419.

# Unjust Enrichment-Claim of Louis Rosenthal.

The claim of Rosenthal may be taken as a good example of the claims for unjust enrichment. Rosenthal bought 200 shares of Southern Pacific on July 29th, and paid in full on July 30th, which was the day when the delivery and payment were to be made. Harris received this stock, and subsequently applied it in reduction of Wilson's indebtedness to Harris. The master awarded a lien to Rosenthal on the fund because it was unjustly enriched by this application, and Rosenthal was put in class A because he had paid for his stock in full.

There is some danger of a mistaken application of the principle of unjust enrichment, arising from the hardship which an adverse ruling visits upon such a claimant as Rosenthal. But it is important not to be misled by a sympathetic desire to make good, as against other claimants, and general creditors, some obvious wrong committed by the broker against his customers. The principle has been tersely stated in Multnomah County v. Oregon Nat. Bank (C. C.) 61 Fed. 912, as follows:

"It is settled that a person may follow and reclaim his property, wrongfully appropriated by another, so long as he can find it. If its form has been changed, he may follow the substantial equivalent of his property, in whatever form. The property into which his own has been changed is impressed with a trust in his favor. But the great weight of authority is against any extension of the rule beyond this."

[4, 5] Where, as in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, and Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, the claimant traces and finds his security or securities of the same kind, he is entitled to that specific security or its equivalent, or his pro rata share, as the case may be. Where, however, prior to insolvency, there has been a conversion into money, he

is unable, of course, to trace the security in kind; but he must show that the proceeds of the conversion have gone into a particular fund, and he must be able to identify those proceeds as a part of that fund. Every conversion, theoretically at least, unjustly enriches the fund ultimately found credited to or in the hands of the converter; but that is not enough. There is nothing in the oft-cited opinion of Mr. Justice Bradley in Frelinghuysen v. Nugent (C. C.) 36 Fed. 229, to the contrary. An extended review of the cases on this subject seems unnecessary, and it remains only to analyze In re Ennis, 187 Fed. 720, 109 C. C. A. 468, so far as that case concerns the claim of the People's Bank. The facts in that case were as follows:

"On April 9, 1909, the People's Bank ordered sold through the bankrupts' Passaic branch \$15,000 of certain bonds. The order was executed upon the same day, and the bonds were sold to one Cohen. On April 12, 1909, holidays intervening, the bonds were delivered to the bankrupts at New York. The messenger who delivered the bonds was instructed to obtain a certified check for their proceeds and to deposit the same in a New York bank. The messenger, however, delivered the bonds upon an uncertified check drawn upon the Mechanics' Bank and deposited that. The condition of the bankrupts' bank account upon said day would have permitted the certification of a check for the amount of the proceeds of said bonds. On April 13, 1909, the bankrupts suspended, and payment of said uncertified check was refused by the bank upon which it was drawn. The check received from Cohen for the purchase price of said bonds was deposited to the credit of the bankrupts, in said Mechanics' Bank. The People's Bank had no account with the bankrupts, except a deposit account of the bankrupts, the balance due upon which was deducted by the master from the claim of said bank."

The master held that a constructive trust arose, and in this view he was sustained by the Circuit Court of Appeals. Judge Noves stated:

"The proceeds of the claimant's bonds constituted trust funds, which were traced into the Mechanics' Bank and have unjustly enriched the bankrupts' estate."

From the statement of facts above outlined it is quite clear that the court based its decision, inter alia, upon the fact that these proceeds were clearly traced into the Mechanics' Bank.

In the Rosenthal claim at bar, and in similar claims, the difficulty is that the proceeds cannot be traced. It may or may not be that these proceeds are somewhere in the cash and securities heretofore or now held by the Guaranty Trust Company; but who can say? There is no doubt that the Wilson estate was unjustly enriched, because the conversion of these 200 shares of Southern Pacific resulted in reducing the indebtedness of Wilson to Harris pro tanto; but that is not enough. If the doctrine of unjust enrichment is to be applied to this case, then it follows that every conversion, whether the proceeds thereof be traced or not, will give a claimant of this character remedies heretofore never accorded. All that will be necessary will be to show that securities were converted without the paramount further requirement of demonstrating beyond question that the proceeds of the conversion are in a fund where they can be unequivocably identified. In re A. D. Matthews' Sons, Inc., 238 Fed. 785, 151 C. C. A. 635.

[6] The question, of course, is not free from doubt, but I am of opinion that the master erred in this regard, and that the claimants 252 F.—41

urging the "unjust enrichment" theory must be regarded as general creditors. The Wilson failure is not similar to the A. O. Brown. Hollins, Lathrop Haskins, Ennis, Pell, Van Schaick, or other Wall street failures. In these bankruptcies the Wall Street house had failed. In the Wilson case, the correspondent failed, not the Wall Street house. These bankruptcies had many funds, and the Wall Street house itself was not a fund. In the Wilson case, the Wall Street house itself (Harris) was the fund. In the above failures. it was necessary for the claimant to trace his given property or the proceeds of it into a given bank loan or fund, or point to the property in the broker's hands. This is not true in the case at bar, for the reason that there was only one fund. The fund was the Harris pledge. The fund was the Wall Street itself (Harris). Therefore, where a customer of Wilson traces property into the Harris pledge before insolvency, and shows that Harris sold the property and had the proceeds before insolvency, and that it remained with Harris (that is, prove that it was not paid by Harris to Wilson, or used by Wilson after that time), he is entitled to reclaim, and, if the stock was wrongfully pledged by Wilson with Harris, under either the Pippey or Bamford rulings, he is in class A.

Godwin's Claim and the Doctrines of Ex parte Bamford, 187 Fed. 721–725, 109 C. C. A. 468, and Ex parte Braun, 187 Fed. 726, 109 C. C. A. 474.

The master's report states:

1
"To summarize: I find that Godwin has traced title to the following shares
in Harris, Winthrop & Co.'s pledge:
100 shares Interborough Metropolitan preferred \$ 5.089.75
100 shares Great Northern preferred
100/350 shares Missouri Pacific (330 shares sold for \$3,427.43), which
amounts to
Total
"He is entitled to deduct from his indebtedness to Wilson the purchase price
of 400 Reading (1/2) shares, or \$34,200, for having absolutely converted this
stock

In regard to the conversion of the Reading stock the master found as follows:

"Godwin was also long of 400 shares of Reading (1/2 shares) purchased by Wilson for his account June 16, at 170¼, aggregating \$34,200. This was, without his customer's authority, sold short by Wilson through Harris, Winthrop & Co. for at the bankruptcy Wilson was 'short' with Harris, Winthrop & Co. 3,260 shares, which the latter firm subsequently covered, and charged the purchase price to Wilson's account. Wilson at the time of the suspension was 'short' of Reading with Harris, Winthrop & Co. and had no Reading stock in his possession in pledge or elsewhere. If it had been lawfully borrowed to complete a short sale, on Harris, Winthrop & Co.'s 'covering' such sale in December, the 400 shares of Reading should have reappeared in the Wilson account as loaned stock returned. The conclusion is irresistible that the Reading stock was prior to the bankruptcy not borrowed, but actually sold and de-

livered, viz. converted, by Wilson. This was 'a grave dereliction of duty' on Wilson's part, and entitled Godwin to deduct the purchase price (\$34,200) from the balance due Wilson."

The conclusion of the master was as follows:

"I think that as long as any part of his indebtedness existed, the hypothecation of his securities was not unlawful, and he should be put in class B, rather than in class A. His equities are not as high as in the case of full-paid securities wrongfully hypothecated. In re Ennis, Ex parte Braun, 187 Fed. 726 [199 C. C. A. 474], distinguishing the decision, In re Ennis, Ex parte Bamford, 187 Fed. 720 [109 C. C. A. 468], made by the same court simultaneously.

\* \* \* On payment of his debit balance, \$7,791.75, I find that Godwin is entitled to a lien on the surplus for the sale price of his securities, \$17,983.76; but he should be placed in class B, subject to contribution to the expenses and the 'burden of the loan.'"

Godwin contends that the master was wrong, and that because of the conversion of the Reading stock he should be placed in class A, and he relies upon the authority of In re Ennis, Ex parte Bamford, 187 Fed. 720, 109 C. C. A. 468, and the so-called Stilwell Act, being Laws of New York 1913, c. 500, subdivision 2. I agree with the master in his conclusion as to the facts, and I shall therefore assume that the 400 shares of Reading were converted as the master found. It is also clear that Godwin was a margin trader, who had authorized Wilson to deal with his securities in accordance with the following authority:

"It is agreed between broker and customer: (1) That all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House. (2) That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer."

[7] The Stilwell Act, so called, was a penal statute. It denounced certain conduct as unlawful, and provided punishment therefor. This act, however construed, cannot per se affect the equities existing between different claimants to securities or their proceeds. Those equities are, of course, to be determined by principles of equity, and the Stilwell Act, in a case such as that at bar, is useful only so far as it may help to determine the kind of act or transaction of which the failing stockbroker was guilty. If, therefore, a stockbroker violates this statute, such violation (all other things being equal) might place a claim in the most favored class. Entertaining this view, it is unnecessary for me to determine whether the word "and," in section 2 of

1 Subdivision 2 of the so-called Stilwell Act provides:

"2. Having in his possession stocks, bonds or other evidences of debt of a corporation, company or association belonging to a customer on which he has a lien for indebtedness due to him by the customer, pledges the same for more than the amount due to him thereon, or otherwise disposes thereof for his own benefit, without the customer's consent, and without having in his possession or subject to his control, stocks, bonds or other evidences of debt of the kind and amount to which the customer is then entitled, for delivery to him upon his demand therefor and tender of the amount due thereon, and thereby causes the customer to lose, in whole or in part, such stocks, bonds or other evidences of debt, or the value thereof."

this statute, is to be construed as conjunctive or disjunctive; and it is also unnecessary for me to determine whether, as matter of fact, Wilson, in dealing with Godwin's Reading shares (in view of the "confirm" order, supra), was guilty of a violation of this statute. It is perfectly plain, irrespective of the Stilwell Act, that these Reading shares were converted by Wilson and that such conduct was a grave dereliction of duty on Wilson's part.

The question thus remains as to whether Ex parte Bamford and Ex parte Braun mean that the mere conversion per se places a claimant such as Godwin in class A, or whether the court, in determining the equities, must also merely ascertain whether the conversion wiped out the debit balance, or must look further and examine all the acts of the parties and the condition of the whole account; i. e., whether debit or credit.

At the outset it will conduce to clearness to point out what the situation would have been if Wilson had not converted Godwin's Reading and what the situation was so far as Godwin knew. Godwin owed \$41,991.75. Wilson was supposed to have on hand, whether in his own "box" or in a pledge, 100 Interborough Metropolitan, 100 Great Northern, 100 Missouri Pacific, and 400 Reading, aggregating in value, at the figures of the master's report, \$52,183.76; i. e., \$17,983.76, plus \$34,200. In other words, Godwin's securities were worth net \$10,-192.04 (the difference between \$52,183.76 and \$41,991.75) on the basis of the purchase price of the Reading and the liquidation figures as to the remaining securities.

If the fact that his Reading had been converted had become known to Godwin, he would have had the choice of three courses: (1) To forgive the tort and allow his unconverted securities to remain in the possession and under the control of the broker with a debit balance against him—i. e., Godwin would owe the broker \$7,791.75 on his margin account, against which the broker would hold Interborough Metropolitan, Great Northern, and Missouri Pacific; (2) to pay the \$7,791.75 indebtedness, and thereupon receive from the broker the unconverted securities; or (3) to order the securities sold and take the net proceeds in cash.<sup>2</sup>

[8] So long as Godwin chose course (1), supra, and so long as Wilson kept these remaining "long" stocks, either in his "box" or in the Harris pledge, Wilson was fully within his rights, and, had that been the situation when Wilson failed, Godwin's claim would properly have been placed in class B, no matter how much the value of his remaining shares exceeded his debit balance either at the date of bankruptcy or as the result of the liquidation. The reason for this result (clearly explained in Ex parte Bamford) is that, under such circumstances, the Godwin securities would have been rightfully in the Harris pledge pursuant to authority duly conferred on Wilson by Godwin. If, however, Godwin had known of the conversion of his Reading, then he could have chosen courses (2) or (3), and could thus have saved to himself what was justly due him.

<sup>&</sup>lt;sup>2</sup> I am excluding from consideration at this time, as irrelevant, any action which Godwin might have against the broker for damages for conversion.

The question then arises as to whether Godwin was properly placed in class B because the proceeds of the conversion of his Reading stock by Wilson were not enough in themselves to wipe out Godwin's debit balance. Godwin, to repeat, owed \$41,997.75 on his margin account, and, after deducting \$34,200, the purchase price of his converted Reading, an indebtedness of \$7,791.75 remained. But this balance of \$7,791.75, representing Godwin's "net" indebtedness, does not state in dollars his net property rights from the standpoint of liquidation; to so treat it is fallacious. True, Godwin owed \$7,791.75, but against this the broker had his remaining securities, of the value in the aggregate of \$17,983.76, with the result that the true net property of Godwin, stated in dollars, was \$10,192.04, which he would have had the right to receive if the conversion of the Reading had not been concealed from him. The master placed Godwin in class B because of his construction of Ex parte Braun. He said:

"In the Bamford Case the court found that there was a credit balance after crediting the value of the converted stocks. In the Braun Case there remained a debit balance."

A reading of the opinion of the Braun Case, without recourse to the record, may tend to some confusion. In the Bamford Case the court had laid down certain general principles, and had given the reasons therefor. In the Braun Case it is apparent that the court confined its opinion to making clear to the litigants the reason for the distinction between Braun's claim and Bamford's claim. I have deemed it desirable, therefore, to examine the record in both Ex parte Bamford and Ex parte Braun, and that examination will, I think, make clear the true meaning of the opinions in both of these cases.

In Ex parte Bamford it clearly appeared that the bankrupts, some time before the failure, had misappropriated shares of Shoe Machinery stock deposited with them as collateral. Some of Bamford's securities had been hypothecated to secure loans to the bankrupt brokers Ennis and Stoppani at the Mechanics' National Bank, and that bank had satisfied such loans by the application of a balance on deposit to the credit of the bankrupts and by a sale of a portion of the collateral, and had a surplus fund on hand, just as in the case at bar. Eighty-two shares of Safety Car Heating stock, which had been deposited by Bamford with Ennis and Stoppani as collateral, and were included in the securities hypothecated with the Mechanics' National Bank, were sold by the bank after bankruptcy, just as in the case at bar. Thirty shares of Patterson Saving Institution stock, which had likewise been deposited by Bamford with the bankrupts and had been included in the collateral delivered to the Mechanics' Bank, were not sold by the bank, and were turned over by the bank to the receiver in bankruptcy, and were in his possession, just as in the case at bar. When the master cast the account, he credited Bamford with the value of certain "long" stocks as per liquidation statement J. Turning to this liquidation statement J, it will be found that there was a net balance in favor of Bamford of \$34,218.30. This net balance was obtained by crediting Bamford with the value of his "long" stocks and bonds at the time of the suspension of the brokers, and the value of same as if sold at the averaged prices approximately at time of suspension, including 82 Safety Car and 30 Patterson Savings Institution. The total of credits was \$172,521.50, against which Bamford owed \$138,303.20, so that on this statement Bamford had a credit balance of \$34,218.30.

In other words, in seeking to ascertain Bamford's true position, he was credited under the liquidation statement with the value of his securities as of the time of the suspension of the brokers. In "restating" Bamford's account, the master charged him with \$138,303.20, the amount owed by him, and credited him with only \$147,371.25. This \$147,371.25 did not include the Patterson Institution stock or the proceeds of the Safety Car stock. In liquidation statement J the Patterson Institution stock was credited at \$14,992.50, and the 82 Safety Car stock at \$10,157.75; total \$25,150.25. Adding \$25,150.-25 to \$147,371.25 will give the \$172,521.50 total credits in Bamford's favor shown in the liquidation statement. The "restatement" of Bamford's account, therefore, showed a credit balance in favor of Bamford of \$9,068.05 (\$147,371.25 minus \$138,303.20), exclusive of the Patterson Institution stock and of the proceeds of the Safety Car stock. In the Bamford Case it made no difference that the master had not included the value of the Patterson Institution and the Safety Car stocks on the credit side of the "restatement" in favor of Bamford, because, exclusive of those two stocks, Bamford had a credit balance of \$9,068.05 as above pointed out.

The "restatement" (although having no effect on the result) was inaccurate because, in order to ascertain the true state of the account, all of the debits should have been charged on the debit side, and all of the credits should have been credited on the credit side, as they were in liquidation statement J, for the purpose of ascertaining whether there was a debit balance against or a credit balance in favor of Bamford. The court said:

"Now, the report of the master 'restates' the account of the appellant with the bankrupts, and shows a substantial balance in favor of the appellant without counting the securities in question. This statement is made in view of liquidation as at the time of the failure, and shows that the bankrupts, according to their own account, had more securities and property of the appellant than the amount he owed, and that the securities in question were not required for the marginal purposes for which they were deposited."

The court continued:

"It further appears \* \* \* that when the bankrupts failed they did not have in their possession or under their control the stocks they had purchased for the appellant, or corresponding shares. This proof might be insufficient to establish conversion at any particular time prior to the failure; but it does make out at least a prima facie case of conversion at some time prior thereto."

From the above it is clear that, inter alia, the court, in determining how to classify claims of reclaiming creditors, must ascertain (1) whether there was a conversion at some time prior to the failure, and (2) what the account between the parties was on a liquidation as of the time of the failure. From the foregoing observations as to the "restatement" by the master of the Bamford account, it will appear why the court in Ex parte Braun held the "restatement" there to be wrong.

 $\frac{107,350.75}{19,862.82}$ 

follows: Debit balance 100 shares	ce March 31, 1907 (Exhibit F) Atchison bought April 1st		\$76,550.77 10,787.50	
Credit for d 100 Atchisor Value of "lo	debits lividends a sold April 13 ong" stocks after liquidation sta		925.00 748.00	
83,723.00				
Deficiency to be charged against "deposit" stocks\$ 3,764.93				
Exhibit F was the liquidating statement:				
Date.	Price.	Amount.	Days Interest.	
1909. Mar. 31 Long Depos. Apl. 1	Balance 200 Sloss 100 Sug. 400 Rdg. 200 Cop. 102 Safety Car 10 Pat. Sav. In. 20 1st Natl. Bk. at Divd. 20/2, 300 U. P. 1¾ 100 Sug. 100 Atch	\$76,550.77 10,787.50 149.66 19,862.82 107,350.75	1	
Cr.				
1909. Apl. 1.  Divd. 20/2, 300 U. P				
of suspensi	owing is a memorandum of 1 ion, April 13, 1909, and valifices approximately at time of 200 Sloss	ue of same as of suspension:	s if sold at the 15,175.00 13,525.00 27,700.00	

The value of the "long" stocks, viz. \$72,050, did not include 102 Safety Car at \$12,635.25, 10 Patterson Institution at \$4,997.50, and 20 First National Bank of Patterson at \$5,995. Taking all the items on both sides of the ledger into consideration, there was a balance in favor of Braun of \$19,862.82. The master, however, when he "restated" the account of Braun, showed a deficiency of \$3,764.93, and the court held that the master's restatement "was incorrect." The court said:

"The testimony is wholly insufficient to afford a basis for charging the appellant with the balance stated, nor does it definitely establish any balance."

This view seems to be supported by the figures, because, after charging Braun with the proper debit items and crediting him with the proper items, there was a balance of \$19,862.82 in his favor.

From the foregoing it appears that Braun had a credit balance, and not a debit balance, as the master found. If the facts as to conversion had been the same as in the Bamford Case, there could not have been any distinction in principle between the Braun and the Bamford claims. In the Bamford Case, however, the master had expressly found that some of Bamford's stock had been converted, and this was also found by the Circuit Court of Appeals. In the Braun Case, the master found that all of Braun's stocks were lawfully hypothecated. This the Circuit Court of Appeals did not find expressly one way or the other, but that court indicated doubt as to the fact, stating:

"\* \* \* The testimony goes far to negative any right in the bankrupts to have the securities in question in the loan at the Mechanics' Bank. \* \* \* "

And the court further said:

"But the testimony leaves the actual state of the account between the appellant and the bankrupts in a state of uncertainty. \* \* \* The bankrupts were not carrying the appellant's 'long' stocks, which the statement purports to liquidate. But when they had been converted is not shown, so that the value at which their proceeds should have been credited does not appear, and it cannot be determined whether the appellant owed the estate or vice versa."

From this it must be obvious that the Braun Case was distinguished from the Bamford Case solely on the question of evidence. In the Bamford Case the conversion had been clearly shown as having occurred prior to the failure, while, according to the court, it was not shown in the Braun Case when the conversion occurred. The result in the Bamford Case was that the liquidation statement of the account clearly demonstrated that there was a credit balance in favor of Bamford, while in the Braun Case, because it was not shown when the securities were converted, the value at which their proceeds should have been credited did not appear, and consequently it could not be determined whether the appellant owed the estate or vice versa.

As a conclusion to the foregoing, the clear inference is that the Bamford claim was placed in class A because the conversion was shown to the satisfaction of the court, and the Braum claim was placed in class B because the conversion was not satisfactorily shown.

The confusion which has arisen in argument in construing the Braun Case is possibly added to by a misinterpretation of the second sentence of the opinion, where the court said:

"The account as 'restated' by the special master—whether rightfully or wrongfully—shows an indebtedness to the bankrupt estate, instead of a balance to the credit of the appellant."

When this sentence is read with the rest of the opinion, it will be found to be merely a statement of fact as to what the master held, and is not a statement of what the court held, for the court later in its opinion pointed out that it did not accept the "restatement" of the master. In view of the interpretations which have been placed by counsel upon these two opinions when read together, and of the construction of the law of these two cases by the master, it is desirable to state the principles to be deduced from, or which necessarily follow, the views expressed by the Circuit Court of Appeals in the Bamford Case.

- [9] Once the basic propositions of the Bamford Case are accepted, it would be entirely illogical to hold that, in order to place a claimant in class A, the conversion of stock must per se amount to sufficient to wipe out the debit balance, without regard to the state of the whole account between the customer and the broker. Such a distinction, however, has been made by the master between, for instance, the Godwin claim and the Patterson claim in the case at bar. In the Patterson claim the conversion was sufficient per se to wipe out the debit balance, and the master therefore placed Patterson's claim in class A. But such cannot be the true test, either on principle or from the standpoint of fair and equitable consideration, based on the practical conduct of business of this kind. The true inquiry should be to ascertain whether, after and as a result of the conversion, the customer would have a credit balance in his favor on the whole account, or a debit balance. If he would have a credit balance, he could take courses (2) or (3) above mentioned; i. e., either to recover his securities by paying his debit balance or to obtain the net proceeds by ordering the securities sold. If, on the other hand, as the result of the conversion, there would nevertheless be a net debit balance against the customer, then, if the securities were sold, he would still remain the debtor of the broker, or, if he paid his debit balance, he would nevertheless be out of pocket when the broker delivered the securities to him.
- [10-12] Lastly, in this connection, it is urged that margin customers are on a different basis from those who have paid for their securities outright. There is no logical ground for this distinction. The margin customer is the owner of the securities which the broker is carrying for him, and they become his absolutely the moment he pays any amount outstanding against him. The broker, it is true, may not hypothecate the securities of the outright owner, and may hypothecate those of the margin customer; but he has no right to convert to his own use the securities of the margin customer, and when he does so the results follow which are pointed out in Ex parte Bamford. This

rule applies where there is a conversion of any of the securities originally rightfully hypothecated.

In view of the importance of the question in this case, and with the hope that a clear rule may be laid down, which will be controlling in proceedings of this character, I will summarize what I believe to be the propositions applicable under this head:

First. As between securities hypothecated with authority and those hypothecated without authority, obviously the latter have the superior equity.

Second. Where securities are hypothecated without authority, or, though hypothecated with authority, are in part subsequently converted, the securities remaining stand on equal equities, provided that, as the result of the conversion of securities originally rightfully hypothecated, the restatement of the whole account shows a credit balance in favor of the customer.

Third. Where securities have been rightfully hypothecated, and there has not been any conversion of any of such securities, then the equity of a customer owning such securities is inferior to that of customers owning securities as described in paragraph first and second.

Finally, it may be observed that the court in the Bamford Case proceeded upon broad grounds, holding that "the extent of the wrong is a measure of the equity," and the court did not deal academically with the questions there considered. It brushed aside Bamford's "mere nominal indebtedness," and based its conclusions upon the real state of the Bamford account. On the other hand, a conversion of part or all of the securities of a customer should not entitle his claim for that reason alone to be placed in class A. Before he should be entitled to that classification, it should clearly also appear that as a result of the conversion there is a net credit balance on the whole account in his favor.

[13] Finally, in making up the liquidation statement, or "restating" the account, the value of the securities should, generally speaking, be taken as of the date of the petition in bankruptcy. In this case, for reasons above stated, it must be taken as of the opening of the Stock Exchange, or the earliest sale thereafter of the particular kind of stock in question. Thus Godwin's claim should be placed in class A, and a claim like Marsan's in class B.

The Extent of the Presumption of Restoration as Applied to Margin Claimants and Cash Claimants.

Claim of English as to 100 Ray Consolidated Copper—Claim of Knowles as to 1,000 Ray Consolidated Copper.

On July 15, 1912, in accordance with English's request, Logan & Bryan delivered to Harris certificates for 400 shares of Ray Consolidated, belonging to English, which Harris received on account of Wilson. On October 22, 1912, Wilson purchased through Harris, for account of English, 100 shares of this stock. From time to time between December 12, 1912, and July 28, 1914, Wilson sold through Harris, for account of English, 400 shares of Ray Consolidated. Wilson

son owed cash customers 900 shares of this stock (100 to English and 800 to others), and from the time of the suspension until December 14, 1914. Wilson had on hand with Harris 1,940 shares. On December 14, 1914, Harris sold 1,940 shares of this stock for \$30,300.99; i. e., at \$15,619 per share. The master found that English had traced his 100 shares of stock, and awarded to him a lien in class A for \$1,561.90. This conclusion of the master was based upon the theory that English had a claim superior to those of the margin traders. In other words, as Wilson owed only 900 shares of this stock to cash customers, and had on hand with Harris 1,940 shares, the master has awarded in full to the cash customers, and it would follow from this holding that margin customers, who had traced, under Gorman v. Littlefield and Duel v. Hollins, would receive only their pro rata of the remaining shares. Using, for purposes of illustration, these figures as to Ray Consolidated, and, for the moment, not referring to other features of any particular claim, the effect of the master's holding is that 900 shares are available to cash customers in class A, and the remaining 1,040 shares are to be prorated among those who have traced, but who are not cash customers. The total number of shares held by customers who were "long" of Ray Consolidated at the time of the suspension was 4,140, so that if customer John Doe (for instance) were in this latter class, and traced 100 shares of Ray Consolidated, he would be entitled only to his pro rata of 1,040 shares. In other words, after deducting from the total of 4,140 the 900 full paid, the remainder would be 3,240, and, as John Doe owed 100 shares, his proportionate ownership of the securities thus remaining would be 100/3240. There would be 1,040 shares left with which to satisfy claims for 3.240 shares; wherefore it would follow, from the master's theory, that John Doe would be entitled to 100/3240 of 1,040

This view of the master follows a rather ingenious argument, which carries the theory of presumptive restoration to its ultimate limit. The theory now pressed is that it must be presumed that when the stockbroker, for his own purposes, was converting Ray Consolidated, he converted those shares belonging to margin customers, because he owed the cash customers the highest duty not to deal wrongfully with their securities. The difficulty with this theory, as I see it, is that it confuses tracing with priority. Preliminarily, it may be stated that, where a claimant has traced by certificate number, or, under Gorman v. Littlefield, where there is no other claimant for the same kind of stock, such claimant so tracing is entitled to all of that stock represented either by the identical certificate number or by the same kind of stock "in the box" of the bankrupt, as the case may be. Whether such a claimant shall be then placed in class A or B depends upon the character of the equity of that claimant as developed by the facts.

It thus remains to consider what the relations are between cash customers and margin traders under such circumstances as were passed upon by the master in respect, for instance, of Ray Consolidated. The stockbroker, of course, had no right whatever to hypothecate a security of a cash customer. Under the agreement between the broker and his

margin customers the security of a margin customer could be loaned by the stockbroker or pledged by him for the sum due thereon, or for a greater sum, without further notice to the margin customer. The securities belonging to a margin customer, against whom there was a debit balance, could be and were lawfully hypothecated, and securities of such a margin customer could be taken out of the pledge to enable the broker to lend the "long" margin customer's stock to the "short" customers; but the broker had no right to use the hypothecated securities of the margin customer for his own purposes. If the broker sold any securities in the pledge for his own speculative account, he was guilty of conversion. The testimony in regard to Ray Consolidated is as follows:

"Q. Will you tell us with regard to Ray Consolidated the condition, the net condition, at the date of the failure? A. 1.940 shares.

"By Mr. Gaylord: Q. The longs and shorts, you mean, and between Wilson and his customers, the total? A. There was 4,040 shares held for various clients.

"By Mr. Mitchel: Q. And the total amount of shorts? A. At that time the firm was short 2,100 shares.

"By Mr. Reynolds: Q. No customer was short any shares? A. No. "By Mr. Remington: Q. The firm was short? A. Yes."

[14] There was a list prepared by Mr. Ogden from the books of Wilson, which showed Ray Consolidated owing to long customers 4,140 and owing by short customers 2,200; but the above-quoted testimony of Gauthier (without reference to additional testimony) is clearly controlling. What this testimony means, therefore, is that prior to the suspension Wilson converted to his own use 2,200 shares of Ray Consolidated out of the 4,140 shares of that stock which he should have had on hand. In other words, it is impossible for any one to say whether, as matter of fact, he converted the shares of cash customers or of margin customers, or, putting the matter another way, it may very well be that he converted securities belonging both to cash customers and to margin customers. At this point it is urged that it must be presumed that he selected the stock of the margin customer for the purpose of converting it, leaving untouched the stock of the cash customer. The difficulty with this theory is that the stockbroker had no more right to convert the stock of a margin customer than he had to convert the stock of a cash customer; for, although the broker had the right to pledge or lend the margin customer's stock under the terms and within the limits of his agreement with the margin customer, he was not thereby authorized to convert it. The conclusion of the special master in this regard can be sustained only by invoking the purest kind of legal fiction, not in my opinion justified by anything said in Gorman v. Littlefield, supra, or Duel v. Hollins, supra, or to be inferred therefrom. The logical procedure, it seems to me, is that the first requirement laid upon a claimant is to trace his stock or its identifiable proceeds. If he fails in that regard, no matter how grievous the wrong, he becomes a general creditor. Without discussing in detail the principles laid down in the Gorman and Duel Cases, supra, the ultimate result is that the claimant must find physically in existence either the precise certificate

or a stock in kind, or the earmarked proceeds where there is a liquidation, as in the case at bar, and, if there are not enough shares to satisfy the particular group of claimants, then such claimants are entitled

to their pro rata.

So, in the case at bar, the 20 shares of M. C. Hayes were traced by certificate number. I shall assume, solely for the purpose of this illustration, that no other shares were thus traced by certificate number. There remained, therefore, 1,920 shares. Of this total English traced 100 shares. As above stated, the total number of shares of customers of Wilson who were "long" of Ray Consolidated, at the time of suspension, was 4,140. Deducting from this total the 20 shares of Hayes, the remainder is 4,120. English, therefore, is entitled to 100/4120 of the 1,920 shares which are left after awarding 20 shares to Hayes, or to 46.602 shares. As Ray Consolidated sold for \$15.619 per share, the 46.602 shares of English must be multiplied by \$15.619, and the result will represent the lien of English.

Having thus ascertained the proportion of shares to which English is entitled, the next inquiry is as to the class to which his claim belongs. It appearing that English owned his Ray Consolidated outright, his claim falls in class A, for reasons heretofore stated. On the other hand, to make the illustration complete, another claimant, who traced his specific 20 shares of Ray Consolidated, might nevertheless be placed in class B for reasons set forth supra. (See heading "Godwin's

Claim.")

[15] The master found that Knowles' 1,000 shares of Ray Consolidated had been converted prior to bankruptcy in an amount sufficient to pay his debt in full. The cost price of Knowles' 1,000 Ray Consolidated was \$21,685. The debit balance against Knowles was only \$11,108.60. Under my interpretation of Ex parte Bamford and Ex parte Braun, supra, this puts the claim of Knowles in class A. Using the illustrative figures, this would entitle Knowles to \frac{1000}{4120} of 1,920 shares of Ray Consolidated, or 466.02 shares of that stock. Multiplying 466.02 by \$15.619 would give the total amount for which Knowles is entitled to a lien. For his balance, Knowles is a general creditor.

of Ray Consolidated, such failure cannot enlarge the pro rata of those who have traced. Matter of Pierson, 233 Fed. 519, 147 C. C. A. 405; Id., 238 Fed. 142, 151 C. C. A. 218. In giving the figures above, it will be understood that I am using them only by way of illustration. It is contended, for instance, that Wallace has traced by certificate numbers. It seems to me, on the evidence, that Wallace has traced 200 shares by certificate numbers (Nos. 20,523 and 27,770), but has not traced by certificate number his remaining 300 shares. (It is not clear to me what has been held by the master in this regard. This point may be taken up on the settlement of the order.)

In view of the fact that the conclusions under this heading affect a number of claims, the general principles will be restated, even at the

expense of repetition:

[17] Where, by reason of conversion, less shares of a certain stock are found "in the box" than are necessary to satisfy the claims of

"long" customers, the procedure is first to trace. If a claimant identifies his stock by certificate number, etc., he is entitled to reclaim that stock or its proceeds. After such specifically identified shares are withdrawn from the total of shares, the remaining claims will be prorated under Duel v. Hollins, supra. After the proper pro rata has been assigned to each claimant who has successfully traced, then the equities of the claimant will be considered, in order to determine whether the claim falls under class A or class B.

[18] I have not discussed any of the contentions revolving around the fact that the stock was in the Harris pledge, and not physically in the Wilson box, because I regard that fact as immaterial for the purposes of the discussion under this head. Further, if there are any cases where there are less shares found than are necessary to satisfy the claims of "long" customers, but where it can be shown that stock has been legitimately used under the terms of the agreement to cover short sales, then, obviously, the situation is different. In such instances, it is a proper and fair presumption that the broker utilized only those securities which he had the right to lend, leaving unaffected the securities paid for by cash customers. I have not attempted to examine the details of each claim, and the proper classification thereof may be taken up upon the settlement of the order.

## Date of Valuation of Securities.

It has happened in this case, and doubtless will in others, that some securities have survived the liquidation. Where the market has arisen, those whose securities were sold suffered accordingly; but that fact should not enable the fund to be increased by the additional present market value of those securities which have not been sold. The contribution which a claimant, whose securities have survived liquidation, is called upon to make, is ordinarily the amount which his securities were worth at the date of bankruptcy. If, for instance, such a security was worth \$50 at that date and is now worth \$100, the amount in the fund will be \$50, and it is due to the unpreventable accidental good fortune of the claimant that he may now have all above the \$50. If the security had gone down, the fund would have been better off, and the claimant worse off. In other words, such claimant may pay into the fund the sum of \$50 and take his stock, or, failing so to do. the stock may be now sold, and from the proceeds \$50 thereof paid into the fund, and the balance paid over to the claimant. This applies in cases like those of Rolph, Conant, and Fiske. Appeal of Mary H. Hudson, supra.

As above stated in this case, owing to the peculiar conditions, the value of the securities should not be taken as of the date of bankruptcy, but must be taken as of the date of the opening of the Stock Exchange, or as soon thereafter as there was a sale of the particular kind of stock in question.

### Particular Claims.

Attention has been called to various instances in which it is contended that there is some error in calculation by the master. I do not

now pass upon these contentions, but refer these details to the master. He can readily determine whether or not these contentions are correct. In passing on the various claims, I have not intended to foreclose such details. It has been my purpose solely to point out the principles governing the classification of the various claims. Except in so far as modified by this opinion, the master has properly dealt with the claims, inter alia, of Duck, Patterson, and Fiske, against which objection has been made.

A word may be added, however, as to the claim of Mrs. Duck. The master properly found that this claimant had traced 20 shares of Mexican Petroleum into the Harris pledge. In addition, on August 1, 1914, she owned 50 shares of Kansas City Southern, but was short 200 Reading. After debiting Mrs. Duck's account with \$14,000 for the short sale of Reading, she had a credit balance of \$2,071, and was "long" 20

shares of Mexican Petroleum.

[19] If it be assumed that the evidence showed she was a margin trader, and that her long stock and cash were security to the broker for the 200 Reading, nevertheless the situation was that she had a cash balance, and was long her Mexican Petroleum stock. Obviously, that is only another way of saying that she owned the Mexican Petroleum outright, and that her position, in equity, is no different from that of a cash customer who had no marginal transactions. In his finding in this regard the master was right.

Claims of Various Persons Represented by Mr. Scott, Messrs. Noble, Estabrook & McHarg, and Messrs. McDonnell & Lebett.

[20, 21] The master dismissed various claims, because the claimants had failed to trace their stocks into the Harris pledge, by reason of the fact that no proof was given, other than the testimony of Wilson's accounting, that Harris actually purchased or received their Whether the master shall take proof in respect of these claims is a matter which rests in the discretion of the court. Under ordinary circumstances a court would be disinclined to give further opportunity to such claimants. I recognize fully the time and labor which have been expended by those who have been active in this proceeding, and they are entitled to that consideration which is usually accorded to the diligent. This case, however, is peculiar. The failing stockbrokers had their main office in California and their branch offices away from New York, and all or many of the claimants represented under this heading (who reside far from New York City) filed their claims and gave their depositions, and it is very natural that they should have assumed that the testimony of Wilson's man, Gauthier, was sufficient. It is not unlikely that in a number of instances that testimony was enough to establish the claim. Indeed, as to Euans and some others (by virtue of the telegram), counsel for Auten et al. concede that such claimants should be placed in class A.

If the determination of this court should be reviewed, however, the appellate court might be of opinion that the claimants should positively follow the claims into the books of Harris. I think it advisable that this should be done in their case for their own protection. In the

circumstances which I have outlined, I am of opinion that it would not be fair, and, indeed, would be harsh, to deny to these claimants this opportunity. These claimants, if so advised, may therefore supplement the existing testimony by testimony as to the Harris books. The least expensive and most expeditious method to that end may be adopted. The expense of stenographer's minutes, if any, for that purpose, and of the accountants, if any, for that purpose, will be specifically charged against these claimants. To the foregoing general disposition there will be a slight exception as to the claim of Quillian. In his case, in addition to the expenses above stated, there will be deducted the expense of the master, if such expense shall be incurred.

# Contribution to Expenses.

The expenses of a proceeding such as this, where the estate is that of a bankrupt stockbroker, may, generally speaking, be divided into three classes: (1) The commissions of the trustee and the allowances to his attorney; (2) the allowance to the master and the disbursements for stenographer's minutes; (3) those expenses which ordinarily a claimant would incur in order to trace his securities.

[22, 23] (1) The commissions of the trustee are, of course, calculated on funds, which do not include either securities or their proceeds, which claimants have successfully reclaimed; nor can any allowance to the attorney for the trustee be made out of such securities or their proceeds.

[24] (2) The allowances to the special master and the expenses for stenographic minutes must come preliminarily out of the general estate. The theory is that the stock of the claimant belongs to him, and under the Pippey Case and In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, at page 893 (which merely exemplify a well-known practice), the claimant is entitled to his securities, or their proceeds, without deduction for this class of expenses. It is the duty of the trustee to deliver to a claimant the securities or traced proceeds to which such claimant is entitled, and the trustee, in effect, represents only general creditors.

In the practical administration, however, of estates such as this. it is difficult, and, indeed, hazardous, for the trustee to take upon himself the determination in controverted cases of the title of a claimant, and it is both wise and desirable in such cases, when the trustee is in doubt, that he should require proof to be made. If it should turn out that there are not sufficient funds in the general estate to permit a reasonable allowance to the master and the payment of stenographer's charges, then such balance as is necessary to be paid to the master or the stenographer, or to both, as the case may be, should be equitably apportioned among the successful claimants. The reason for this is that it would not be possible otherwise for the court to determine the rights of the claimants, and the court will protect its own officer in such circumstances. These expenses should first come out of the general estate. If that is not sufficient, then they should come pro rata out of the securities or their proceeds available to class B claimants. If not satisfied out of class B securities or proceeds, then the balance, if any, for this purpose, should be appor-

tioned pro rata among class A claimants.

[25] (3) It was necessary for the trustee to engage accountants to unravel the details contained in the Harris books. An order has been made apportioning this expense among various claimants including the trustee. (Exhibit B, attached to petition of M. & L. W. Scudder, dated April 14, 1917.) No question has been raised as to the reasonableness of the charges. While it is true that the trustee represented general creditors, and doubtless has done everything in his power in their interest, nevertheless it is also true that the work on these accounts was for the benefit of the claimants, and work which it would have been necessary for them to have done, if this arrangement had not been made. These disbursements, in my opinion, were therefore chargeable to each claimant in the amounts set forth in the petition of M. & L. W. Scudder. In a case such as that of Mrs. Conant, who was able to trace her securities without the aid of the accountants, no charge for that service should be made. I do not understand that what I have set forth supra as to contribution conflicts with the conclusions of the special master set forth at page 114 et seq. of his report; but I have indicated my views because of the fact that some questions in this regard were suggested on the argument. These conclusions of the special master as thus interpreted by me are approved.

In order to avoid misunderstanding, I think it desirable to state that under this heading I am referring only to the case of a bankruptcy of stockbrokers. In the ordinary mercantile bankruptcy, the claimant can point to his specific merchandise, and in such case usually he is entitled to reclaim without contribution of any kind; but a bankruptcy of the character of that at bar must be treated differently because of the practical considerations above referred to. Possibly, when the figures are rearranged, this discussion as to contribu-

tion to expenses may prove academic.

#### Conclusion.

Except in the respects hereinbefore set forth, and saving corrections in figures which the master may make, and any necessary recasting of accounts, his report is approved.

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#### THE CUBADIST.

(District Court, S. D. Alabama. August 13, 1918.) No. 1701.

- 1. Seamen &=24—Wages—"After the Cargo has been Discharged."

  Rev. St. § 4529, as amended by Seamen's Act (Comp. St. 1916, § 8320), providing that seaman on vessel making foreign voyage shall be entitled to his pay within 24 hours "after the cargo has been discharged," does not entitle a seaman to his wages in full up to the time the cargo has been discharged at any port or ports; the quoted words being used in the sense of the termination of the voyage for which the seaman has been employed.
- 2. Statutes €==208—Construction.

  Words in a statute are not to be given their ordinary meaning, when the context shows that they were intended to be given some other meaning.
- 3. Statutes €=205—Construction.

  In determining meaning of words in statute, the whole statute must be construed together, so as to get a harmonious construction of the whole, if it can be done.
- 4. SEAMEN @=24—Wages. Under Rev. St. § 4529, as amended by Seamen's Act (Comp. St. 1916, § 8320), a seaman is entitled at once upon his discharge to one-third of the balance of the wages then owing to him, and not to a bonus equal to such an amount.
- 5. SEAMEN &==18—REFUSAL TO PAY WAGES—"WITHOUT SUFFICIENT CAUSE."

  Under Rev. St. § 4529, as amended by Seamen's Act (Comp. St. 1916, § S320), as to master who refuses or neglects to make payment "without sufficient cause," having to pay seaman double wages, it is only in cases where the refusal to make payment is willful, and without justification or excuse, that double pay should be given.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Without Sufficient Cause.]

- 6. SEAMEN \$\iiint 24\to Wages\times "When the Voyage is Ended."

  Under Rev. St. \\$ 4530, as amended by Seamen's Act (Comp. St. 1916, \\$ 8322), providing "and when the voyage is ended," every seaman shall be entitled to the remainder of his wages due as provided by section 4529 (section 8320), the voyage is ended for any particular seaman when his period of employment under his contract ends.
- 7. Infants \$\iff 58(1)\$—Wages—Minors.

  Seamen, who were under 21 years when they signed shipping articles, were not bound thereby, and are entitled to their discharge and pay, although the period of employment under their contract is not ended.

In Admiralty. Libel by Henry W. Gordon and others against the steamship Cubadist. Decree for three of libelants, and libel dismissed as to others.

Howard & Pegues, of Mobile, Ala., for libelants. Palmer Pillans, of Mobile, Ala., for claimant.

ERVIN, District Judge. This is a libel filed by Henry W. Gordon and several other seamen against the steamship Cubadist, in which

they set up that they were employed as seamen about the 18th day of April in the port of Boston. The shipping articles provide as follows:

"It is agreed between the master and seamen or mariners of the steam-ship Cubadist, of which Harry L. Michelson is at present master, or whoever shall go for master, now bound from the port of Boston to Puerto Padre, Cuba, and for such other ports and places in any part of the [West Indies and or Gulf of Mexico] as the master may direct, and back to the final port of discharge in the United States north of Hatteras, for a term not exceeding six months."

The vessel sailed to Puerto Padre and took on a cargo to New Orleans, where she unloaded this cargo, and then proceeded to the port of Matanzas, Cuba, where she again loaded a cargo and brought it to Mobile, Ala., where she arrived on, to wit, May 20, 1918, and proceeded to unload this cargo. After arrival at Mobile, the various seamen demanded their discharge and the full payment of their wages, which demand was refused by the master. The seamen then filed this libel, in which they contend that they are entitled to be discharged and to be paid in full, because the voyage they signed for is ended.

There is no dispute between the libelants and the vessel as to the amount of wages earned and the amount paid on account, nor is it contended that the vessel has returned to a port north of Hatteras, or that the six months has expired, but the whole question in dispute is: Have the seamen completed the voyage they signed for, so as to entitle them to be discharged and paid? The seamen base their contention upon the language of sections 4529 and 4530 of the Revised Statutes, as amended by the Seamen's Act (Act March 4, 1915, c. 153, §§ 3, 4, 38 Stat. 1164 [Comp. St. 1916, §§ 8320, 8322]), which read as follows:

Section 4529: "The master or owner of any vessel making coasting voyages. shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases, the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

Section 4530: "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. And when the voyage is ended, every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: Provided fur-

ther, that notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes, any court having jurisdiction may, upon good cause shown set aside such release and take such action as justice shall require: And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

[1] It is contended by libelants that they are entitled to full pay, even if not to a discharge, under the second paragraph of section 4529, which provides that the seaman shall be entitled to his wages "in the case of vessels making foreign voyages \* \* \* within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens." It will be noticed that the language does not expressly state that the seaman shall be entitled to his discharge when the cargo has been discharged; hence the argument is that the statute provides that the seaman shall be entitled to his wages in certain contingencies, one of which is the discharge of the seaman, either by the termination of the time for which he is employed, or for any other reason, or when the cargo has been discharged.

It is urged upon me that this language as written necessarily implies that the seaman is to be paid his wages in full up to the time the cargo is discharged at any port or ports at which the vessel calls and unloads her cargo. To illustrate the contention by the case shown here: The vessel went from Boston to Puerto Padre and loaded a cargo which she discharged at New Orleans. She then went back to Matanzas and loaded another cargo, which she discharged in Mobile, and that hence, under the language of the above statute, the seamen were entitled to be paid their wages in full as earned at both New Orleans and Mobile.

- [2] It is urged with earnestness that the words used in a statute are to be so construed as to give the words used their ordinary meaning. This rule of construction is not always to be followed literally. It is true that words used are to be given their ordinary meaning generally, but one should never lose sight of the purpose intended to be accomplished by statute, and the words used are not to be given their ordinary meaning, when the context of the statute shows that they were intended to be given some other meaning.
- [3] Again, in getting at the meaning of words as used in a statute, the whole statute must be construed together, so as to get a harmonius construction of the whole statute if this can be done; otherwise, we would have one part of a statute given one construction and another part an entirely different construction, so that the parts will be inconsistent with each other. A careful reading of section 4529 will show that Congress intended that the seamen should be paid their wages in full when their term of service is ended, either by performance or discharge. Each of the instances in which the seaman is entitled to his full wages shows that this was intended, and when we examine the language used, which says that in case of the vessel's making foreign voyages, the seaman shall be entitled to his pay within 24 hours after

the cargo has been discharged, these words "after the cargo has been discharged" manifestly were used in the sense of the termination of the

vovage for which the seaman had been employed.

When these statutes were originally written, it was customary for the crews of the vessel to load and unload the cargoes. That custom has in course of time been entirely changed, so that now the loading and unloading of the cargo is performed by stevedores, who themselves furnish the hands to put the cargo aboard and store it on the vessel, and to take it out of the vessel and deliver it on the shore. This will explain the provisions in this statute, requiring the seaman to remain until the cargo is discharged, because the cargo was then discharged by the seaman, and his employment was not ended until he had helped discharge the cargo. This construction must necessarily be the one adopted, unless there is to be a conflict between the provisions of section 4529 and those of section 4530, because section 4529 provides for the payment to the seaman of his wages in full, while section 4530 provides for the payment to the seaman of "one half part of his wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended. \* \* \* And when the voyage is ended, every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section 4529."

It will be noticed here that this half part of the wages is payable at each port where the vessel shall load or deliver cargo. Now, to put the construction which is sought upon the language used in section 4529, would make that section require the payment to the seaman in full of his wages, when the cargo was discharged, and section 4530 would provide for the payment to the seaman of only one-half of his wages when the same thing was done. It is manifest that these two sections would then be in hopeless conflict. The courts have all agreed that the purpose of the provisions of section 4530 which authorizes the vessel to retain one-half part of the wages which have been earned by the seamen was to enable the vessel to have some hold upon the seaman to induce him to perform his contract of service in full, so that he would himself have an inducement to prevent him from forfeiting his contract.

I am therefore constrained to overrule the contention of the seamen and to hold that the words used in section 4529, giving the seaman the right to his wages on a foreign voyage, when the cargo has been discharged, were used to indicate a termination of the period for which the seaman had been employed.

[4] There is another expression in this section which at first blush is confusing. It is found in these words:

"And in all cases, the seaman shall be entitled to be paid at the time of his discharge on account of wages, a sum equal to one-third part of the balance due him."

This language is open to two constructions: One is that the seaman is to be given a bonus when he is discharged, equal to one-third part of the balance of the wages then owing to him, while the other con-

struction is that he shall be paid at the time of his discharge, one-third of the balance then owing to him. The language used is awkwardly expressed, but bearing in mind that the provision for the payment to the seaman of the balance of his wages, which precedes this language, did not give them to him, except at the end of some enumerated period of time, I think that the purpose was to give him, at once upon his discharge, one-third of whatever balance was then owing, so that he might have something on which to live until the balance of the wages were payable to him.

[5] There is a confusion as to another part of this statute, which

reads as follows:

"Every master or owner, who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause [italics mine] shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

It has been contended that, wherever the seaman recovers his wages after a refusal of payment has been made by the master, this recovery should have added to it double pay for the period following the demand and until the hearing. I cannot agree with this contention, for I do not think the words "without sufficient cause" are intended to mean this. If this were the meaning intended, the words "without sufficient cause" would have been omitted, and the language then used would have expressed this meaning. The inclusion of these words, however, negatives this idea.

What, then, is meant by the words "without sufficient cause"? There are numerous instances where masters have been known to willfully refuse to pay seamen their wages. In these cases I think it unquestionable that, if the seaman recovers, he should also recover double pay. There are, however, other cases where the master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where it may be a very close question. I do not think that the statute was intended to penalize any master or vessel for exercising sound judgment and discretion, or to require them to surrender such judgment under a penalty of double pay. I think the language used carries with it the idea that, where the court finds that the master's refusal was willful and without justification or excuse, double pay should be given, but where the master was exercising a reasonable and proper discretion, and the question was doubtful, it reserves to the court the power to pass upon the question of the reasonableness or the sufficiency of the excuse of the master, and give or deny the double pay, accordingly as the court may find the contention of the master to be honest or a mere pretext.

[6] Another question has been pressed upon me, which is the construction of the language used in section 4530, where it says:

"And when the voyage is ended, every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section four thousand five hundred and twenty-nine of the Revised Statutes."

It is contended here that the voyage is ended whenever the vessel carries a cargo from one port to another and there unloads it. I cannot accept this contention. I think the language used imports the idea that the voyage is ended for any particular seaman when his period of employment under his contract ends. The voyage might be ended for one seaman at one port, for another seaman at another port, and for still a third seaman at a different port; for instance, a vessel might sail from Mobile to Havana, Cuba, thence to the River Plate, thence to Jacksonville, Fla., and back to Mobile. She might employ a number of her crew to take the whole round trip, another part to go only as far as Havana, and another part to the River Plate. Now the voyage would be ended as to each of these seamen at the point where his contract for services terminated.

I have gone more into the detail in discussing the various contentions made as to the proper construction of these two sections, because neither I nor the proctors in this case have been able to find any construction by other courts of these statutes in this respect, though these proctors have searched diligently for such constructions. I have given the conclusions I reached and the reasons which prompted me to reach them, hoping that other judges, as the questions may arise before them, will criticize and correct or amplify them as their experience and judg-

ment may indicate.

[7] Among the libelants who joined in this libel, there were three over the age of 21 years at the time the libel was filed, and these three are Henry W. Gordon, Hermann Zahlit, and William Burman. I am of the opinion, therefore, that as to these three that they are not entitled to recover, and as to them the libel should be dismissed. There are, however, three others, Frans Westra, Hans Larsen, and Adolph Aarons, each of whom were under the age of 21 years at the time they signed the shipping articles. Being under 21 years of age, they were not bound by their contract, and hence are entitled to their discharge and pay. Belyea v. Cook (D. C.) 162 Fed. 180.

There being no dispute about the balance of the wages owing to these men, a decree will be entered in favor of each one of them against the vessel for the amount shown to be due them, with costs. McCAULL-DINSMORE CO. v. CHICAGO, M. & ST. P. RY. CO.

(District Court, D. Minnesota, Fourth Division. August 23, 1918.)

1. CARRIERS \$\infty\$-Interstate Commerce Act.

Under the Cummins amendment of March 4, 1915, to the Interstate Commerce Act, which declared that carriers should be liable for the full actual loss, a common carrier, where wheat was lost in transit is liable for the value of the grain at the point of destination, notwithstanding the shipment was made under a contract known as a "uniform bill of lading," which was part of the public tariffs filed with the Interstate Commerce Commission, and which provided that the loss should be computed on the value of the property at the time and place of shipment.

2. Carriers \$\infty 135\)—Failure to Deliver Goods—Damages.

In case of nondelivery, the carrier's common-law liability is the value of the goods at the point of destination at the time they should have been delivered.

At Law. Action by the McCaull-Dinsmore Company against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff.

Cobb, Wheelwright & Dille, of Minneapolis, Minn., for plaintiff. F. W. Root, of Minneapolis, Minn., for defendant.

MORRIS, District Judge. I hereby find the following facts established by the agreed written statement of facts and by the admissions of the parties:

#### Findings of Fact.

(1) That the plaintiff was and is a corporation, duly created, organized, and existing under the laws of the state of Minnesota, and a citizen of said state, having its principal place of business in the city of Minneapolis, county of Hennepin, state of Minnesota, and is a resident and inhabitant of said Fourth division.

(2) That the defendant was and is a railway corporation of the state of Wisconsin and a citizen thereof, and was and is a common carrier of freight and passengers for hire in and between the states of Wisconsin, Minnesota,

South Dakota, North Dakota, Montana, Iowa, and Nebraska.

(3) That at Three Forks, Mont., a station on the line of defendant, on the 17th day of November, 1915, there was delivered to the defendant, in Canadian Pacific car No. 210470, by the Three Valley Co-operative Association, 87,840 pounds, or 1,464 bushels, of No. 2 hard Montana wheat, consigned and for transportation to the McCaull-Dinsmore Company, for account of the McCaull-Dinsmore Company, Omaha, Neb., and that said wheat was the property of the plaintiff.

(4) That at the time of such delivery of said wheat to the defendant there was entered into between the consignor thereof and the defendant a certain contract for the purpose of such receipt, transportation, and delivery, which said contract is commonly known and referred to as a "uniform bill of

lading."

(5) That said contract was a part of the published tariffs, legally published and filed with the Interstate Commerce Commission. That said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; and said tariff further provided that,

in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was

provided by said tariffs.

(6) That said contract or bill of lading provided, among other things, as follows: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid."

(7) That on or about the 5th day of December, 1915, said car and contents were wrecked in transit, and the said wheat became so mixed and commingled with other wheat of other persons as to cause its identity to be lost, and no

part of said grain was ever transported to destination.

(8) That ten days was a reasonable time for the transportation of said car of grain from said Three Forks to said Omaha. That the value of said wheat at the place and time of shipment was 82 cents per bushel. That the fair market value of said wheat at destination, at the time when it should have been there delivered to the plaintiff, with interest, less lawful freight charges, is the sum of \$1,422.11, of which the plaintiff received from the defendant,

on March 8, 1916, the sum of \$1,200.48.

(9) That after the rate was fixed by the Interstate Commerce Commission the freight charges received by the defendant on said shipment of grain were based upon the weight of the grain shipped without regard to value. That the defendant contends that, by virtue of said provision in said bill of lading, it is liable only for the value of said wheat at the place and time of shipment. That the plaintiff contends that the defendant is liable for the market value of the wheat at destination at the time when it should have been there delivered to the plaintiff, less lawful freight charges. That this is a suit and proceeding arising under the act of Congress of February 4, 1887 (24 Stat. 379, c. 104), and the several acts amendatory thereof, including the so-called "Cummins Amendment" of March 4, 1915 (Act March 4, 1915, c. 176, 38 Stat. 1196 [Comp. St. 1916, §8 8592, 8604a]), and is a suit and proceeding arising under the Constitution and laws of the United States.

#### Conclusion of Law.

As a conclusion of law the court finds that plaintiff is entitled to judgment against the defendant for the sum of \$221.63, with interest thereon since the 27th day of November, A. D. 1915, together with its costs and disbursements. Let judgment be entered accordingly.

[1, 2] The sole question in this case is whether the loss to the shipper is to be measured by the value of the property at the place of destination at the time it should have been delivered, or by the value of the property at the time and place of shipment; and the decision of this question must depend upon whether or not the provision or stipulation in the bill of lading, issued by the carrier and accepted and agreed to by the shipper, that the loss should be measured by the value at the time and place of shipment and settled on that basis, was valid under the Cummins Amendment of March 4, 1915, to the Interstate Commerce Act, which was the law in force at the time of the shipment and of the loss. This amendment was passed after the decisions of the Supreme Court on the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]) cited by counsel had been rendered, and it is apparent from its language that its proposal and enactment were caused by these decisions, and that it was aimed directly at them. Viewed in the light of those decisions and of the purpose evidently sought to be accomplished, it is difficult to see how its language could be more sweeping:

"Shall be liable \* \* \* for the full actual loss \* \* caused by it, \* \* notwithstanding any limitation [the italics are mine] of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, exempt from that language, and the only way in such cases of avoiding its terms, and thus emphasizes and, if that were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher.

Under this language, is the provision or stipulation above referred to in the bill of lading unlawful and void? If it is an agreement as to value, which I think it is not, it is clearly so. The answer to the question must therefore be found in the answer to the further question: Was this a limitation of the liability of the carrier, or a limitation of the amount of recovery? And it seems to me the answer to this question is found in the answer to the further question: What would have been the liability of the carrier, and the consequent amount of recovery, if that provision or stipulation had not been in the bill of lading? In the latter case there can be no question, and it was so admitted on the argument, as it had to be, but that the liability and the consequent amount of the recovery would have been that of the common law, namely, the value of the goods at the point of destination at the time they should have been delivered; and that this is the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, whether the value is greater or less than at the time and place of shipment, is the foundation of the common-law rule.

From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void. In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant, and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matters. But, consider the matter as I may, I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom.

I cannot see that there could be any greater difficulty, after loss has occurred, in ascertaining and proving the value at the time and place of delivery or destination than in ascertaining and proving the value at the time and place of shipment. If it be true, as suggested in the argument and by the commission, as I think it may be, that the conclusion which I have reached will result in difficulties and confusion in existing rules and regulations and schedules, and in some cases, under these rules and regulations and schedules, in hardship and injustice to the carriers, and possibly in some discrimination amongst shippers, the remedy will be found in facing the law, whose language, as it seems to me, is too plain for construction or evasion, squarely, and revising and reconstructing those rules and regulations to meet it

### In re MULLINGS CLOTHING CO.

(District Court, D. Connecticut. July 13, 1918.)

No. 3613.

1. BANKBUPTCY \$\sim 228\text{-Finding of Referee-Review.}

A question of fact, when found by the referee in bankruptcy, will not be disturbed by the courts on petition for review.

2. LANDLORD AND TENANT \$\infty 101\frac{1}{2}\lldow Insolvency of Lessee-Effect.

A lease contract did not cease to be a subsisting obligation by reason of the insolvency of the lessee and the appointment of a receiver for it, and, had the lessor not re-entered, but allowed the premises to stand vacant, he could have recovered all of the rent as it accrued from the receiver.

3. Bankeuptcy \$\infty\$ 322—Tenant's Insolvency—Measure of Damages,
Where lessee company became insolvent, had receiver appointed for it,
and went into bankruptcy, lessor's measure of damages, provable by him in
bankruptcy proceedings, is loss of bargain, difference between rent agreed
upon in original lease and actual rent received from receiver and new
tenant for balance of term.

In Bankruptcy. In the matter of the Mullings Clothing Company, bankrupt. On petition for review of an order of the referee. Order modified.

See, also, 151 C. C. A. 134, 238 Fed. 58, L. R. A. 1918A, 539.

Bronson, Lewis & Hart, of Waterbury, Conn., for claimant. Carmody, Monagan & Larkin, of Waterbury, Conn., for trustee.

THOMAS, District Judge. This is a petition for review, filed by George G. Mullings, administrator upon the estate of his father, John B. Mullings, late of Waterbury, deceased.

The order of the referee appealed from reads as follows:

"Ordered: First. That the administrator of said estate be and is hereby allowed to prove claim against the estate of the Mullings Clothing Company in the sum of \$7,500.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Second. It is found that the rental value of the property returned to J. B. Mullings in October, 1914, was at that time, and for the period of five years from the date of renewal, \$10,500 a year."

The petitioner claims that this order is erroneous, in that the amount of the claim which he should have been allowed to prove against the bankrupt should have been fixed in the amount of \$15,000, instead of \$7,500.

Litigation heretofore had has already determined that the petitioner has a provable claim. The question to be decided now is what amount

shall be allowed as a claim against the bankrupt estate.

The petitioner maintains that in accordance with the terms of the lease, the clothing company agreed to pay him \$12,000 a year. After the breach of contract and surrender of the premises, the petitioner's intestate, after using reasonable diligence in securing a new tenant, finally relet the same to one Federman for \$9,000 for five years, and the difference, to wit, \$3,000 a year for five years, or \$15,000, he claims is the amount which the referee should have allowed as damages for the breach of contract of lease.

This case has heretofore been before this court, and its decision is reported in 230 Fed. 681. From that decision an appeal was taken to the United States Circuit Court of Appeals, and its decision reversing this court is reported in 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539. In accordance with the mandate of the Circuit Court of Appeals the following order was passed:

"Ordered: That the matter of petitions of John B. Mullings for allowance of claim as on file be referred to Hon. Carleton E. Hoadley, referee in bankruptcy, and the said referee will reinstate said petitions and proceed with the questions as to liquidating said claim of said John B. Mullings all in accordance with the opinion of the Circuit Court of Appeals for the Second Circuit."

All of the facts in the case are fully stated in the opinions of the District Court and the Circuit Court of Appeals, supra. So far as necessary for an understanding of the questions involved in this petition, the facts are as follows:

John B. Mullings, now deceased, was the owner of a building in the city of Waterbury. On the 25th day of July, 1913, Mr. Mullings entered into a contract of lease with the Mullings Clothing Company, by the terms of which the latter leased a portion of the building for a term of five years from the 1st day of October, 1914, for an annual rental of \$12,000, payable in monthly payments of \$1,000 each. At the time of the execution of this lease the bankrupt was in possession of the premises under a prior lease which was to expire on October 1, 1914, for which a rental of \$800 a month was agreed to be paid.

On the 19th day of August, 1914, the directors of the bankrupt company voted to wind up its affairs, and two days later all of the stockholders of the company petitioned the superior court in Connecticut to appoint a receiver, as authorized under the statutes of the state, and prayed for the dissolution and winding up of the affairs of the corpora-

tion, and such receiver was appointed.

The receiver, acting under instructions of the court which appointed him, repudiated the lease which was to begin October 1, 1914. The receiver turned over possession of the premises to the petitioner's intestate, who entered and took possession. After diligent efforts made by Mr. Mullings, the owner, a new tenant was found for the premises, and Mr. Mullings executed a lease to him on the 28th day of January, 1915. This lease was to begin March 1, 1915, and was to run for a term of five years at an annual rental of \$9,000; the rental thus obtained being \$3,000 a year less than that which the bankrupt agreed to pay in the repudiated lease.

The petitioner's intestate received \$800 from the receiver of the state court for rental for October, 1914. J. H. James, to whom the receiver sold the stock and fixtures of the corporation, in accordance with an order of the state court, took possession of and occupied the store and paid \$800 for the use of the same for the month of Novem-

ber, 1914.

The referee, after hearings had, found that \$10,500 was a fair annual rental value of the premises from October 1, 1914, to October 1, 1919.

[1] The application of the proper rule of damages to the above facts will determine the amount of the claim. So that this review raises, not a question of fact, which, when found by the referee, will not be disturbed by the courts, but a question of law.

The trustee contends that the rule of damages is the difference be-

tween the stipulated rental and the rental value.

The petitioner contends that the rule of damages is the difference between the stipulated rental and the rental secured in the reletting.

[2, 3] The contract did not cease to be a subsisting obligation by reason of the insolvency and the appointment of a receiver. Had Mr. Mullings not re-entered, but allowed the demised premises to remain vacant, he could have recovered all of the rent as it accrued. But, instead of doing that, he availed himself of the right he had under the agreement to rent the premises to a new tenant, and by so doing he acted in the interest of the bankrupt, by diminishing its contract of indebtedness to him. His agreement having expressly conferred upon him the right he exercised, there is nothing left to construction. Acting within the scope of his authority, and after exhausting every effort at his command, he relet the premises, thereby mitigating the indebtedness of the former tenant. He now asks to be allowed to prove his claim in the amount which he has suffered by the dissolution of the corporation and the consequent termination of the contract of lease.

"Where a lessee repudiates or abandons his lease, the measure of the lessor's damages for the breach of contract is the difference between the rent stipulated in the lease and the sum for which the premises are rented to other parties for the remainder of the term; and where, through no fault of the lessor, the premises remain vacant during the remainder of the term, the lessor is entitled to recover as damages, the amount of the rent reserved for the unexpired portion of the lease." 24 Cyc. 923.

In Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332, where a corporation entered into a lease with the appellants, and thereby agreed to pay

them a stipulated annual rental in monthly installments for the use of premises therein described for a term of ten years, and before the expiration of the term the corporation was dissolved by statutory proceedings and a receiver appointed, who declined to accept the benefits and burdens of the lease and abandoned possession of the premises, it was held that by the dissolution the corporation was disabled from further performing the obligations of the lease on its part, and the breach of its contract to pay rent for the unexpired term of the lease became total and final, and thereupon a cause of action immediately accrued to the appellants for the recovery of all damages, present and prospective, which they sustained by the loss of their contract, and were allowed to prove their claim for such damages and share ratably in the distribution of the estate of the corporation.

Therefore the measure of damages is the loss of the bargain—the difference between the rent agreed upon in the original lease and the actual rent received for the balance of the term.

As the record shows that the state receiver paid \$800 rental for the month of October, 1914, and James, who purchased the stock of merchandise, also paid \$800 for the month of November, 1914, and that the premises then remained vacant for three months and until March 1, 1915, when the Federman lease took effect, the damages for the first year were \$5,150, and for the succeeding four years the damages were \$12,000—or a total of \$17,150. But, as the petitioner is contending that the second rule applies here, asks that he be allowed to file his claim for only \$15,000, the court will therefore assume that such is the correct amount, although, if the record as above stated is correct regarding the rental received, the amount of the provable claim would necessarily be, under the application of the second rule, the sum of \$17,150.

It has generally been held in such circumstances as are here presented by this record that it is the owner's duty to use reasonable diligence to obtain another tenant at the best rental possible under all the circumstances of the case, and in this manner to reduce, as far as possible, the damages which the owner would be entitled to recover, and if, after using due diligence to obtain a tenant, and in the absence of bad faith or fraud in the reletting (and this record negatives such a claim) the owner or lessor leases the premises for the same term for a lesser amount than the rental stipulated in the broken lease, he is entitled to recover as damages the difference between the amount of the rental stipulated and the rental secured in the contract of reletting.

The facts in People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129, were strangely similar to the facts in the case at bar. There the lessor presented a claim to the receiver for the difference between the amount of rental reserved under the original lease (\$12,000) and the amount reserved in the subletting, which was \$9,000. There the claim was rejected by the receiver, and that action the Court of Appeals held was error, and declared that the lessor's claim "was definite and without any element of contingency."

In that case the Court of Appeals of New York, after discussing the difference between the situation of a receiver of a corporation and an assignee for the benefit of creditors, says (151 N. Y. on page 597, 45 N. E. 1130):

"What the lessor, Mills, did in this case, was to present as his claim against the estate in the hands of the receiver an indebtedness which was definite and without any element of contingency. Instead of claiming from the receiver the payment of all the rent which was to accrue during the unexpired term of the lease, Mills only claimed as an indebtedness the precise loss resulting from what he had been able to relet the premises for during the unexpired term. There was no question of a contingent liability, only to be ascertained to be such by the occurrence of future events. There was simply the presentation of a claim for a definite sum, as the loss which the lessor had suffered by the dissolution of the corporation, and the consequent termination of the subsisting engagement between it and its lessor."

The rule applicable here is found stated in Cyc. vol. 24, at page 923, supra.

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the Supreme Court held that where a contract is renounced before the performance is due, and the renunciation goes to the whole contract and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once.

I am unable to find any case, nor do counsel for the trustee refer to any in their brief, which supports the rule contended for. The whole discussion urged by the trustee is taken up with the proposition of whether the referee's finding that \$10,500 was a fair rental value was based upon the evidence. In other words, whether the referee's finding of fact was supported by the evidence. And if the only question here presented was whether the referee had correctly found the facts as claimed by the trustee, this court would not, as previously indicated, disturb such finding of fact. But such is not the case here.

A careful study of the cases convinces me that the rule of damages here applicable is the one urged by the petitioner, so that the rental value for the term is immaterial to the present inquiry.

But counsel for the trustee cite and rely upon Cohn v. Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572, and Bernhard et al. v. Curtis, 75 Conn. 481, 54 Atl. 213, to sustain the contention that the rule here applicable is the difference between the rental value for the term and the amount stipulated in the broken lease. A careful examination of the reasoning in those cases discloses that the conclusion here reached is not in violation of the doctrine laid down in Cohn v. Norton and Bernhard v. Curtis.

Both cases are reasoned out upon the fundamental doctrine expounded in Hadley v. Baxendale, 9 Exch. 341, 354, where it was held that the damages recoverable for breach of contract are—

"such as may fairly and reasonably be considered either arising naturally; i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

The Hadley v. Baxendale rule has been generally adopted by the courts of this country, and the observation made by the courts respecting this rule is well expressed by Judge Carpenter in Cohn v. Norton, supra, where he said:

"This rule has been criticized somewhat as not being sufficiently definite; but we apprehend that any difficulty of that sort has necessarily arisen from the difficulty in applying the rule in given cases. It is not an easy matter in many cases to determine whether a given result is the natural consequence of a breach of a contract, or whether it arose from a matter which may reasonably be supposed to have been contemplated when the parties entered into the contract. Oftentimes it is a question on which men's minds may well differ."

Applying the reasoning in the two Connecticut cases relied upon by the trustee to the instant case, the rental value of \$10,500 would be material in case no reletting had been made, and in that case the petitioner could then prove his claim upon the theory which the trustee now urges. But the reletting to Federman at \$9,000 (in the absence of bad faith or fraud, and none whatever is shown) fixes definitely the actual value as the basis upon which the rule is to be computed.

In view of the conclusion reached, the order of the referee is modified, to the extent that the petitioner shall be allowed to prove his claim as a general claim, and that he be allowed as a general creditor to share pro rata with other general creditors in the dividend to be paid from the estate in the sum of \$15,000, as prayed for by the peti-

tioner.

Ordered accordingly.

# BUNCH et al. v. UNITED STATES ex rel. and to the Use of TOWNSEND et al.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

No. 4999.

1. JUDGMENT \$\infty 619-Res Judicata-Jurisdiction.

Judgment against a county is res judicata, on mandamus against its officers to compel levy for and payment of the judgment, as to the defense, that might have been made in the action, that there was no diversity of citizenship between the real parties in interest to give the court jurisdiction

2. Judgment \$\infty 619-Res Judicata-Limitations.

The defense of limitations, available in action on judgment, is res judicata, on mandamus to compel levy for and payment of the judgment for plaintiff in the action.

3. JUDGMENT \$\sim 511-Collateral Attack-Fraud.

Fraudulent representations as to ownership of the cause of action to show jurisdiction on the ground of diversity of citizenship do not render void the judgment for plaintiff, and so are available only in direct suit to avoid, and not on collateral attack in mandamus, to compel payment of, the judgment.

4. JUDGMENT \$\infty 456(1)\$—AVOIDANCE FOR FRAUD—DILIGENCE.

Disclosure of diligence to discover the fraud is, after long delay, indispensable to obtain relief against judgment because of fraudulent representations, in the action in which judgment was obtained, on the tendered issue of ownership of cause of action to give jurisdiction on the ground of diversity of citizenship.

5. EQUITY \$\sim 84\$—Laches—General Application.

The doctrine of laches is an equitable principle applied to promote, but never to defeat, justice.

6. EQUITY \$\infty 87(2)\ldots\ldot \text{Following Statute of Limitations.}

The doctrine of laches has no function when the analogous action or proceeding at law is not barred, and no unusual conditions invoke its application within the period of limitations to secure a just result.

7. Mandamus = 143(2)—Collection of Judgment-Laches.

Owner of judgment against a county was guilty of no culpable laches or breach of duty, for which the court in its discretion should refuse mandamus to compel payment, though for 30 years after original judgment, during which the county amassed other large indebtedness, he did nothing except to obtain renewal judgments; application for mandamus being a year after the last judgment, and limitations for issue of execution being 10 years.

8. COUNTIES \$\infty=192\text{-Tax Levy-Railroad Aid Bonds.}

The quoted words in Laws Mo. 1857, p. 62. § 14, and Laws 1859-60, p. 404, authorizing a county to subscribe for stock of a railroad company, issue bonds therefor, and "take proper steps to protect the interest and credit of the county," empower it to levy and collect sufficient taxes to pay the bonds.

9. Counties \$\infty\$190(2)—Special Tax-Limitations.

Special law authorizing a county to levy and collect sufficient taxes to pay its bonds issued for railroad shares is not affected by general laws limiting amount of taxes to support the state government or to defray the expenses of a county.

10. Mandamus &=152—Parties—Paying Judgment Against County.

One writ of mandamus against all officers of a county charged with any duty in the co-operative or separate steps of levying, collecting, and pay-

 $<sup>\</sup>epsilon$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  $252~\mathrm{F.}-43$ 

ing a tax to satisfy a judgment against the county is proper, being in reality a proceeding against the county.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the West-

ern District of Missouri; Arba S. Van Valkenburgh, Judge.

Mandamus by the United States, at the relation and to the use of J. T. Townsend, Jr., and others, against J. T. Bunch and others, County Judges of St. Clair County, Mo., and others. Peremptory writ issued, and defendants bring error. Affirmed.

John H. Lucas, of Kansas City, Mo. (L. E. Crook, of Osceola, Mo.,

on the brief), for plaintiffs in error.

William D. Tatlow, of Springfield, Mo. (Ewing Y. Mitchell, of Springfield, Mo., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The plaintiffs in error in this case are J. T. Bunch, W. H. Duncan, and W. P. Tucker, who are the county judges of St. Clair county, Mo., and William J. Mathews, the collector, George Virgil Higgins, the clerk, and E. M. Terry, the treasurer, of that county. They complain that the court below, notwithstanding their return to an alternative writ of mandamus served upon them, issued its peremptory writ commanding the judges to levy \$2.50 on each \$100 of the assessed value of the property in St. Clair county, and the collector, clerk, and treasurer to make return of their willingness to collect such levy and pay over the proceeds thereof to the relators, who are the owners of that certain judgment in favor of Joseph B. Townsend, Jr., J. Barton Townsend, and Charles C. Townsend, for \$338,162.43, and against St. Clair county, rendered in the court below on the 4th day of May, 1914.

A brief statement of the origin of this judgment will materially aid in a ready understanding of the issues to be considered. Under an act to incorporate the Osage Valley & Southern Kansas Railroad Company, approved November 21, 1857 (Session Laws of Missouri 1857, p. 59), and an act to incorporate the Tebo & Neosho Railway Company, approved January 16, 1860 (Session Laws of Missouri 1859-60, p. 402), St. Clair county issued and delivered its bonds and coupons. Joseph T. Murtagh brought an action in the United States Circuit Court for the Western District of Missouri, the predecessor of the court below, against the county on some of these bonds and coupons, and on April 24, 1884, recovered a judgment against it thereon. Upon that judgment of April 24, 1884, Murtagh brought an action in the same court against the county and recovered a judgment against it thereon on November 29, 1895. Upon that judgment of November 29, 1895, Murtagh brought an action against the county in the same court and on December 16, 1905, recovering a judgment against it thereon. Upon that judgment of December 16, 1905, the relators, to whom Murtagh had assigned the judgment, brought an action against the county in the court below, and on May 4, 1914, recovered the judgment against it thereon for \$338,162.43, upon which the peremptory writ of mandamus in this case is based.

[1] One of the reasons why the county judges insist that the writ should not have issued is that they allege in their return to the alternative writ that all these judgments were void because neither Murtagh nor the relators, all of whom were citizens and residents of states other than Missouri, were ever the real owners of the bonds or the coupons, or the judgments thereon, but that these bonds, coupons, and judgments were always owned by residents and citizens of the state of Missouri, so that no diversity of citizenship between the parties to the actions ever existed. But these alleged facts, even if they existed, constitute no legal reason why the peremptory writ should not issue, because the question whether they did or do exist is by these judgments rendered res adjudicata against the county, and therefore against its officers, who have no interest or standing here, save as its agents These judgments against the county rendered, or representatives. not only every issue and defense made by the county in the actions on which they are founded, but every issue and defense that might have been made by the county in these actions, res adjudicata against it and its officers and agents, as between them and the plaintiffs in those judgments. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; St. Louis, K. C. & C. R. Co. v. Wabash Railroad Co., 152 Fed. 849, 861, 81 C. C. A. 643, 655; Commissioners v. Platt, 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91, 92; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. 482, 31 L. Ed. 402. And the defense which the county judges here seek to interpose might have been made in any of the actions on which these judgments are based. It is too late to interpose this alleged defense now on this application for a mandamus upon the last judgment to compel the county officers to levy for and pay that judgment against the county, a mandamus which is the mere equivalent and substitute for an execution on a judgment against an individual. Ralls County Court v. United States, 105 U. S. 733, 734, 26 L. Ed. 1220; United States v. New Orleans, 98 U. S. 381, 397, 25 L. Ed. 225.

[2] Another contention which the county judges make why the writ should not have issued is untenable for the same reason. That contention is that the writ should not have issued, because they alleged in their return that the judgment of May 14, 1914, was void for the reason that more than 10 years had elapsed from the date of the original judgment sued on in said action, without revival or payment made thereon, and that under the laws of the state of Missouri such original judgment could only be enforced by revival or payment, and no suit could be brought thereon. Revised Statutes of Missouri 1909, § 1912. It is not admitted or intimated that this contention is sound, or that the alleged facts therein, if they exist, would have constituted any defense to any of the actions on the judgments which have been recited. Lafayette County v. Wonderly, 92 Fed. 313, 317, 34 C. C. A. 360, 364; Town of Fletcher v. Hickman, 165 Fed. 403, 404, 405, 91 C. C. A. 353, 354, 355; Cranor v. School District, 151 Mo. 119, 123, 52 S. W. 232; McFaul v. Haley, 166 Mo. 56, 62, 63, 64, 68, 65 S. W. 995; Tice v. Fleming 173 Mo. 49, 53, 55, 72 S. W. 689, 96 Am. St. Rep. 479; Goddard v. Delaney, 181 Mo. 564, 571,

80 S. W. 886; Bick v. Robbins, 131 Mo. App. 670, 674, 111 S. W. 612. Indeed, the authorities just cited leave little or no doubt that this contention cannot be maintained even if the facts are as alleged. It is not necessary, however, to discuss that question at length in this case, for if that contention is unsound, or if those alleged facts did not exist, or did not constitute any defense to any of the actions on the judgments, that contention and those alleged facts present no sound reason why the payment of the judgment of May 14, 1914, should not be enforced by mandamus. If, on the other hand, that contention is sound, and if those alleged facts did and do exist, then that contention and those facts constituted a good defense to the action which resulted in the judgment of May 14, 1914, which the county either made or might have made in that action, and therefore that judgment renders that contention, the existence of those alleged facts, and the validity of the defense founded thereon res adjudicata against the county and its officers and agents, and conclusively estops them from availing themselves thereof now to prevent the enforcement of the judgment by mandamus. Even if the decision of the court and its adjudication of this defense on May 14, 1914, were erroneous, nevertheless the judgment of that date is not void, may not be attacked collaterally, and is equally conclusive against the county and its judges, for the county had notice of the action which resulted in the judgment, had an opportunity to defend against it, the court had jurisdiction to hear and determine the defense now presented, had jurisdiction of the parties to and the subject-matter of the action, and the county did not avail itself of the only remedy it had, a writ of error to correct the error of the court, if it committed any, in the rendition of that judgment of May 14, 1914.

[3] Another reason why the county judges contend that the court below should not have issued the writ is that they alleged in their return that the judgments were void for fraud because the residents and citizens of Missouri, whom they alleged were and are the real owners of the bonds and coupons upon which Murtagh sued the county, caused Murtagh to represent, and he did falsely and fraudulently represent, himself to be the owner of these bonds and coupons on which he obtained his judgment in 1884, in order to give color to his claim of adverse citizenship of the parties in that action, and to perpetrate a fraud upon the court which heard that action; that these Missouri owners caused Murtagh to assign this judgment to the relators, and caused them to represent, and they did falsely represent, that they were the owners of the judgment assigned to them for the same purpose; and that the falsity of these representations was unknown to the county and was fraudulently concealed from it until the alternative writ of mandamus was issued on June 10, 1915. But these facts, if they existed, present no legal or sufficient reason why the peremptory writ should not issue. If they exist, the judgments and the adjudications these judgments evidenced were not void. At most they were available only upon proof of the alleged fraud, and that proof was incompetent and inadmissible save in a plenary suit in equity to avoid the judgments for the fraud. On their faces these judgments were regular and valid. There is no claim that the county was not served with proper process in the actions which resulted in them, or that on the facts presented to the court it did not have plenary jurisdiction of the subject-matter or of the parties to them. They are therefore impervious to a collateral attack for fraud such as these judges here present. Until a direct suit is brought to avoid these judgments for the alleged fraud, and a decree of avoidance of them therefor is rendered they, and the things they adjudicated, are conclusive upon the parties to them, upon the officers and agents of the county and their privies, and they estop them from again litigating the matters thus adjudged. Christmas v. Russell, 5 Wall. 290, 305, 18 L. Ed. 475; Maxwell v. Stewart, 21 Wall. 71, 22 Wall. 77, 81, 22 L. Ed. 564; Peninsular Iron Co. v. Eells, 68 Fed. 24, 34, 35, 15 C. C. A. 189, 199, 200; Board of Com'rs v. Platt, 79 Fed. 567, 573, 25 C. C. A. 87, 93.

[4] Moreover, the judges disclose the fact in their return that the fraud they here plead was continually perpetrated from some time in 1884 until June 10, 1915, more than 33 years, that it was concealed during all this time, and that the county was not aware of it. The return fails, however, to allege how, by what acts or failures to act, by what representations or means, it was concealed, and it fails to state that the county exercised any diligence whatever, made any inquiry or search or endeavor, from 1884 to 1915 to ascertain who owned the bonds and coupons upon which the first judgment was obtained, or who owned the judgments, although the issue of their ownership was tendered to it in court in the actions which have been recited time and time again. The averments on this subject in the return, or rather the absence of averments upon it, fail to disclose that diligence to discover the alleged fraud which after such delay is indispensable to obtaining any relief on account of it, either by a plenary suit or otherwise. Wagner v. Baird, 7 How. 233, 258, 12 L. Ed. 681; Wood v. Carpenter, 101 U. S. 135, 137, 138, 140, 143, 25 L. Ed. 807: Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21; Rugan v. Sabin. 53 Fed. 415, 420, 3 C. C. A. 578, 582.

[5-7] Another reason which the judges argue should have prevented the issue of a peremptory writ is that such issue was an abuse of the discretion of the court below, because they alleged in their return that the relators were guilty of culpable laches, in that from April 28, 1884, no demand was made for the payment of the debt evidenced by the judgment of that date, no execution was issued upon it, and no application for a mandamus was made until that here under consideration; that more than 66 per cent. of the judgment bears interest at 10 per cent, compounded annually, that the indebtedness of the county, all of which is equally binding with the claim of the relators, is \$5,000,000, and the assessable property of the county is \$5,500,000. But from the time the county issued the bonds and coupons which are the subject of this litigation it owed Murtagh and the relators the duty to pay these bonds and coupons when they became due, and so to limit the amount of and so to pay its indebtedness with annual levies of reasonable amounts upon the property in the county as would enable it to discharge its debts as they matured. Neither Murtagh nor

the relators owed the county any duty to demand payment of their bonds, coupons, or judgments, and the actions against the county which have been recited left it under no misapprehension as to their desire for payment. It was the laches and recklessness of the county, and not those of Murtagh or the relators, that created its heavy indebtedness, and by failure to pay it, as it was in duty bound to do, permitted the accumulation of the unpaid interest. Moreover, the application for this mandamus is not founded on the judgment of April 28, 1884, but upon the judgment of May 4, 1914, and the application for the mandamus was made on June 10, 1915, little more than a year after the judgment was entered. The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice. It has no function when the analogous action or proceeding at law is not barred, and no unusual conditions invoke its application within the time fixed by the statute of limitations in the analogous action at law in order to secure a just result. Brun v. Mann, 151 Fed. 145, 154, 80 C. C. A. 513, 522, 12 L. R. A. (N. S.) 154; Broatch v. Boysen, 175 Fed. 702, 707, 99 C. C. A. 278, 283. It is generally applied in analogy to the statute of limitations relating to corresponding proceedings at law. The proceeding at law corresponding to the issue of a writ of mandamus to enforce payment of a judgment against a county is the issue of an execution upon a judgment against a private individual, and under the statutes of Missouri such an execution may issue at any time within 10 years after the entry of the judgment. Revised Statutes of Missouri 1909, § 2133. The result is that the relators have been guilty of no culpable laches, no breach of duty, that all the laches and failures to discharge duty disclosed in the case have been those of the county; a denial of the writ of mandamus under these circumstances would have tended to defeat justice and to promote injustice, and the court below committed no abuse of discretion in issuing it.

[8, 9] Finally, the judges take the position that the county court has no power to levy a tax of \$2.50 on each \$100 of the taxable property of the county, and for that reason the writ was erroneously issued. In support of this position they cite section 5, p. 1324, 2 Revised Statutes of Missouri 1854-55, which provides that the annual tax on real and personal property for the support of the government of the state shall not exceed one-fifth of 1 per cent. of the assessed value thereof; section 1, p. 1349, same statutes, which empowers the county courts "to levy such sum as may be annually necessary to defray the expenses of their respective counties," and declares that "the county tax shall in no case exceed the state tax, on the same subject of taxation, more than 100 per cent."; section 7, p. 96, General Statutes of Missouri 1865, which declares that the annual tax on real and personal property for the support of the government of the state, the payment of its debt. and the advancement of the public interest, shall be 40 cents on the \$100 of assessed value; section 76, p. 121, of the statutes last cited, which empowers the county courts to levv such sums as shall be annually necessary "to defray the expenses of their respective counties," and declares that the county tax shall in no case exceed the state tax on the same subject of taxation more than 100 per cent. for the same

time, and section 165, p. 1193, Wagner's Missouri Statutes 1872, which authorizes county courts to levy such sums as may be annually necessary "to defray the expenses of their respective counties," and declares that the county tax shall in no case exceed one-half of 1 per cent. on all taxable property. The bonds and coupons here in litigation were issued subsequent to the statutes of 1865 and prior to those of 1872. But they were not issued to support the state government, nor to defray the expenses of the county. The county court was not authorized by any general statutes which have been cited to issue these bonds or coupons, nor to levy taxes to pay them, nor was its power to make such levies either prohibited or limited thereby, and this because the county was expressly empowered by special acts of the Legislature of Missouri "to subscribe to the stock of the company, and for the stock subscribed in behalf of the county may issue the bonds of the county, to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court" (Laws of Missouri 1857, p. 62, § 14; Laws of Missouri 1859-60, p. 404), and under that authority and no other the county issued the bonds and coupons, and the court below has commanded the levy to pay them. The statutes cited by the judges are general statutes which treat of the ordinary governmental expenses of the state and its counties and the method of raising revenue to pay them. The acts under which these bonds were issued were special acts which authorized the county to issue its bonds and coupons to pay for the county's authorized subscription for stock of a railroad company, and empowered its county court to levy and collect sufficient taxes to pay them, for in that way only can the county "take proper steps to protect the interest and credit of the county." These general and special statutes fall under the familiar rule that powers granted and privileges conferred by special acts are not affected by inconsistent general legislation on the same or on similar subjects; but the special acts and the general laws must stand together, the former as the laws of the particular cases and the others as the general laws of the land. South Carolina v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650; Board of Commissioners v. Ætna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590; Gowen v. Harley, 56 Fed. 973, 979, 6 C. C. A. 190, 196; Christie-Street Commission Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471.

The conclusion of the whole matter is that by the special acts which have been cited the state of Missouri conferred upon St. Clair county the power to issue the bonds and coupons in controversy; that from this grant of power the authority of the county court to levy sufficient taxes to pay them is conclusively implied in the absence of counter legislation (Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455; United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225); that this authority was expressly conferred upon the county court by the express grant of power to "take proper steps to protect the interest and credit of the county"; and that this power is not limited or restricted by the general statutes to which attention has been called. Further discussion of the reasons for these conclusions is omitted from this opinion, because they have been authoritatively set forth and the conclusions stated

have been adjudged by the Supreme Court in the consideration of analogous cases involving the construction of similar Missouri statutes. Ralls County Court v. United States, 105 U. S. 733, 736, 738, 26 L. Ed. 1220; Scotland County Court v. Hill, 140 U. S. 41, 45, 46, 11 Sup. Ct. 697, 35 L. Ed. 351; Seibert v. Lewis, 122 U. S. 284, 291, 292, 294, 296, 298, 7 Sup. Ct. 1190, 30 L. Ed. 1161; State ex rel. Hamilton v. Hannibal & St. J. Ry. Co., 113 Mo. 298, 303, 304, 305, 21 S. W. 14. [10] Mathews, the collector, Higgins, the clerk, and Terry, the treasurer, of the county, alleged in their returns that they have no power to levy the tax required, and that whenever a levy of a tax has been made in the past they have discharged their respective duties in the recording, collection, and disbursement of it. But these returns present no sufficient reason why these parties should not be joined as respondents in the peremptory writ and commanded to perform their respective duties with reference to the recording of the proceedings, or the collection and disbursement of the taxes to be levied by the county judges. The object of this writ of mandamus is not only to levy the tax, but to collect it, and pay its proceeds over to the relators in part payment of their judgment, and all this the court may command the officers of the county to do, although under the law it may be necessary that some successive steps to accomplish it be done by some of the officers and others by other of the officers, by some co-operating and by others taking steps succeeding each other. One writ of mandamus against all officers of the county charged with any duty in the co-operative or separate steps for the levying, collection, and paying of a tax to the owners of a judgment is a proper and the most speedy and effective means to enforce the imposition of the tax upon the property of the county, its collection, and the payment of its proceeds upon the judgment. Labette County Com'rs v. Moulton, 112 U. S. 217, 218, 219, 223-227, 5 Sup. Ct. 108, 28 L. Ed. 698; Hicks v. Cleveland, 106 Fed. 459, 462,

C. C. A. 274, 279, 280. Indeed, a proceeding for a mandamus against the judges of the county court and the other officers of a county whose duty it is to participate in either the levy, the collection, or the payment of a judgment against the county, to compel them to discharge their respective duties, is in reality a proceeding against the county itself. The duty to levy, collect, and pay is imposed upon all officers of the county so far as they respectively have any duty to perform, either in the levy, the collection, or the payment, and the writ binds, not only such officers named, but also their successors in office. Thompson v. United States, 103 U. S. 480, 483-485, 26 L. Ed. 521; People v. Collins, 19 Wend. (N. Y.) 56, 65; Commissioners v. Sellew, 99 U. S. 624, 627, 25 L. Ed. 333; Hollon Parker, Petitioner, 131 U. S. 221, 226, 9 Sup. Ct. 708, 33 L. Ed. 123; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 33, 17 Sup. Ct. 225, 41 L. Ed. 621; United States ex re. Bernardin v. Butterworth, 169 U. S. 600, 603, 18 Sup. Ct. 441, 42 L. Ed. 873; Murphy v. Utter, 186 U. S. 95, 99, 101, 102, 103, 22 Sup. Ct. 776, 46 L. Ed. 1070.

45 C. C. A. 429, 432; Guthrie v. Sparks, 131 Fed. 443, 446, 451, 65 C. C. A. 427, 430, 435; Rose v. McKie, 145 Fed. 584, 589, 590, 76

There was no error in the issue of the writ of mandamus and the judgment of the court below is affirmed, and this case is remanded to that court forthwith, with leave to the court below to make such changes in the order for the peremptory writ and in the writ itself as may be necessary by reason of the time which has elapsed since it was issued.

STONE, Circuit Judge (dissenting). The plaintiffs in error claim in their return that the judgments were void for fraud, because the residents and citizens of Missouri, who they claim were and are the real owners of the bonds, caused the plaintiffs in these various judgments to represent themselves falsely and fraudulently as the owners of the bonds, in order to give a colorable diversity of citizenship of parties, and thus lodge jurisdiction in the court; that these acts were intended to be and constituted frauds upon the court; that the falsity of these representations was unknown to the county, and was fraudulently concealed from it until after this alternative writ of mandamus was issued.

In my judgment this presents a question of fact going to the vitality of the judgments, which should have been determined in the trial court. It is true that under many circumstances the only orderly way to challenge judgments for such causes as here involved would be through an equitable proceeding. In this case, however, is the allegation made by the county as a statement of fact that it had no information of the fraud until after the issue of the writ in the present proceeding. This, in my judgment, creates a situation necessitating, and therefore authorizing, the presentation of the above defense in the mandamus proceeding.

#### DAVIS et al. v. ANDERSON-TULLY CO.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

#### No. 5086.

The Circuit Court of Appeals has jurisdiction to review a judgment of the District Court dismissing an action in ejectment on objection that the lands in controversy were not within the territorial jurisdiction of the District Court, as such an objection does not challenge federal jurisdiction.

2. Appeal and Error \$\iff 1008(1)\$—Review—Findings of Fact.

Regardless of the rule as to review of findings of fact in case tried without a jury, the appellate court will examine the evidence of the facts, where a review of the decision of the trial court on jurisdiction is invoked, although there is a presumption of the correctness of the trial

court's decision.

3. States \$\iff 12(2)\$—Boundaries—Navigable Waters—Channel of Stream. Where the main channel of a navigable stream is the boundary between two states, and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; but, where it changes by the sudden and violent process of avulsion, the boundary remains

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where the main channel was at the time of the avulsion, subject to such changes as may be wrought thereafter by accretion or erosion, while the old channel is occupied by the running stream.

4. NAVIGABLE WATERS \$\infty 44(3) - ACCRETION - RIPARIAN RIGHTS.

When a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them, and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes, while the water in it remains a running stream, etc., notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years, etc.

5. STATES \$\infty 12(2)\to Boundaries\to Navigable Streams.

In ejectment, held, that the lands in controversy were in Mississippi instead of Arkansas, the old channel of the Mississippi river, which was directly under the Arkansas bank, remaining the boundary between the states, notwithstanding the diversion of the channel into a cut-off; and so the District Court for Arkansas was without jurisdiction.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by W. L. Davis and the Sudan Plantations Company against the Anderson-Tully Company. There was a judgment dismissing the action, and plaintiffs bring error. Affirmed.

G. J. McSpadden, of Memphis, Tenn., and John I. Moore, of Helena, Ark., for plaintiffs in error.

R. G. Brown, of Memphis, Tenn. (H. B. Anderson, of Memphis, Tenn., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. W. L. Davis and Sudan Plantations Company, a corporation, hereafter called the "plaintiffs," complain of the judgment of the court below, which dismissed their actions in ejectment for the recovery of the possession of lands, for damages for their detention, and for the taking of timber therefrom by the Anderson-Tully Company, a corporation, henceforth called the "defendant." In their complaint the plaintiffs alleged that the lands were situated in the state of Arkansas; that they own them, and are entitled to the possession of them; that the defendant unlawfully detained them and has cut and removed timber from them to the damage of the plaintiffs. They also averred that these lands were in and appurtenant to the east half of section 11 and the east half of section 14, township 2 north, range 5 east. The defendant denied the material allegations of this complaint and alleged that the lands of the plaintiffs in these sections were bounded on the east by a lake 800 feet wide and 8 to 12 feet deep; that the defendant owned and was in possession of that portion of the lands described in the plaintiff's complaint which were east of the lake; and that it was from this portion of the lands that the defendant had cut wood and timber; but that these lands which the defendant owned and detained were not in the state of Arkansas and that the District Court of the District of Arkansas had no jurisdiction of the subject-matter in controversy in these actions. A jury was waived, the case was tried by the court, the court made special findings of the facts, and among them that the plaintiffs had failed to prove that the lands in controversy were within the state of Arkansas. It accordingly dismissed the plaintiff's actions for want of jurisdiction without adjudging any other issue.

[1] The first question which the case suggests is whether the jurisdiction to review this judgment is in the Supreme Court or in this court. It falls under the literal terms of the first rule stated in U. S.

v. Jahn, 155 U. S. 109, 114, 15 Sup. Ct. 39, 41 (39 L. Ed. 87):

"That if the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error" to the Supreme Court.

But, since the objection to the jurisdiction of the District Court which prevailed below, that the lands which are the subject of the action are not within its territorial jurisdiction is an objection common to all judicial tribunals and is not an objection to the jurisdiction of the District Court as a federal court, this court has jurisdiction to review the judgment which sustains that objection. Courtney v. Pradt, 196 U. S. 89, 91, 92, 25 Sup. Ct. 208, 49 L. Ed. 398; Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 24 Sup. Ct. 119, 48 L. Ed. 159; Mexican Central Ry. Co. v. Ekman, 187 U. S. 429, 432, 23 Sup. Ct. 211, 47 L. Ed. 245; Blythe v. Hinckley, 173 U. S. 501, 507, 19 Sup. Ct. 497, 43 L. Ed. 783; Bache v. Hunt, 193 U. S. 523, 525, 24 Sup. Ct. 547, 48 L. Ed. 774; Merriam v. Saalfield, 241 U. S. 22, 26; Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; Blythe Co. v. Blythe, 172 U. S. 644, 19 Sup. Ct. 873, 43 L. Ed. 1183.

- [2] Counsel for the defendant invoke the rule that where a jury is waived, the case is tried by the court, and the court makes special findings of fact, the only issues that can be reviewed in a federal appellate court are the sufficiency of the facts found to sustain the judgment, and the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions. That rule undoubtedly governs the review of the trial of the merits of a case by a court which makes special findings. But where a review of the decision of the jurisdiction of the trial court is invoked, while the presumption is indulged that the decision of the lower court is correct, the duty nevertheless is imposed upon the appellate court to examine the evidence of the facts and to reverse the decision if it finds that the findings of fact were clearly wrong. Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 250, 256, 29 Sup. Ct. 445, 53 L. Ed. 782.
- [3-5] The controlling issue for consideration and decision therefore is: Does the evidence in this case fairly prove that the finding of the court below that the lands in controversy were not in the state of Arkansas was erroneous? The principal facts in this case are either admitted or established beyond controversy, and among them these: The lands in dispute are claimed by the plaintiffs by virtue of their title to the east half of sections 11 and 14, in township 2 north, range 5 east, according to the United States government survey. Accord-

<sup>&</sup>lt;sup>1</sup> 36 Sup. Ct. 477, 60 L. Ed. 868.

ing to the original United States government surveys made on the Arkansas side in 1823 and on the Mississippi side in 1835 and 1836, these half sections were riparian lands on the west or Arkansas bank of the Mississippi river as it flowed southerly around Walnut Bend. At the times of these surveys and until about the year 1873, the river coming at that place from the southeast first flowed in a northwesterly direction until it reached the most northerly part of Walnut Bend, then southerly and southeasterly past the eastern parts of sections 11 and 14, and, on its return towards the southeast, it left a peninsula on the Mississippi side containing several thousand acres of land. The defendant claims the lands in dispute under titles to a part of this peninsula and accretions thereto, and insists that it is on the Mississippi side of the river. At the time of the original surveys Whisky Chute and Bordeau Chute extended through this peninsula within the bend, and in high water some of the waters of the river flowed through these chutes from the northeast to the southwest. Whisky Chute was northwest of Bordeau Chute, and the head of the peninsula was northwest of Whisky Chute and was called Whisky Island, while the portion of the peninsula between the two chutes was called Bordeau Island. Some time between 1871 and 1875, and probably about 1873, the main channel of navigation of the river and the larger volume of its water changed its course from its bed around the bend to Bordeau Chute or cut-off, and they have never returned to Walnut Bend, although water flowed and packet boats passed around through that bend for at least ten years thereafter, and perhaps longer, and there still remains in the old river alongside its Arkansas bank, as that bank stood at the time the cut-off was made, on and along the east half of sections 11 and 14 a lake several miles long, 600 or 800 feet wide, and from 6 to 12 feet deep. Since 1874 a large part of the river bed as it was when the cut-off took place has been filled by sediment, and trees have grown on parts of it; but the Arkansas bank and its location as it was when the cut-off was made are clearly established by the evidence. That bank is still discernible upon the ground, and it was and is on the east half of sections 11 and 14 at various distances west of the line of the Arkansas bank as it was found in 1823 by the United States government surveyors and as it was described in their field notes and maps of their survey of that year. All the lands described by the plaintiffs in their complaint lie east of this Arkansas bank as it stood when the main channel of the river was changed to Bordeau Chute. All that portion of the lands described in the plaintiffs' complaint which the defendant claims, all that portion of which the defendant is in possession, and all that portion upon which the wood and timber were cut, lie east of the lake which extends along the east side of the Arkansas bank of the river as it stood when the main channel of the river was changed to Bordeau Chute. The defendant insists that the boundary between the states of Arkansas and Mississippi runs through this lake, so that the lands whose title is in controversy in this action are in the state of Mississippi. On the other hand, the plaintiffs contend that the boundary line between the states is the middle line of the old bed of the river as that bed was located by the original United States government surveys of 1823 and 1835 and 1836, which middle line is at varying distances east of the east line of the lake, and, if this middle line is the true boundary between the states, a part if not all of the lands, the titles of which are in question in these actions, are in the state of Arkansas. Up to this point there is no real controversy between the parties to these actions, but they disagree as to the rule of law applicable to the facts and as to some of the pertinent facts to be hereafter mentioned.

The plaintiffs assert that the change of the main channel from Walnut Bend to Bordeau Chute was caused by an avulsion, while the defendants insist, and the court found, that it was not so caused, but was the result of gradual and imperceptible changes. The court, however, also found that the main channel of the river around through the bend at the time of its change from bend to chute, as subsequently changed by accretion and erosion, was and still is the boundary line between the states of Arkansas and Mississippi. The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Arkansas v. Tenn., 246 U. S. 158, 38 Sup. Ct. 304, 62 L. Ed. 638; Cissna v. State of Tennessee, 246 U. S. 289, 38 Sup. Ct. 306, 307, 62 L. Ed. 720. But the first clause of this rule was made to govern and is applicable to cases where, by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation. Missouri v. Kentucky, 11 Wall. 395, 408, 20 L. Ed. 116; Washington v. Oregon, 211 U. S. 127, 135, 29 Sup. Ct. 47, 53 L. Ed. 118.

The evidence in the record in hand upon the question of avulsion vel non is conflicting; but that question is immaterial, because if there was no avulsion this case falls under the exception to the rule of gradual change. The strongest evidence in support of gradual change goes only to prove that for several years prior to the cut-off, which was

probably in the spring of 1873, larger volumes of water had been flowing through Bordeau Chute year after year, until residents in the vicinity and those familiar with the river expected the change, and until finally the channel through the chute carried deeper water and was more navigable than the channel around the bend, and then the former became the main channel of navigation and the use of the old channel for commercial purposes and the waters in it gradually There were thousands of acres of land between the old channel and the new one. There was no evidence that the river or its channel crept over these lands by the gradual processes of accretion and erosion. The proof was that the waters of the river gradually cut a new channel south of these lands and abandoned the channel northwest of them, and the conclusion is that the boundary between the states remained in the old channel of navigation around the bend as it was at the time that the course through Bordeau Chute became the main channel of navigation, and that that boundary now is where that old channel, by the processes of accretion and reliction, had become at the time when the waters flowing through it around the bend became

stagnant and ceased to be a running stream.

Thus the final question becomes: Where was the main channel of the old river around the bend when that river ceased to be a running stream? Counsel for the plaintiffs argue, and cite testimony to support the contention, that when the cut-off was made the main channel was in the middle of the old bed of the river as that bed is defined by the original surveys of 1823 and 1835 and 1836, and that it was never moved or changed by accretion or erosion, and that it still remains there. But defendant's counsel contend that at the time the cut-off was made the main channel of navigation of the old river was directly under the Arkansas bank in what is now the lake which lies just east of that bank. Upon this issue, maps, charts, surveys, and testimony, too voluminous for recital or review, were introduced in evidence and have been patiently read and examined. They have convinced that from 1823 until the time of the change of the main channel of navigation to Bordeau Chute the river ran around through Walnut Bend, that the Arkansas bank of the river along the east side of or upon the east half of sections 11 and 14 was during all this time a bank which curved inward around the flowing river, that, where a navigable river flows between an island or the head of a peninsula upon one side and an inwardly curving bank upon the other side, it ordinarily hugs the curving bank, that that bank is generally eroded and often caves, that accretions ordinarily attach to the island or peninsula, that the deepest and more navigable part of the stream and its main channel of commerce ordinarily adjoins the curving bank, that during those years from 1823 to 1873 the Mississippi river followed this ordinary course and had this effect as it flowed through Walnut Bend, that when the main channel of navigation was changed to Bordeau Chute that channel was near the Arkansas bank as that bank then and now stands and was in that portion of the river which has now become the lake immediately east of that bank, that the channel has not been moved easterly by accretion, reliction, or erosion since the change of the main channel of navigation to Bordeau Chute, that the boundary between the two states remained in that main channel of the river after the change, and is now in the lake east of and adjoining the Arkansas bank as it was when the cut-off was made and the lands east of the lake, the title to which, and the alleged trespasses upon which, are here in controversy, are in the state of Mississippi and without the jurisdiction of the court below. The evidence in this case fails to fix the exact line of the old channel in this lake, or the exact boundary line between the states therein, and there may be some portions of the lands described in the complaint in this action which lie under the water of the lake west of this land. But the defendant is not in possession of any of that land and makes no claim to it. The only land concerning which there is any controversy in this case lies east of that line, and of that controversy the court below had no jurisdiction.

Its judgment was therefore right, and it is affirmed.

# McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, August 12, 1918.)

### No. 5072.

 Indictment and Information ===133(7)—Mode of Attack—Federal Courts.

Practice of attacking an indictment, as not stating an offense, by objection to introduction of evidence, does not prevail in federal courts, and will not be permitted, except under extraordinary circumstances; but motion to quash, demurrer, or motion in arrest is proper practice.

- 2. Conspiracy \$\iffus{37}\$—Criminal Offense.—Merger in Substantive Offense.

  Defendant, indicted with H. for conspiring with employes of a carrier to have the employes deliver intoxicants to defendant and H. under a fictitious name, in violation of Penal Code, \( \frac{5}{238} \) (Comp. St. 1916, \( \frac{5}{2} \) 10408), may be convicted of conspiracy, notwithstanding delivery to H., defendant taking no part therein; the doctrine of agency not being available to show defendant's participation in the completed offense.
- 3. Conspiracy \$\infty 46\to Evidence\to Overt Acts.

Overt acts, other than those charged in the indictment for conspiracy, tending to show defendant guilty, are admissible as against objection of irrelevancy.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Charles McKnight was convicted, under Penal Code, § 37, of conspiracy to commit the offense denounced by section 238, and brings error. Affirmed.

B. B. Blakeney and J. H. Maxey, both of Tulsa, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. [1] McKnight was convicted and sentenced for conspiring to commit an offense against the United States. Sections 37 and 238, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096, 1136 [Comp. St. 1916, §§ 10201, 10408]). After a jury had been impaneled and counsel for the United States had made an opening statement, counsel for defendant objected to the introduction of any evidence in the case, for the reason that the indictment did not state any offense against the laws of the United States. The practice of attacking an indictment in this manner does not prevail in the courts of the United States, and will not be permitted, except under circumstances of an extraordinary nature. A motion to quash, a demurrer, or a motion in arrest should be resorted to. United States v. Gooding, 12 Wheat. 461, 6 L. Ed. 693; Estes v. United States, 227 Fed. 818, 142 C. C. A. 342.

[2] There is no assignment of error based upon the ruling of the trial court in regard to striking out all evidence with reference to shipments of liquor consigned to E. Boyd. There was a motion for a directed verdict made by counsel for defendant under which they seek to raise the question as to whether a conviction for conspiracy will be upheld, when the evidence shows that the object of an alleged conspiracy is an offense, an essential element of which is participation by at least two persons and concert of action, and the evidence also shows the completed offense. The offense denounced by section 238 of the Penal Code is described as follows:

"Any officer, agent, or employe of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind which has been shipped from one state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

It was charged in the indictment that Charles McKnight, Albert Herskowitz, and Will Moore entered into a conspiracy with B. L. Tully and Finis E. Roberts, employés of the Wells-Fargo & Company Express to cause such employés to knowingly deliver and cause to be delivered to persons under a fictitious name, intoxicating liquors shipped in interstate commerce, and that said conspiracy had for its object the delivery to the defendants at and within Pottawatomie county, Okl., such intoxicating liquors under the fictitious names of E. Blume, E. Boyd, and Dan Gould, and which liquors should be shipped from S. Hirsh Distilling Company of Kansas City, Mo., to the said McKnight, Herskowitz, and Moore. Section 332 of the Penal Code (Comp. St. 1916, § 10506) provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

It is claimed by counsel for defendant that the offense described in section 238 requires that some person shall receive the intoxicating liquor in order to complete the offense committed by the officer. agent or employé of the common carrier, as the officer, agent or employé may not knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, without that other person aiding and abetting the officer, agent or employé in the commission of the offense, and, as the law makes an aider or abettor guilty as a principal, the offense denounced by the statute requires the participation of two persons and concert of action between them, and if the evidence shows that the offense denounced by the statute has been completed, then an indictment for a conspiracy to commit the offense will not lie, nor will a conviction be upheld if the evidence shows such a state of facts. There is very respectable authority supporting the contention of counsel for defendant in error. U. S. v. N. Y. C. & H. R. Ry. Co. et al. (C. C.) 146 Fed. 298; U. S. v. Dietrich & Fisher (C. C.) 126 Fed. 664; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; Ú. S. v. Burke (D. C.) 221 Fed. 1014; Miles v. State, 58 Ala. 390; Shannon v. Commonwealth, 14 Pa. 226; Wharton, Crim. Law, § 1339.

An examination of the record has convinced us, however, that the evidence does not show that McKnight received any of the intoxicating liquor; on the contrary, it shows that it was all received by Herskowitz. If McKnight took no part in the actual commission of the offense, he still could be indicted and convicted for a conspiracy to commit the offense, and he would not be within the rule contended for by his counsel, if he did not participate in the commission of the offense itself, and we do not think the doctrine of agency can be re-

lied upon to show such participation.

[3] A delivery by Roberts or Tully, the express agents, to Herskowitz alone, would have constituted a completed offense, and he alone might have aided and abetted Roberts or Tully and been guilty as a principal, yet McKnight, who conspired with them that the liquor should be delivered by Roberts or Tully to Herskowitz, could be guilty of a conspiracy, though he did not take any part in the completed offense. In cases of bribery or dueling between two parties, a third person who did not participate therein, could be guilty of conspiring with them to have them commit the offense.

We do not think the contention of counsel for defendants that the court erred in admitting evidence in regard to overt acts other than those charged in the indictment, because they were irrelevant, is valid. They all tended to show the defendants guilty of the crime

charged.

The contention that, because the evidence in the case shows a completed offense, the defendant could not be indicted for conspiracy to commit the offense, is not supported by the decisions of the Supreme

Court. Heike v. U. S., 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128.

The judgment below must be affirmed; and it is so ordered.

SANBORN, Circuit Judge (dissenting). The principle which conditions the decision of this case is nowhere more clearly stated than in 2 Wharton's Criminal Law (9th Ed.) § 1339, in these words:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."

A plurality of agents, an employé of a common carrier who knowingly delivers or causes the delivery of the intoxicating liquor to a person under a fictitious name to a person who receives it under that name, are logically necessary to the commission of the substantive offense denounced by section 238 of the Penal Code, and that offense is not aggravated by the voluntary accession of more than two persons, and therefore under the principle an indictment for a conspiracy to commit this offense will not lie.

The rule of practice which conditions the decision of this case is that when the indictment for conspiracy to commit such a substantive offense as that above described, or the evidence at the trial discloses the fact that the substantive offense has been committed, a conviction for the conspiracy cannot be sustained. When an offense necessarily involves an unlawful agreement between two or more persons, and they have committed that offense, none of them who has participated in that commission can be lawfully convicted of a conspiracy for having made such an agreement. United States v. N. Y. C. & H. R. R. Co. (C. C.) 146 Fed. 298, 301, 303, 304; United States v. Shevlin (D. C.) 212 Fed. 343, 344; United States v. Kissel (C. C.) 173 Fed. 823, 828; United States v. Dietrich (C. C.) 126 Fed. 664, 666, 667; Shannon and Nugent v. Commonwealth, 14 Pa. 226, 227; Miles v. State, 58 Ala. 590. Heike v. United States, 227 U. S. 131, 139, 140, 144, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128, cited in the opinion of the majority, did not fall under this rule, because the substantive offense of defrauding the United States of its revenue by the use of false weights involved in that case could be committed by a single person.

The principle and the rule are not challenged by the majority, but they are of the opinion that neither the principle nor the rule applies to McKnight's case, because the evidence fails to show that he received the liquor, while it does show that it was all received by Herskowitz. But he who does an act by his agent does it himself, and the evidence conclusively proves that Herskowitz was the mere agent of McKnight to receive and receipt for the liquor for him under the fictitious name, and to take it from the express office to McKnight's place of business, and that the express agent knew this, agreed to deliver it to Herskowitz for McKnight, and received \$1 a barrel from McKnight for doing so. The evidence proves that the liquor was ordered shipped by telegrams sent to S. Hirsch Distilling Company at Kansas City; that it came to Shawnee, Okl., addressed to fictitious names; that it

was charged by the Hirsch Company on its books to McKnight, and that he paid those charges; that when the first two casks of liquor came to Shawnee they were not addressed to McKnight, but to some other person; that McKnight personally persuaded Finis Roberts, the driver and delivery employé of the express company, to deliver these casks to him personally; that he did so, and McKnight received them; that McKnight then agreed with Roberts that he would cause subsequent shipments of liquor to be made via the express company addressed to fictitious names; that Roberts should deliver these shipments to Herskowitz for McKnight; that Herskowitz should sign the express book for them with the fictitious names, and that McKnight should pay Roberts \$1 a barrel for delivering the liquor to him in this way; that pursuant to this agreement so much liquor was shipped and delivered to McKnight in this way; that at the rate of \$1 per barrel he paid to Roberts and another employé of the express company, who divided with him, \$200. In this state of the evidence, my mind is irresistibly forced to the conclusion that McKnight, the principal who ordered and caused the whisky to be shipped in the fictitious names, who bought and paid for it, who hired the employé of the express company to deliver it to his agent Herskowitz, who signed for it and received it for him, that McKnight, who conceived and caused the commission of the substantive offense, and received all the whisky, and without whom the offense would never have been committed, participated in the commission of the substantive offense, both because the evidence so clearly proves his personal participation, and his participation through his agent, Herskowitz, and because every conspirator is unavoidably a participant in every act done by any of his co-conspirators in the execution of the conspiracy. Nor is this view without respectable authority to sustain it. In the leading case of United States v. N. Y. C. & H. R. R. Co. (C. C.) 146 Fed. 298, 301, 303, 304, Guilford and Pomeroy, agents of the railroad company, and Edgar and Earle, shippers of sugar, were indicted, under section 5440 of the Revised Statutes (Comp. St. 1916, § 10201), for conspiring with Palmer and Riley, agents of the sugar companies, and of Edgar and Earle, to cause the railroad company to give unlawful relates. Palmer and Riley, the agents of Edgar and Earle, were not indicted. The indictment not only charged that Guilford and Pomeroy, Edgar, and Earle conspired with Palmer and Riley to cause the railroad company to give rebates, but it also charged that such rebates were actually given by Guilford and Pomerov acting on behalf of the railroad company, and received by Palmer and Riley acting on behalf of Edgar and Earle. murrer to the indictment was interposed. There was no charge in it that Edgar and Earle personally received or receipted for any of the rebates, and the government claimed that their cases did not fall under the principle and rule under consideration in this case; but the court nevertheless held that, although Edgar and Earle were not charged with personally receiving the rebates and Palmer and Riley were, nevertheless because as their agents Palmer and Riley received them, and thus Edgar and Earle, through their agents, participated in the commission of the substantive offense, the indictment of them for a conspiracy to commit that crime could not be sustained. By the same mark, since McKnight was proved to have been, not only a participant in, but the sole cause of, the commission of the substantive offense of the delivery of the intoxicating liquor under fictitious names by the agent of the common carrier to McKnight individually in two cases, and to his agent in the other cases, and since through his agent McKnight received all of it, except the two deliveries he received personally, and since McKnight paid Roberts, for delivering all of his whisky to him in this way, his indictment and conviction for a conspiracy to commit that offense was erroneous.

"When the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult," says Judge Holt, in 146 Fed. 303, "to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself."

All that McKnight and the agent of the common carrier did was to agree that the agent for the common carrier should deliver the intoxicating liquor under fictitious names to McKnight through his agent, and that McKnight should receive it in that way, and to perform that agreement McKnight ought not to suffer any penalty more severe than that prescribed for the commission of the substantive offense as he will if his sentence for the conspiracy is affirmed.

"If a conspiracy to commit a crime has been carried out, and the crime committed," says Judge Holt, in United States v. Kissel (C. C.) 173 Fed. 823, 828, "the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords."

It seems to me that the facts proved in McKnight's case bring it under the principle and rule that when an offense necessarily involves an unlawful agreement between two or more persons, and they have committed that offense, none of them who has participated in that commission can be lawfully convicted of a conspiracy for making that agreement, but that they are only liable for the commission of the substantive offense. It seems to me that the evidence conclusively proves that McKnight participated in the commission, indeed that he caused the commission of the substantive offense; and for these reasons I am of the opinion that the judgment against him should be reversed.

#### GRANT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.) No. 5077.

1. Indictment and Information \$==133(7)-Mode of Attack.

The mode of attacking an indictment for failure to state an offense by objecting to introduction of evidence does not prevail in federal courts.

2. Conspiracy \$\infty 43(1)\text{-Indictment-Completed Offense.}

An indictment merely charging a conspiracy to do a thing, but not alleging the thing was done, does not show the completed offense within

principle that indictment for conspiracy does not lie when it makes that showing.

In Error to the District Court of the United States, for the Western District of Oklahoma.

W. B. Grant was convicted under Penal Code, § 37, of conspiracy to commit the offense denounced by section 238, and brings error. Affirmed.

Joe M. Adams and W. L. Chapman, both of Shawnee, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. Grant was convicted of having entered into a conspiracy with certain agents and employés of an express company to deliver and cause to be delivered to persons under fictitious names intoxicating liquors. Section 238, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [Comp. St. 1916, § 10408]). It is claimed that the trial court erred in overruling the objection of the defendant to the introduction of any evidence on the part of the prosecution, for the reason that the indictment did not state facts sufficient to constitute an offense against the laws of the United States.

[1] We have recently said in the case of McKnight v. United States, 252 Fed. 687, — C. C. A. —, that this mode of attacking an indictment does not prevail in the courts of the United States. United States v. Gooding, 12 Wheat. 461, 6 L. Ed. 693; Estes v. United

States, 227 Fed. 818, 142 C. C. A. 342.

[2] The principle contended for, however, is this: When the object of an alleged conspiracy is an offense, an essential element of which is participation by at least two persons and concert of action by them, an indictment charging a conspiracy to commit such offense will not lie, if it shows the completed offense. The indictment in this case was for a conspiracy under section 37 of the Penal Code (section 10201) to commit the offense denounced by section 238 of the same Code. The trouble with the contention of counsel is that an examination of the indictment shows that it does not charge a completed offense. It is nowhere alleged in the indictment that intoxicating liquors were in fact delivered and shipped to any of the conspirators in the names of fictitious persons. It is charged that Grant and his co-conspirators conspired together to have P. V. Kelly and Jess Lake, as agents and employés of an express company, deliver intoxicating liquors in the names of fictitious persons to Frank Cole and Clarence Squires. But it is nowhere alleged that such deliveries were in fact made. It thus appears that the indictment does not present the question sought to be raised.

The judgment of the court below is therefore affirmed.

# DIXON v. ANDERSON.

(Circuit Court of Appeals, Fourth Circuit. July 26, 1918.)

No. 1630.

1. Contracts \$\igsim 313(1)\to Anticipatory Breach.

If one of the parties to an executory contract avowedly and unequivocally repudiates it, the other party is not obliged to wait until the time fixed for performance, but may sue to establish his rights as soon as the contract is broken.

2. Exchange of Property =1-Contract-Construction.

A contract by which defendant agreed to sell plaintiff certain apartment houses, and plaintiff agreed to sell defendant a farm, fixing the date of transfer and the adjustment of taxes, interest, and insurance, but in which neither party expressly agreed to buy the other's property, was an agreement for an exchange of properties, and not merely two separate and distinct options to purchase.

3. EXCHANGE OF PROPERTY €=3(1)—CONTRACT—CONSIDERATION.

The agreement of one party to exchange certain property was the consideration for the similar agreement of the other party, so that both became bound by signing a written contract.

4. EQUITY \$\infty 362-BILL-DISMISSAL-GROUNDS.

On a bill for specific performance, an objection by defendant that the contract could not be enforced, because it was not signed by his wife, not arising on the allegations in the bill, furnished no ground for its dismissal.

5. Specific Performance \$\sim 106(1)\$—Parties—Wife of Defendant.

On a bill for specific performance of an agreement for an exchange of properties, not signed by defendant's wife, she was not a necessary party, as, if she was unwilling to join in the conveyance, the court might nevertheless require defendant to execute a deed in accordance with his contract.

6. Specific Performance =117-Wife's Joinder in Husband's Convey-ANCE-MATTERS TO BE PROVED.

A wife's willingness to join in her husband's conveyance or exchange of properties need not be affirmatively shown, as the law presumes her willingness to unite with him in conveying the property which he has agreed to convey.

7. SPECIFIC PERFORMANCE = 129-RELIEF-PARTIAL PERFORMANCE.

Where defendant contracted to sell plaintiff two apartment houses for a certain sum in exchange for a farm, and, before plaintiff's suit for specific performance, disposed of one of the houses, he would be compelled to convey the other to plaintiff, and to pay plaintiff the ascertained value of the one sold.

Appeal from the District Court of the United States for the Eastern

District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Bill for specific performance by C. S. Dixon against T. J. Anderson. Decree for defendant dismissing the bill without prejudice, and plaintiff appeals. Reversed and remanded.

Luther B. Way, of Norfolk, Va. (Pender, Way & Foreman, of Nor-

folk, Va., on the brief), for appellant.

Harry K. Wolcott and H. C. Sherritt, both of Norfolk, Va. (Wolcott, Wolcott, Lankford & Kear, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. On defendant's motion the court below dismissed plaintiff's bill without prejudice, and he appeals. The al-

legations of his bill may be thus summarized:

Under date of May 24, 1917, both parties signed a contract, drawn by themselves, by which Anderson agreed to sell to Dixon two apartment houses in the city of Norfolk, Va., known as the West End and the Panacea, for the sum of \$50,000, and Dixon agreed to sell to Anderson a farm in Beaufort, N. C., with certain live stock and farming implements, for the sum of \$40,000. Anderson did not in express terms agree to buy the farm, nor did Dixon in express terms agree to buy the apartment houses. The concluding paragraph of the contract reads as follows:

"This agreement is written in duplicate, and is signed and agreed to by both of parties named, which is attached hereto and is witnessed. This transfer is to take effect as of December 1, 1917. Tax, interest and insurance to be prorated as of this date."

About July 16, 1917, Anderson served written notice on Dixon that he would not carry out the contract, and Dixon in turn promptly notified Anderson that he intended to fully perform on his part, and that he expected Anderson to do the same. A few days later, by deed dated July 24, 1917, Anderson, without the knowledge of Dixon, sold the West End apartment to one Fox. On learning of this two or three weeks afterwards, Dixon instructed his representative to ask Anderson whether he intended to carry out the contract; but Anderson again declared he would not, and that he repudiated it altogether. Thereupon, on the 4th of September, Dixon brought this suit for specific performance. Besides the usual averments that plaintiff has at all times been ready, able, and willing to fully perform his part of the contract, and that defendant has wholly refused to perform, the bill alleges an agreement between the parties, when the contract was signed, that the price of the West End was \$30,000, and the price of the Panacea \$20,000. A copy of the contract is filed as an exhibit and made a part of the bill. The prayer for relief is to the effect, among other things, that if the court be without power to compel a conveyance of the West End apartment, because of its sale to an innocent third party, the defendant be required to convey the Panacea apartment, and that plaintiff have a money judgment for the balance due him in that case, according to the agreed values of the respective properties.

[1] In support of the decree of dismissal it is argued that the suit was prematurely brought, because the contract was not to be performed until the following December. The contention is clearly untenable. It is well settled that, if one of the parties to an executory contract avowedly and unequivocally repudiates it, the other party is not obliged to wait until the time for performance arrives, but may sue to establish his rights as soon as the contract is broken. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Payne v. Melton, 67 S. C. 233, 45 S. E. 154; 36 Cyc. 771; Miller v. Jones, 71 S. E. 248, 68 W. Va.

526, 36 L. R. A. (N. S.) 408. In the last-named case, which appears directly in point, the court cites a number of Virginia and West Virginia decisions, and says:

"Most of the above cases were actions at law for damages for breach of contract; but we do not perceive that any different rule applies in equity, provided the contract is such a one as equity can and will enforce specifically. In case of such a contract the injured party may elect his remedy; he may either sue at law for the breach, or he may sue in equity for specific performance."

- [2.3] It is also argued that the contract is unenforceable for want of consideration, because plaintiff did not expressly agree to buy the apartment houses, and defendant did not expressly agree to buy the farm. It is even contended that no mutual contract was entered into. but that the writing in question merely "contains two separate and distinct options to purchase, each option as widely separated as though written on separate sheets of paper." This can hardly be regarded as a serious contention, since it is obvious from the instrument itself that what the parties intended and agreed to was an exchange of properties, and nothing else can be made of it. In no other reasonable way is it possible to explain the simultaneous promise of each to sell to the other, and the joint provision for adjusting taxes, interest, and insurance as of a stated date. It follows that the agreement of one party was the consideration for the agreement of the other party, and that both became bound by signing the undertaking. Butler v. Thomson, 92 U. S. 412, 23 L. Ed. 684; Lenman v. Jones, 222 U. S. 51, 32 Sup. Ct. 18, 56 L. Ed. 89; Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; Ferguson v. Getzendaner, 98 Tex. 310, 83 S. W. 374; Smokeless Fuel Co. v. Seaton, 105 Va. 170, 52 S. E. 829; 9 Cyc. 333; 39 Cyc. 1206.
- [4-6] It is further argued that the contract cannot be enforced, because it was not signed by defendant's wife, and she is not made a party to the suit. But this objection does not arise on the allegations of the bill, and therefore furnishes no ground for its dismissal. The wife is not a necessary party, and her willingness to join in the conveyance need not be affirmatively shown. Campbell v. Beard, 57 W. Va. 501, 50 S. E. 747. In a case like this the law presumes that the wife will be willing to unite with her husband in conveying the land which he has agreed to sell. If the fact turns out otherwise by answer and proof, the court may nevertheless require the husband to execute a deed in accordance with his contract. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; Brown v. Eaton, 21 Minn. 409. And so it is distinctly held by the Supreme Court of Appeals of Virginia in Steadman v. Handy, 102 Va. 382, 46 S. E. 380; the headnote reading as follows:

"If the vendee is willing to accept the title contracted for, his rights are unaffected by the outstanding inchoate right of dower of the vendor's wife. Nor can the vendee be defeated in his right to specific performance of the contract according to its terms by the fact that he may ultimately have to resort to the covenant of general warranty contracted for to protect himself against a claim of dower asserted by the vendor's wife after the death of her husband."

Of the objection that no specific provision was made for the payment of the \$10,000, which on the face of the contract would be due from plaintiff to defendant, it is enough to say that defendant's sale of the West End apartment, in violation of his agreement with plaintiff, has taken that question out of the case. Nor would it stand in the way if defendant were now able to fully perform his engagement, since in that case the court would require plaintiff to pay the agreed difference, which is a matter of the simplest calculation, between the value of the farm and the value of the apartment houses.

[7] It goes without saying that defendant should not be excused from such performance as is yet in his power, because complete performance has been prevented by his own wrongful act. The contract signed by him is of unmistakable import, its terms and subject-matter are perfectly definite, and its validity not open to serious question. If in disregard of his obligation he has put himself in a position where he cannot convey both the apartments, it is only just that he be compelled to convey the one he still holds, and to pay plaintiff the ascertained value of the one he has sold.

The decree appealed from must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

# ROSS et al. v. MILLER.

(Circuit Court of Appeals, Fourth Circuit. July 2, 1918.)

No. 1617.

1. Courts \$\infty\$ 264(2)—Federal Courts—Diversity of Citizenship—"Ancillary Suit."

Suit to cancel, as procured by fraud, a release of judgment, and to subject an equity in land to payment of the judgment, is ancillary and supplemental to the suit in which the judgment was recovered, and so, without regard to the citizenship of the parties, may be maintained in a federal court where the judgment was recovered.

[Ed. Note.—For other definitions, see Words and Phrases, Ancillary Suit.]

2. Abatement and Revival ← S(8)—Pendency of Other Suit—Identity of Subject-Matter.

Suit to cancel release of judgment and subject land to payment of the judgment will not be dismissed because of pendency of other suit differing only as to the land; the subject-matter, because of such difference, not being the same.

3. Equity \$\infty\$ 148(3)—Multifariousness.

Bill to cancel release of judgment and to subject equity in land to payment of the judgment is not multifarious; the cancellation being but incident to the real purpose of the litigation.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield; Benjamin F. Keller, Judge.

Suit by William E. Ross, administrator of R. R. Henry, deceased, and others, against R. B. Miller. From a decree of dismissal, plaintiffs appeal. Reversed and remanded.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

James S. Kahle and Samuel W. Williams, both of Bluefield, W. Va., for appellants,

John Kee and Russel S. Ritz, both of Bluefield, W. Va. (Joseph M.

Sanders, of Bluefield, W. Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. The above-named appellants were plaintiffs below, and will be so designated in this opinion; the appellee will

be referred to as defendant. These facts appear:

On May 8, 1915, in the District Court of the United States for the Southern District of West Virginia, at Bluefield, one Randolph Henry recovered judgment against the defendant, R. D. Miller, for \$5,165 and costs, which judgment he assigned on the same day to R. R. Henry, then and until his death in the following October a citizen of Tazewell county, in the state of Virginia. In July, 1915, execution was issued on this judgment for the benefit of the assignee, and the sum of \$167.80 collected as of November 20th of that year; the balance remains unpaid.

The will of R. R. Henry appointed as executrix his daughter, Lucy Henry Walker, at that time a widow residing in the city of Washington, and she qualified as such when the will was admitted to probate in Tazewell county shortly after the testator's death. By the terms of the will the judgment in question became a part of the residuary estate. On June 23, 1917, Mrs. Walker was married to Samuel W. Williams, of Wytheville, Va., and her residence thereupon became the residence of her husband. Just before the marriage, and on the same day, she executed a release of the judgment, for the recited consideration of \$250, which release was recorded soon afterwards in the clerk's office of the court in which the judgment was rendered.

On the 24th of July, 1917, Mrs. Williams, as executrix of R. R. Henry, filed a bill in equity in the circuit court of Bland county, Va., against R. D. Miller and Randolph Henry, assignor of the judgment, to set aside the release executed by her, on the ground that it had been procured by fraud, and to subject to the payment of the judgment certain tracts of land in that county which Miller had acquired. On his petition, showing that he was a nonresident of the state, the cause was removed to the District Court of the United States for the Western District of Virginia, where it remains pending and undetermined.

Then, on August 25, 1917, the plaintiffs brought this suit, in the court in which the judgment against Miller was originally recovered, to set aside the release given by Mrs. Williams, on the ground that it had been procured by fraud, and to subject to the payment of the judgment the equity of Miller in certain real estate in Mercer county, W. Va., which had been purchased by him some two months before, and on which he had paid at the time the sum of \$5,000; the balance being secured by a deed of trust on the property. It appears from the bill of complaint that the plaintiff Ross is a citizen and resident of Mercer county, in the state of West Virginia, and the duly appointed administrator in that state of the estate of R. R. Henry, deceased; that the

plaintiff Lucy Henry Williams is a citizen and resident of the state of Virginia, and by due appointment under the laws of that state the executrix of the last will and testament of R. R. Henry, deceased; and that the plaintiff Randolph Henry is likewise a citizen and resident of the state of Virginia. All the defendants are stated to be citizens and

residents of Mercer county, in the state of West Virginia.

The answer of defendant Miller on the merits is an explicit and detailed denial of any fraud or misrepresentation in obtaining the release. He also sets up in defense the pendency of the suit brought by the executrix in the circuit court of Bland county, Va., as above stated, makes the plaintiff's bill in that case a part of his answer, recites its removal to the federal court on his petition, alleges that the parties and cause of action are the same in both suits, and accordingly asks that this suit "be abated and dismissed." The answer of defendant Ritz, from whom Miller bought the real estate in question, admits the sale of the property and the receipt of \$5,000 on account of the purchase price, denies that any further payment has been made or become due, and asks that his interest be protected. It does not appear that defendant Pollock, the trustee named in the deed of trust, has filed an answer.

Upon these pleadings Miller moved to dismiss the bill of complaint (1) for want of equity, and (2) for want of jurisdiction, because no federal question is involved and the requisite diversity of citizenship is lacking. Other grounds were stated in the motion; but, as they were virtually abandoned at the argument, any mention of them may be omitted. The court below sustained the motion and dismissed the bill, though whether upon one or both the grounds specified is only inferable from the record. The plaintiffs thereupon moved the court to suspend its decision and retain the cause on the docket until the decision of the case removed to and pending in the Western district of Virginia; but the motion was overruled. Their further motion to strike out the names of William E. Ross, administrator, and Randolph Henry, as plaintiffs, and to make them both defendants, was also overruled.

[1] Upon consideration of these facts, we are of opinion that the court below was not deprived of jurisdiction by the circumstance that one of the plaintiffs is a citizen of the same state as the defendants. It has long been settled that a suit which is ancillary and supplemental to an original suit may be maintained in a federal court, without regard to the citizenship of the parties. Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. Ed. 886; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Pacific R. R., of Mo. v. Missouri Pacific Ry., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; Johnson v. Christian, 125 U. S. 642, 8 Sup. Ct. 989, 1135, 31 L. Ed. 820; Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. In Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, Chief Justice Marshall said:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."

And Mr. Justice Clifford, in Riggs v. Johnson County, 6 Wall. (73 U. S.) 166, 18 L. Ed. 768, upholding a mandamus to levy a tax for the payment of a judgment, says:

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment; else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

The definition in the cited cases of a dependent and supplementary suit seems clearly to cover the instant case, and therefore to place it in the class of which federal courts have jurisdiction, irrespective of the citizenship of the parties; for, if an equity suit can be maintained in a federal court, without diversity of citizenship, to restrain or set aside a judgment at law in that court, because the equity suit is ancillary and supplemental, as the Supreme Court distinctly holds in Krippendorf v. Hyde, supra, it would appear to follow as a matter of course that an equity suit is likewise maintainable to enforce the payment of such a judgment, although it happens, as in this case, that one of the plaintiffs and all the defendants are citizens of the same state. The principle upon which the decisions referred to are based is, as we conceive, that a federal court, by virtue of its jurisdiction to render the original judgment, has also full jurisdiction of any appropriate proceeding for the collection of that judgment, whatever may be the residence of the interested parties.

Nor, in our judgment, is the principle any the less applicable to the suit at bar because it seeks to cancel the release as well as to enforce the judgment. The subordinate character of the suit is fixed by its primary purpose, which is to subject the equity of Miller in certain real estate to the payment of the original judgment recovered against him in the same court, and it does not lose the status of a dependent and ancillary suit by the circumstance that, as incident to its ultimate and principal object, the cancellation is sought of a release alleged to have been obtained by fraud. In other words, the supplementary nature of the suit is not changed or affected by the needed removal of an obstacle to its prosecution. The conclusion is therefore reached that the court below had jurisdiction to hear and decide the cause.

[2] We are also of opinion that the dismissal of plaintiffs' bill cannot be sustained by the pendency of a similar suit, previously brought, in the state of Virginia. Treating that suit as though begun in the federal court to which it has been removed, and granting, as defendant argues, that federal courts of different districts are not foreign to each other, the conclusive answer to his contention nevertheless is that the subject-matter of the two suits is not the same. True, both of them seek to set aside the same release and to enforce the same judgment; but the lands sought to be charged in one case are in Virginia, while in the other the lands sought to be charged are in West Virginia. As above held, the cancellation of the release is only an incident to the main purpose of the suits, namely, the collection of the judgment against Miller, and we are not aware of any legal objection to concurrent suits for that purpose in different jurisdictions, whether federal or state, where the defendant has property that can be reached. Such suits have the same parties, to be sure, and are based on the same judgment; but they differ in subject-matter because each is concerned with a separate piece of property. Of course, there can be but one satisfaction, for there is only one judgment to be enforced. Whatever, therefore, may be realized in the suit first concluded must be credited in the suit that remains pending; and there is ample authority to protect against double recovery. Moreover, it is not here questioned that the court below has full discretion to stay the prosecution of this suit, or postpone its trial, to await the outcome of the prior Virginia suit. All we have occasion now to decide is that both can be maintained at the same time, though brought for the same ultimate purpose, and that the pendency of the first is not adequate ground for dismissing the second.

[3] If, as we hold, the cancellation of the release be but incident to the real purpose of the litigation, it is obvious that the bill is not multifarious, and that contention needs no further answer. Of the merits it is enough to say that the bill makes out a prima facie case, and that no sufficient reason appears for denying a trial of the issues. The decree of dismissal must accordingly be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

## DOWNEY v. GERMAN ALLIANCE INS. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 2, 1918.)

No. 1614.

Insurance = 282(14)—Fire Insurance Policies—Construction.

Where a fire policy, which insured a building in a specified amount and personal property in a specified amount, provided that the entire policy should be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage, the fact that the personal property was mortgaged does not invalidate the insurance on the building, for the policy, which was on the standard New York form prescribed by the laws of West Virginia, should be given the effect of two different contracts, one applicable to the building, and the other to the personalty.

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge. Action by William W. Downey, receiver of the Stewart Vehicle Company, against the German Alliance Insurance Company and another. There was a judgment on directed verdict for defendants, and plaintiff brings error. Reversed.

John O. Henson, of Martinsburg, W. Va., and Malcolm Jackson, of

Charleston, W. Va., for plaintiff in error.

W. Calvin Chestnut, of Baltimore, Md., and John W. Davis, of Clarksburg, W. Va. (Allen B. Noll, of Martinsburg, W. Va., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

KNAPP, Circuit Judge. For a detailed statement of facts reference is made to the opinion of this court in the kindred case of Hartford Fire Insurance Co. v. Downey, Receiver, 223 Fed. 707, 139 C. C.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

A. 237. On September 15, 1912, the factory and its contents of the Stewart Vehicle Company, of Martinsburg, W. Va., were destroyed by fire. The insurance in force was \$21,500 on the building, \$80,500 on the stock of merchandise, and \$5,500 on the machinery, or a total of \$107,500, which is approximately the amount at which the loss was adjusted. The policies were all of the New York standard form, prescribed also by the laws of West Virginia, and contained the following provision:

"This entire policy shall be void if \* \* \* the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

Claiming that this provision had been violated, the insurance companies refused payment of the loss, and thereupon, in 1913, suits were brought against them by plaintiff in error, who had been appointed receiver of the vehicle company shortly after the fire. Some of the suits were brought in the state courts at Martinsburg, and others in the United States District Court for the Northern District of West Virginia. The first case tried was the one against the Hartford Fire Insurance Company, supra, whose policy covered merchandise only. The judgment for plaintiff in that case, entered upon a verdict of the jury, was reversed by this court on the ground that the undisputed evidence showed that the insured property had "become incumbered by a chattel mortgage," which avoided the policy, and that therefore the trial court should have directed a verdict for the defendant. A petition for rehearing was considered and denied. In the meantime, and before the decision of this court, the case against the National Fire Insurance Company was tried in the state court, with the result of a verdict and judgment for plaintiff. That judgment was affirmed, some months after our decision in the Hartford Case was announced, by the Supreme Court of Appeals of West Virginia. Downey, Receiver, v. National Fire Insurance Co., 77 W. Va. 386, 87 S. E. 487. Thereupon the receiver applied to the Supreme Court of the United States for a certiorari in the Hartford Case, but the application was refused. 241 U. S. 671, 36 Sup. Ct. 722, 60 L. Ed. 1230.

The case against these defendants, tried in September, 1917, was submitted by stipulation of counsel on the proofs of record here in the Hartford Case, and consequently as regards the chattel mortgage the same facts precisely are again before us. The only difference is that the policy now under review was not on merchandise only, but partly on the building and partly on the merchandise, and this presents a question of law which did not arise in the former suit. The court below, following our decision in the Hartford Case, directed a verdict for defendant as to the entire policy, thereby holding in effect that it was an indivisible contract, which was wholly avoided by the breach of the chattel mortgage condition.

The elaborate argument of plaintiff in error for a reversal of our former decision is quite unconvincing. It seems for the most part to miss the point. There is no dispute as to the meaning of the policy, or of the statute which prescribes its form. All parties agree that a violation of the chattel mortgage provision avoids the policy; all agree that, if the bonds in question were actually pledged to the Trust Com-

pany, that pledge constituted a chattel mortgage within the meaning of the policy; and all agree that, if such a pledge was made, the plaintiff cannot recover for the personal property destroyed. As to that property the sole question is one of fact as to whether or not a pledge of the bonds had been consummated before the fire. We held in the Hartford Case that this question was improperly submitted to the jury, because the uncontradicted evidence showed beyond any reasonable doubt that the bonds had been completely and unconditionally pledged prior to the fire; and our reasons for so holding are stated at some length in the opinion above cited. It is enough to say that we adhere to that ruling, and with the more confidence because it seems to us, after studious re-examination, that fair-minded judgment can reach no other conclusion on the record here presented. In this court the question is not open to further discussion.

Is the policy in suit a divisible contract? It recites that the "aggregate amount insured" is \$9,000, the rate 1.25 and 1.50, and the premium \$127.50. The insured property is described, in a typewritten statement pasted on the printed form, headed "The Stewart Vehicle Company," and containing two separate items or paragraphs, as fol-

lows:

"\$3,000.00—On their three story and basement brick building," etc. "\$6,000.00—On their buggies manufactured and in the process of manufacture," etc.

The aggregate premium is the 1.25 rate applied to \$3,000, plus the 1.50 rate applied to \$6,000. It will thus be seen that two distinct classes of property were insured, each for a separate and specified sum. Both classes were included in the mortgage given by the vehicle company, but concededly the giving of that mortgage affected in no wise a policy confined to the building. This being so, we find it difficult to see why a policy which insured the building for a stated amount, and as a separate subject of insurance, should be held invalidated as to that insurance by the chattel mortgage provision in question, merely because the same policy also covered, as another and distinct subject of insurance, a quantity of personal property as to which it became invalidated by the incumbrance of a chattel mortgage.

It is a matter of common knowledge that an insurance agent usually represents a number of companies, and must do so in order to carry a large risk, like a factory and its contents, because only a small part of such a risk will be taken by any one company. For example, the insurance in question embraced about 40 policies, some on the building alone, some on the stock alone, others on building and stock, and still others on building, stock, and machinery. Ordinarily, the distribution among the various companies of a risk of this kind is not directed, or even known in advance, by the insured, but left to the judgment and discretion of the agent; and this for the reason that, as a rule, the insured is indifferent as to how or where the aggregate insurance shall be placed. It therefore seems to us that the inclusion in the policy in suit of both building and merchandise, each for a specified amount and as a distinct subject of insurance, was a mere incident of insuring the entire property, which should not charge the vehicle company with the

consequences now asserted. In other words, whilst this policy is in form a single contract, it is in substance and effect two contracts, each separate from the other and complete in itself, and so in our opinion it should be regarded for the purpose now in hand. Moreover, it is to be noted that the one standard form of policy is used for all classes of property, though obviously some of its provisions are applicable to one class, but not to another. For this reason, also, we think a violation of the chattel mortgage clause, which relates to personal property only, should not be permitted, in a case like this, to vitiate the separate realty insurance, which may happen to be included with the separate insurance of merchandise in the same policy. To hold in such case that the entire policy is avoided is to construe the clause as though it read, "if the subject of insurance or any part thereof be personal property and be or become incumbered by a chattel mortgage," which would give the clause a meaning not required by its language, not fairly applicable to the facts, and not consistent with justice to the insured.

The distinction appears to be this: A blanket policy, which insures two or more classes of property for a gross sum, as a single subject of insurance, without separation into items, and without specifying the amount for which each class is insured, has been held an indivisible contract, which would be wholly avoided by a violation of the chattel mortgage condition. Such a policy was before the court in Fries-Breslin Co. v. Star Fire Ins. Co., 154 Fed. 35, 83 C. C. A. 147, relied upon by defendants in error. Such also was the policy in Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358. But where, as in this case, the two classes of property insured are clearly and definitely separated, each being made a distinct subject of insurance, and each being insured for a specified sum, it seems but reasonable to hold that the contract is divisible, and that the insurance on the building is not avoided by a chattel mortgage, which invalidates the

insurance on the personal property.

It would serve no useful purpose to review the conflicting decisions upon the question here considered. As we read the cases, the decided weight of state authority supports the views above expressed. In New York, where the standard form originated, the divisibility of an insurance contract like the one before us has been repeatedly affirmed. Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184, frequently cited with approval; Knowles v. Am. Ins. Co., 142 N. Y. 641, 37 N. E. 567; Kiernan v. Dutchess Co. Mutual Ins. Co., 150 N. Y. 190, 44 N. E. 698; Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81. Some of the decisions of other states to the same effect are Radford v. Carwile, 13 W. Va. 660; Fisher v. Ins. Co., 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Light v. Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851; Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523; and Bills v. Hibernia Ins. Co., 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121, in which the subject is discussed at length.

The federal cases are few in number. Four only are cited by defendants. Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497,

71 C. C. A. 21, 9 L. R. A. (N. S.) 433, throws no light on the question and may be disregarded. Fries-Breslin Co. v. Star Fire Ins. Co., supra, and Dumas v. Northwestern Nat. Ins. Co., supra, are not in point. as we think, for they deal with blanket policies which seem clearly distinguishable. In McKernan v. North River Ins. Co. (D. C.) 206 Fed. 984, a policy similar to the one in suit was held not divisible; but, with all respect for the learned judge who decided that case, we cannot accept the theory of a constructive increase of the building risk resulting from a chattel mortgage on its contents. It is understood that insurance companies give consent almost as a matter of course to the. execution of mortgages on the insured property, unless some exceptional reason induces refusal. When a large amount is placed on different classes of property, as a store or factory and its stock of merchandise, the risk is not in fact regarded as entire, for the companies issue indiscriminately separate policies on each class, or policies covering both classes, according to their own judgment or interest, as appears to have been done in the present instance. In short, in the circumstances of this case, and in the absence of any authority which should control our decision, we are constrained to hold that the policy in question was not avoided as to the \$3,000 of insurance on the building of the vehicle company.

It follows that the court below was in error in directing a verdict for defendant on the entire policy, but should have directed a verdict for plaintiff for the amount of insurance on the building.

Reversed

# FERGUSON et al. v. BABCOCK LUMBER & LAND CO.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1918.)

No. 1589.

1. Judgment \$\iff 489\)—Collateral Attack--Title to Land--Validity--Jurisdiction.

The general rule is that a judgment of a court purporting to adjudicate the title to land outside the limits of its territorial jurisdiction is void for lack of jurisdiction and will be treated as a nullity wherever encountered.

One claiming title to land under a grant from one state as to land situated therein may sue to recover it from citizens of another state claiming under a grant from that state, in the United States courts of the first state, and have the title finally adjudicated by that court.

3. JUDGMENT \$\infty 747(5)\$—FEDERAL COURTS—CONCLUSIVENESS—PARTIES.

Where the United States Circuit Court for the Eastern District of Tennessee had jurisdiction of a suit to quiet plaintiff's title to land alleged to be in Tennessee, and to cancel defendants' grants from North Carolina, its decree for complainant was conclusive of the rights of parties, and available to the complainant and to those claiming under him, against the defendants and those claiming under them.

4. JUDGMENT €==813-FULL FAITH AND CREDIT-DECREE.

Where the United States Circuit Court for the Eastern District of Tennessee had jurisdiction of a suit to quiet plaintiff's title to land alleged

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to be in Tennessee, and to cancel defendants' grants from North Carolina, all other courts of the United States were bound to give full faith and credit to its decree.

5. EQUITY \$\infty 418-Title to Land-Decree Pro Confesso.

On a bill in the United States Circuit Court for the Eastern District of Tennessee to quiet title to land, etc., a necessary party defendant, resident in North Carolina, who had been legally served and thereby required to meet the allegations that the land was in Tennessee, by his default admitted that the land was in that state, and brought himself within Act March 3, 1875, c. 137, § 8 (Comp. St. 1916, § 1039), so as to entitle the court to enter judgment against him.

6. JUDGMENT \$=651—DECREE PRO CONFESSO—EFFECT.

A defendant was as fully bound by a duly rendered decree pro confesso against him as if he had resisted the suit.

7. JUDGMENT \$\$\infty\$813\top-Full Faith and Credit\top-Erroneous Construction\top-Evidence.

Evidence, however convincing, that the United States Circuit Court for the Eastern District of Tennessee reached an erroneous conclusion in a suit to quiet title to land, involving the question whether the land was in that state or in North Carolina, could not affect the credit and conclusiveness of its decree for complainant in any court to which it was presented.

- 8. Judgment 6560—Conclusiveness—Void Decree—Effect of Affirmance.

  After a decree for complainant in the United States Circuit Court for the Eastern District of Tennessee, in a suit to quiet title to land involving the question of its location in Tennessee or in North Carolina, the Circuit Court's dismissal of a bill of review on the merits, affirmed on appeal to the Circuit Court of Appeals, and on certiorari by the United States Supreme Court, all after discovery of a plat showing that the land was in North Carolina, amounted to an affirmation of the validity of the Circuit Court's original decree.
- 9. Judgment \$\sim 660\$—Conclusiveness—Void Decree—Effect of Affirmance.

  An adjudication of the United States Supreme Court in a suit between the two states that the land was in North Carolina, made pending the bill of review, did not impair the validity of that decree.

Pritchard, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge. Bill to quiet title by the Babcock Lumber & Land Company against J. W. Ferguson and J. C. Blanchard. From a decree for complainant (243 Fed. 623), defendants appeal. Affirmed.

Mark W. Brown and F. A. Sondley, both of Asheville, N. C., for appellants.

James G. Merrimon, of Asheville, N. C., and John Franklin Shields, of Philadelphia, Pa. (John S. Adams, of Asheville, N. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The Babcock Lumber & Land Company filed its bill on January 20, 1917, in the District Court for the Western District of North Carolina to quiet its title to a tract of land on Slick Rock creek in that state against the claims of the defendants, J. W. Ferguson and J. C. Blanchard. The defendants answered, setting up title in themselves. The District Court held that the complainant had

shown good title and decreed accordingly. The appeal mainly depends on the question whether a decree made in 1896 by the United States Circuit Court for the Eastern District of Tennessee in the case of Chas. Hebard against D. W. Belding and others, involving title to a large tract including the land in dispute, is binding on the defendants. The complainant in this case derives title from Hebard, the successful complainant in the Tennessee suit; the defendants derive title from R. L. Cooper, one of the defendants in that suit. If the decree there made was valid, then the complainant's title is good; if it is void for lack of jurisdiction of the Circuit Court for the Eastern District of Tennessee, the complainant has no title to the land under it against the defendants' claim of title.

In his bill filed in the Circuit Court for the Eastern District of Tennessee in January, 1896, Hebard, a resident of Michigan, alleged his ownership of a tract of 40,000 acres of land, under a grant from the state of Tennessee; the situation of the land in the state of Tennessee: the residence of some of the defendants in Ohio and New York. and the residence of the defendants R. L. Cooper and J. W. Cooper in North Carolina; the claim of the defendants to 8,000 acres of the land under grants from the state of North Carolina; the dispute between complainant and the defendants as to the location of the state line; and the purpose of the defendants to cut timber on the disputed land. The relief asked was a perpetual injunction forbidding defendants to cut the timber, the quieting of complainant's title by adjudging it to be valid against defendants' claims, and the cancellation of defendants' grants from the state of North Carolina as clouds on complainant's title. The defendant R. L. Cooper, an inhabitant of North Carolina, was personally served in that state, under the provisions of Act March 3, 1875, 18 Stat. 472, c. 137, § 8 (Comp. St. 1916, § 1039), but he failed to appear and a decree pro confesso was taken against him. Other defendants answered, denying complainant's title and setting up title in themselves. The sole question at issue in the cause was whether the land was in Tennessee or North Carolina: If in Tennessee, it belonged to the complainant, Hebard, under the grants from that state; if in North Carolina the grants from that state conferred title on the defendants. After a full hearing the Circuit Court found this issue in favor of the complainant, and on June 10, 1899, entered a decree accordingly. The Circuit Court of Appeals of the Sixth Circuit, after a careful review of the testimony, affirmed the decree. Belding v. Hebard, 103 Fed. 532, 43 C. C. A. 296.

[1, 2] The general rule that a judgment of a court purporting to adjudicate the title to land outside the limits of its territorial jurisdiction is void for lack of jurisdiction, and will be treated as a nullity wherever encountered, is well established. But it is also established, by authority which removes the question from the region of discussion, that one who claims title to the land under a grant from one state as land situated in that state, may sue to recover it from citizens of another state who claim under a grant from that other state, in the United States courts of the first state, and have the title finally adjudicated by that court. If this were not so, it would be impossible

for such claimant to have his title adjudicated. The right of the claimant under the Tennessee grants to have his title adjudicated, and the jurisdiction of the Circuit Court for the Eastern District of Tennessee to make the final adjudication, have been settled by the Supreme Court of the United States. In Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233, the court says:

"But for the other class of cases, 'controversies between citizens of different states,' the eleventh section of the Judiciary Act [Act Sept. 24, 1789, c. 20, 1 Stat. 73] makes provision; and the Circuit Courts, in their original, and this court, in its appellate, jurisdiction, have decided on the boundaries of the states, under whom the parties respectively claim, whether there has been a compact or not. The jurisdiction of the Circuit Court in such cases was distinctly and expressly asserted by this court as early as 1799, in Fowler v. Miller, 3 Dall. 411, 412 [1 L. Ed. 658]; s. p. [New Jersey v. New York] 5 Pet. 290 [8 L. Ed. 127]. In Handley's Lessee v. Anthory, the Circuit Court of Kentucky decided on the boundary between that state and Indiana, in an ejectment between these parties; and their judgment was affirmed by this court. 5 Wheat. 375 [5 L. Ed. 113; Robinson v. Campbell] 3 Wheat. 212-218 [4 L. Ed. 372]; s. p. Harcourt v. Gaillard, 12 Wheat. 523 [6 L. Ed. 716]. When the boundaries of states can be thus decided collaterally, in suits between individuals, we cannot, by any just rule of interpretation, declare that this court cannot adjudicate on the question of boundary, when it is presented directly in a controversy between two or more states, and is the only point in the cause." Ayers v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314; Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6, 49 L. Ed. 142; Anderson v. Elliott, 101 Fed. 609, 41 C. C. A. 521 (Fourth Circuit).

[3-7] These decisions take the case entirely out of the general rule argued forcibly by appellant's counsel. The circuit court having jurisdiction, the decree was final and conclusive of the rights of the parties, and available to the complainant and all claiming under him against the defendants and all claiming under them; and all other courts of the United States were bound to give full faith and credit to it. R. L. Cooper, a necessary party, having been served in the manner required by law, and being required by the service to meet the allegations that the land was in Tennessee, by his default admitted that the land was in that state, and thus brought himself within the provisions of the act of 1875 before cited. He was as fully bound by the decree pro confesso against him as if he had resisted the suit. Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. Evidence, however convincing, that the court reached an erroneous conclusion—even a different conclusion by the same court or another court as to the state lines in a litigation between different parties, or even between the same parties with respect to other lands in like situation —could not affect the credit and conclusiveness of this decree in any court to which it was presented that the complainant's title to this land was good against the parties defendant.

In view of this rule, too well settled for discussion, we proceed to consider the subsequent developments showing conclusively that the Circuit Court for the Eastern District of Tennessee and the Circuit Court of Appeals erred in the finding of fact that the land was in Tennessee and passed under the grants from that state.

[8] Some years after the final decree of the Circuit Court of Appeals in favor of Hebard had been filed, the lost plat and the report

of the commissioners empowered to fix the boundary line between North Carolina and Tennessee, dated in 1821, were found in the archives of the state of Tennessee; this report and plat showed that the land adjudicated to belong to Hebard under the Tennessee grants was in fact on the North Carolina side of the line. On the basis of this report and plat as newly discovered evidence, an application for leave to file a bill of review was granted. One of the grounds of this application argued by counsel and mentioned in the dissenting opinion of Judge Severens was that the Circuit Court for the Eastern District of Tennessee had no jurisdiction, because the land was actually situated in North Carolina. Upon the hearing the Circuit Court made a decree dismissing the bill of review on the merits. This decree was affirmed on appeal by the Circuit Court of Appeals (194 Fed. 301, 114 C. C. A. 261), and on certiorari by the Supreme Court (Hopkins v. Hebard, 235 U. S. 287, 35 Sup. Ct. 26, 59 L. Ed. 232). The grounds of dismissal were that reconsideration of the merits on the newly discovered evidence was within the court's discretion, and that the force of the claim of the petitioners, grantees of the original defendants, to reopen the case, was overcome by the fact that they had purchased after the entry of the final judgments against their grantors, and that a third party had purchased from Hebard on the faith of the decree in his favor. Refusal to open the decree, either on the ground that newly discovered evidence would lead to a different result, or on the ground that it showed the decree to be a nullity for lack of jurisdiction, was a clear recognition of the jurisdiction of the Circuit Court for the Eastern District of Tennessee, and an affirmation of the validity of its decree by the Circuit Court of Appeals and the Supreme Court. It is true that R. L. Cooper had died before the petition for leave to file a bill of review was filed, and it is contended that his widow and two minor children, his heirs at law, from whom defendants claim, were not parties to the petition. We do not think it necessary to decide whether they were parties or not, for even if they were not, and the dismissal of the bill of review was not res adjudicata as to them, the decree of dismissal nevertheless has the force of highest judicial authority on the point now involved.

[9] In March, 1899, while the bill of review was pending, the state of North Carolina filed in the Supreme Court a bill against the state of Tennessee to settle the boundary. In that suit the Supreme Court, in the light of the report and plat of the commissioners above referred to, so adjudicated the true state line that the land now in controversy is on the North Carolina side. North Carolina v. Tennessee, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97. This decision was made about 20 days before the decree of the court dismissing the bill of review and is reported in the same volume. If the Supreme Court had considered that its location of the land in North Carolina reached back to the suit of Hopkins v. Hebard, and withdrew the land from the jurisdiction of the court that decided that case, surely it would not have taken the pains to consider the merits of a bill to review a void judgment. It seems fair to infer that it would have

said there is nothing to review, since the decree is void for want of jurisdiction. In this language the court, on the contrary, asserts the validity of the decree attacked:

"Notwithstanding our conclusion in the proceeding between the states of North Carolina and Tennessee, where the established facts in respect to the location of the dividing line were for the most part the same as those disclosed in the record now before us, we think the decree of the Circuit Court of Appeals was right, and it is accordingly affirmed."

Had the decision of the Supreme Court in the litigation between North Carolina and Tennessee been made before the decree in Hopkins v. Hebard it would have been conclusive of the latter case. As it was made afterwards, it no more impairs the validity of the decree in that case than a like adjudication in a litigation between private parties. To hold that it could would lead to the impossible result that citizens of different states could settle their rights under grants from different states only in suits between the states, which they have no right to require the states to institute.

After the decision of the Supreme Court in the litigation between North Carolina and Tennessee that the land is in North Carolina, it was necessary for the complainant to file this bill in a court having jurisdiction of land in that state for the protection of its rights; but the decree adjudging valid the title under which it claims, having been rendered by a court of competent jurisdiction, must receive in the District Court for the Western District of North Carolina full faith and credit. These conclusions result in the affirmance of the judgment, and render unnecessary consideration of complainant's assertion of title by adverse possession and the effect of the grants from the state of North Carolina introduced by complainant, alleged to be prior in date to that under which defendants claim.

Affirmed.

PRITCHARD, Circuit Judge (dissenting). I cannot concur in the opinion of the majority of the court, wherein it is held (1) that the decree entered in the Circuit Court of the United States for the Eastern District of Tennessee affecting the title to lands wholly within the Western District of North Carolina, is not subject to collateral attack upon the ground that the District Court of Tennessee was without jurisdiction; and (2) that the complainant is entitled to recover on the merits of the case.

It is admitted by appellee, complainant below, that by virtue of a decision of the Supreme Court of the United States locating the boundary line between Tennessee and North Carolina, that these lands lie wholly within the Western district of North Carolina. Even if this admission had not been made, the complaint filed herein discloses the fact that the decree upon which it relies to recover was secured in a suit instituted in the Tennessee district, as I have stated. This allegation goes to the root of the whole matter and lays bare the weakness of the claim which complainant relies upon to sustain the jurisdiction of the court below.

It is well settled that the jurisdiction of a court is confined to its territorial limits, and where it appears that a court has attempted to

exercise jurisdiction for the purpose of determining title to property not within the limits of the district such judgment is a nullity and may be attacked collaterally. In the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, the second and third syllabi are in the following language:

"The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

"Want of jurisdiction may be shown either as to the subject-matter of the

person, or in proceedings in rem as to the thing."

In the case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, the Supreme Court said:

"The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond these limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

The case of Thompson v. Whitman, supra, is very much in point. In that case a decree was entered for unlawfully taking clams in violation of a statute which provided for the forfeiture of a vessel in the county in which the seizure was made. There the court held that the decree could be attacked collaterally by showing that the seizure was not made in the county where the proceedings were instituted, notwithstanding the fact that the decree entered by the court below contained a recital in which it was stated that the seizure was made in the county where the offense was committed. That case, in my opinion, clearly sustains the rule which should control in the instant case. There the question presented was, as I have stated, as to whether a court of one county had jurisdiction to declare the forfeiture of a vessel when it was shown that the seizure was made in another. The court permitted the owner of the vessel to show that it was seized in another county, upon the theory that a court cannot exercise jurisdiction over property not within its territorial limits. It was just as essential to the jurisdiction of the Circuit Court for the Eastern District of Tennessee that the property in question should have been within the district where the suit was instituted, as it was in the case of Thompson v. Whitman, supra, that the proceedings for forfeiture should have been instituted in the county in which the seizure was made.

The case of Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, is also directly in point. The Supreme Court in that instance said:

"Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. The Mary, 9 Cranch, 126, 144 [3 L. Ed. 678]; Hollingsworth v. Barbour, 4 Pet. 466, 475 [7 L. Ed. 922]; Pennoyer v. Neff, 95 U. S. 714, 727 [24 L. Ed. 565]. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, 'unquestionably depends as well on the state of the thing, as on the constitu-

tion of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.' Rose v. Himely, 4 Cranch, 241, 269 [2 L. Ed. 608]. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. Thompson v. Whitman, 18 Wall. 457 [21 L. Ed. 897]."

If the contention of the complainant as to the law in case at bar be correct, it would render property rights of but little value and lead to interminable confusion. When we analyze the opinion of the majority of the court, we find that the defendants are denied property rights which are accorded other citizens similarly situated. One has only to understand the facts in order to appreciate the fallacy of such a proposition; it appearing that the defendant Cooper would be deprived of his property, while all other citizens in the district would enjoy the benefits of that provision of the Fourteenth amendment to the Constitution of the United States, which provides that no one shall be deprived of his property without due process of law.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Scott v. McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 1112 (38 L. Ed. 896).

As I have stated, it affirmatively appears in the complaint filed by the complainant in this action that the decree entered in the Tennessee court is not enforceable in this district, and therefore complainant comes into the District Court of the United States for the Western District of North Carolina with a decree which according to its own showing is inoperative, and asks that court to make the same effective by entering a decree for complete relief. In other words, it appears that the decree upon which it relies is not enforceable because it was obtained in a court which could not exercise any power or control over the property by virtue of the fact that the property was situated wholly outside the territorial limits of the Circuit Court of the United States for the Eastern District of Tennessee at the time that the suit in which such decree was entered was instituted.

In the case of Old Wayne Mutual Life Association of Indianapolis v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345, the Supreme Court said:

"No state can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a court of one state is questioned in a court of another government, federal or state, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it. Such is the settled doctrine of this court. In the leading case of Thompson v. Whitman, 18 Wall. 457, 468 [21 L. Ed. 897], the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one state may be questioned in a collateral proceeding in another state, notwithstanding the averments in the record of the judgment itself. The court, among other things, said that

if it be once conceded that 'the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.' This decision was in harmony with previous decisions."

However, we are confronted at the threshold of this case with the well-established rule that a court cannot acquire jurisdiction in any case without having the parties properly before it, either by personal or substituted service. If the parties live in the district where the suit is instituted, then they may be properly served by the marshal of such district. But if, on the other hand, it should appear that one or more of the defendants, having an interest in the property, do not reside within the district, then said defendants may be made parties to a suit within the district by what is known as substituted service. It appears in this instance that the defendant did not reside in the Eastern district of Tennessee and was a citizen and resident of the Western district of North Carolina. Therefore it becomes important to determine as to whether the requirements of the statute, which authorizes substituted service, have been met. Not being a resident of the district where the suit was instituted the complainant sought to bring the defendant, Cooper, into court by substituted service in pursuance of section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1916, § 1039]), the material part of which is in the following language:

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. \*

A careful reading of this section shows conclusively that it only applies to cases where the property sought to be affected is within the

district where the suit is instituted. The condition under which service may be had upon a nonresident is to be found in the following provision:

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought. \* \* \* " (Italics mine.)

Thus it will be seen that the right to have substituted service in a suit to remove cloud from title or other incumbrance is conditioned upon the fact that the real or personal property to be affected by the decree is "within the district where such suit is brought." It is elementary that a judgment against a party upon whom no service has been had and who was not, therefore, a party to the suit, is a nullity. In this instance it clearly appears that the land in controversy is not now and was not at the institution of this suit in the district where the suit was brought.

This statute should be construed strictly. In the case of Non-Magnetic Watch Co. v. Association Horlogere Suisse of Geneva et al., 44 Fed. 6, Judge Lacombe, sitting in the Circuit Court, said:

"Statutes which undertake to give to courts jurisdiction over nonresidents, who do not come within the district for purposes either of residence or business, should not be enlarged by too liberal construction. \* \* \* "

In the case of Citizens' Savings & Trust Co. v. Illinois Central Railroad Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703, the question arose as to whether the property was within the district. Justice Harlan in that opinion italicized the words "within the district where such suit is brought," thus clearly indicating that the power of the court to bring in a defendant residing in another district, under the statute, is based upon a condition precedent, to wit: That the property sought to be affected by the decree must be within the district. The second syllabus in the above-cited case is in the following language:

"A suit brought by owners of stock of a railroad company for the cancellation of deeds and leases under and by authority of which the properties of the company are held and managed is a suit within the meaning of section 8 of the Act of March 3, 1875, 18 Stat. 470, as one to remove incumbrances or clouds upon rent or personal property and local to the district and within the jurisdiction of the Circuit Court for the district in which the property is situated, without regard to the citizenship of defendants so long as diverse to that of the plaintiff, and foreign defendants not found can be brought in by order of the court subject to the condition prescribed by that section, that any adjudication affecting absent nonappearing defendants shall affect only such property within the districts as may be the subject of the suit and under the jurisdiction of the court."

Referring to the case of Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 I. Ed. 178, the court in the case of Citizens' Savings & Trust Co. v. Illinois Central Railroad Co., supra, said:

"In Mellen v. Moline Malleable Iron Works, 131 U. S. 352 [9 Sup. Ct. 781, 33 L. Ed. 178], we had occasion to examine the provisions of the act of 1875. A question there arose as to the jurisdiction of a Circuit Court of the United States to render a decree annulling a trust deed and chattel mortgage covering property within the district where the suit was brought, in which suit the defendants did not appear, but were proceeded against in the mode authorized

by the above act of 1875. This court said: "The previous statute gave the above remedy only in suits "to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," while the act of 1875 gives it also in suits brought "to remove any incumbrance or lien or cloud upon the title to" such property. Rev. Stat. sec. 738 [Comp. St. 1916, § 1039]; 18 Stat. 472, c. 137, § 8. We are of opinion that the suit instituted by the Furnace Company against the Iron Works and others belonged to the class of suits last described. The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought."

In the case of Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties of states other than Michigan, against the Michigan mining corporation and certain individual defendants holding shares of stock in that corporation and being citizens and residents of the state of Massachusetts. The complainants alleged that they were the sole owners of certain shares of the stock of the corporation, the certificates for which were held by the Massachusetts defendants, and sought a decree removing the cloud upon their title to such shares and adjudging that they were entitled to them. The court held that the defendant citizens of Massachusetts were necessary parties to the suit, and the second syllabus is in the following language:

"That they could be proceeded against in respect of the stock in question in the mode and for the limited purposes indicated in the eighth section of the act of Congress of March 3, 1875 (18 Stat. 470, c. 137), which authorized proceedings by publication against absent defendants in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought." (Italics mine.)

The Supreme Court in that case sustained the contention of the complainant upon the ground that the property about which the suit was instituted was "within the district where such suit is brought."

In the case of Evans v. Charles Scribner's Sons et al. (C. C.) 58 Fed. 303, it was sought to bring a defendant into court and to have canceled as fraudulent a deed or conveyance to certain real estate near Atlanta, situated in the district where the suit was instituted. However, the other purpose of the bill was to set aside a transfer of certain insurance policies in the Northwestern Mutual Life Insurance Company on the life of complainant's deceased husband. The court, among other things, found that the insurance policies were not within the district where the suit was instituted, and therefore set aside the order for substituted service so far as it related to that part of the bill covering the insurance policies and sustained the order as to the real estate upon the ground that the real estate was situated within the district where the suit was instituted. In referring to this phase of the question the court said:

"Even if the insurance policies in issue could be said to be in any fair sense such personal property as is contemplated by the statute, the policies are in the state of New York and not in this district." After the decree in question had been entered it appears that the Circuit Court of the United States for the Eastern District of Tennessee in 1907 refused to entertain a bill of review by which this suit was sought to be reopened for the introduction of newly discovered evidence, and upon consideration of the same the purported bill of review was dismissed. An appeal was taken from the order dismissing the bill of review to the Circuit Court of Appeals for the Sixth Circuit. Hopkins v. Hebard, 194 Fed. 309, 114 C. C. A. 261. That court affirmed the decree of the court below, and later, when the case went to the Supreme Court of the United States by certiorari, that court in turn affirmed the action of the Circuit Court of Appeals. Hopkins v. Hebard, 235 U. S. 287, 35 Sup. Ct. 26, 59 L. Ed. 232. The Circuit Court of Appeals in disposing of the case, among other things, said:

"What we do mean to decide is that in our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition."

Thus it will be seen that the Circuit Court of Appeals based their decision solely upon one question, to wit, as to whether or not the court below abused its discretion in dismissing the bill of review. That was the only question which was before the court. The statements of both the Circuit Court of Appeals and the Supreme Court, restricting their decision to the one point, shows very clearly that it was their purpose to avoid expressing their opinion as to any other question involved in the decree which might be raised in the future. There is no warrant for the contention that the Circuit Court of Appeals either directly or indirectly passed upon the question as to whether the Circuit Court for the Eastern District of Tennessee had jurisdiction in the first instance.

The Supreme Court quoted with approval that portion of the opinion cited above, in which that court stated: "We rest our decision solely upon this proposition." Thus it will be seen that the question of jurisdiction was not involved, nor was the question as to whether the attempt to have Cooper brought in by substituted service passed upon in any manner whatever. The purported bill of review was filed solely for the purpose of reopening the case, in order that an opportunity might be afforded, as I have stated, to offer newly discovered or additional evidence, and this motion was denied. The validity of the decree was not challenged in either of the courts in question, for the simple reason that there was no issue raised which afforded the court an opportunity to pass upon that question. Under these circumstances I cannot conceive upon what theory it may be said that defendants are estopped from raising the question of jurisdiction by anything decided in that case.

In the case of De Sollar v. Hanscome, 158 U. S. 221, 15 Sup. Ct. 818,

39 L. Ed. 956, the Supreme Court said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that

question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

It is further insisted that the minor heirs of Cooper, but not his widow, were made parties to the bill of review. I fail to find anything in the record to justify this contention. In the first place it does not appear that a guardian was appointed to represent the minor heirs, nor does it appear that authority was given the heirs of Cooper to file the purported bill of review. While the bill of review refers to the heirs as being parties, the relief sought could not, in

any sense of the word, apply to them.

R. L. Cooper never having been made a party to this suit, the only question that could affect the rights of his heirs would be the question of jurisdiction, and this question was not at issue. Further, the action on the part of counsel filing the bill of review was wholly unauthorized as it appears from the record. The making of these heirs parties to the proceedings at that time had no bearing whatever upon the question as to whether the court had jurisdiction. Counsel seems to have lost sight of the fact that the property sought to be affected by the decree was not within the district at the time the suit was instituted, nor was it within the district at the time of the alleged attempt to make these heirs parties to the suit.

In the opinion of the majority of the court it is also held that "one who claims title to land under grant from one state as land situated in that state may sue to recover from citizens of another state who claim land grant from that other state in the United States court of the first state," and the case of Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233, among others, is cited in support thereof. The point raised in the instant case, to wit, as to whether the court of one state has jurisdiction to pass upon title to land lying in another, was not involved in that case, but the question there relates exclusively to the powers conferred upon the federal court by the Constitution, and makes no reference whatever to the power of the federal or any other court to determine the title to property not situated within its territorial jurisdiction; the question there being as to whether the judicial power granted by the Constitution of the United States included the power of the federal courts to pass upon the location of state lines between two states, or that power had not been conferred by the Constitution, and therefore remained exclusively in the state. The court in referring to this phase of the question said:

"This court, in considering the Constitution as to the grants of powers to the United States and the restrictions upon the states, has ever held that an exception of any particular case presupposes that those which are not excepted are embraced within the grant of prohibition and have laid it down as a general rule that where no exception is made in terms, none will be

made by mere implication or construction. [Cohens v. Virginia] 6 Wheat. 378 [5 L. Ed. 257]; [Society for the Propagation of Gospel v. New Haven] 8 Wheat. 489, 490 [5 L. Ed. 662]; [Brown v. Maryland] 12 Wheat. 438 [6 L. Ed. 678]; [Gibbons v. Ogden] 9 Wheat. 206, 207, 216 [9 L. Ed. 23]. Then the only question is whether this case comes within the rule or presents an exception, according to the principles of construction adopted and acted on by this court, in cases involving the exposition of the constitutional laws of the United States."

The court not only did not announce the rule that the federal courts had jurisdiction to determine title to lands lying beyond its territorial limits, but, on the contrary, it specifically declared that:

"As this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitutional laws have authorized it to act, any proceeding without the limits prescribed is coram non judice, and its action is a nullity."

This is in perfect harmony with the cases I have already cited. The other cases upon which the complainant relies, to wit, Town of Pawlet v. Clark et al., 9 Cranch, 292, 3 L. Ed. 735, and Colson et al. v. Lewis, 2 Wheat. 377, 4 L. Ed. 266, do not, in my opinion, sustain the contention of the complainant. These cases are referred to in the case of Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6, 49 L. Ed. 142. There the court said:

"Two cases arising under the Judiciary Act of 1789 are cited, Town of Pawlet v. Clark et al., 9 Cranch, 292 [3 L. Ed. 735], decided March 10, 1815, and Colson et al. v. Lewis, 2 Wheat. 377 [4 L. Ed. 266], decided March 14, 1817. In Pawlet v. Clark, it appeared that the parties were citizens of Vermont and that the cases were pending in Circuit Court of the District of Vermont, but the reporter's statement does not show that the case was commenced in the state court. The record on file in this court, however, discloses that such was the fact, and that the cause was removed into the Circuit Court under the twelfth section. Colson et al. v. Lewis is not well reported. It was a bill in equity in which Lewis and others were complainants and Rawleigh Colson was the sole defendant. It came here on certificate, and the title was Lewis and others against Colson, and not as given in the report. The case stated shows that the case was removed from the state court into the Circuit Court of Kentucky, and that the complainants were citizens of Virginia, but the citizenship of the defendant was not disclosed. The headnote asserts that the parties were citizens of Kentucky, but the certificate of the clerk, as appears from our files, sets forth 'that it is stated in the bill that the defendant, Rawleigh Colson, is a citizen of the state of Virginia.' In both cases the parties were citizens of the same state and the cases were originally commenced in the state courts, and the Circuit Courts acquire jurisdiction by removal."

The syllabus in the case of Stevenson v. Fain, supra, is in the following language:

"The Circuit Courts do not possess original jurisdiction over controversies between citizens of different states claiming lands under grants of different states by reason of the subject-matter, and the decree of a Circuit Court of Appeals in such a case is final and an appeal to this court does not lie."

Thus it will be seen that the cases relied upon by the complainant cannot be said, in any sense of the word, to sustain the rule announced by this court. I think the case of Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6, 49 L. Ed. 142, supra, is directly in point and conclusive as to this phase of the question. It should be borne in mind that in the Tennessee suit the complainant was a citizen and resident

of the state of Michigan and the defendants were citizens and residents of the states of Ohio, New York, and North Carolina. Therefore it clearly appears that none of the parties was a resident of the state of Tennessee, and they were not residents of the same state, as required by the Constitution. These facts distinguished this case from any of the cases relied upon to sustain the contention of the complainant.

In addition to what I have said as to the jurisdiction of the court, I am also of the opinion that the assignment of error as to what transpired in the trial of the case is sufficient to warrant reversal of the decree of the court below upon the merits of the case. However, I do not deem it necessary to enter into a discussion of that phase of

the question, in view of what I have already said.

## MORAN v. MORGAN et al.

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

No. 230.

1. BANKRUPTCY \$\infty 303(3)\ldot Actions\ldot Evidence.

In a suit by the trustee of bankrupts to set aside a conveyance made before the filing of the petition, on the ground that it was in fraud of creditors, evidence *held* to show that the bankrupts were insolvent at the time the deed was first executed.

2. Appeal and Error \$\iff 1009(1)\to Review\to Findings of Fact.

Findings of fact in equity suit to set aside a conveyance as in fraud of creditors will not ordinarily be disturbed on appeal.

3. Fraudulent Conveyances \$\sim 49(1) - Parol Trust.

While a parol trust made at the time of the delivery of a deed is within the statute of frauds, nevertheless it supports a conveyance which would otherwise be open to attack as in fraud of creditors.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by William L. Moran, as trustee in bankruptcy of Charles Hobart Morgan and Albert B. Morgan, individually and composing the firm of Morgan Bros., against Charles Hobart Morgan and others. From a decree for complainant, defendants Morgan and wife appeal. Reversed and remanded.

Appeal from a decree in equity entered on the 14th day of December, 1916, setting aside a deed of real property as in fraud of creditors. The suit was brought by the trustee in bankruptcy of the firm of Morgan Bros. against Charles Hobart Morgan, one of the bankrupts, and Harriet M. Morgan, his wife, and the Blue Bird Motor Cab Company, of whom only the two first appeal. The complaint alleged that on the 18th day of January, 1916, within four months after the filing of an involuntary petition against the bankrupts, Charles Hobart Morgan undertook to convey to his wife, Harriet M. Morgan, certain real property in the city of New Rochelle, county of Westchester, and on that day recorded a deed to Harriet Morgan to that effect; that the deed was without consideration, and that the firm, including Charles H. Morgan, was insolvent; that the Blue Bird Motor Cab Company had some subsequent interest.

The answer contained certain denials, and as a defense alleged that on the 9th day of February, 1909, one Charles V. Morgan, the father of Charles Hobart Morgan, executed a deed to Charles H. Morgan of the premises in question, upon the understanding and agreement that the same should be and become the property of the defendant Harriet M. Morgan and the children of Charles H. Morgan and Harriet M. Morgan, subject to the use of the same by the defendant Charles H. Morgan and Albert B. Morgan, composing the firm of Morgan Bros., so long as they remained in business and required the use of the same; that subsequently, and on the 2d day of October, 1913, Charles H. Morgan, for certain valuable considerations, executed a deed of the premises to Harriet M. Morgan subject to the tenancy of Morgan Bros., and pre-

sumptively in pursuance of the aforesaid trust.

Upon the trial it developed that Morgan Bros. had for many years been engaged as liverymen in the city of New Rochelle, but that this business had slowly fallen in value and extent after the introduction of motorcars, until their embarrassment finally became such that in April, 1916, they had assigned for the benefit of creditors. On the 16th day of May, 1916, their creditors filed an involuntary petition in bankruptcy against them, which was followed in due course by an adjudication on the 23d day of May. The plaintiff was appointed their trustee in bankruptcy and by permission of the court began this suit. Much testimony was taken at the trial touching the solvency of Morgan Bros. on the 2d day of October, 1913, the date of the conveyance by Charles Hobart Morgan to his wife, Harriet M. That they were heavily indebted was conceded by both sides, and the issue turned substantially upon the value of the horses, carriages, hearses, and the like, together with their accounts. Of the latter they had a large number on the books, but many were old and uncollectible. The District Judge found that they were insolvent on the 2d day of October, 1913, and, applying the rule in New York that a voluntary conveyance was presumptively in fraud of creditors when the grantor was insolvent, decreed that Harriet M. Morgan should reconvey the property to the trustee in bankruptcy.

As alleged in the answer, Charles V. Morgan, the father of the bankrupts and the original owner of the livery business, conveyed the property in question on February 9, 1909, to his two sons, Charles H. and Albert B., by full-covenant deed recorded May, 1914, of which the habendum read as follows: "To have and to hold the above-granted premises unto the said Albert B. Morgan so long as he shall remain and continue in the livery business and shall require the use of said premises for such business, and upon his death or upon his withdrawal from such business then unto the said Charles H. Morgan, or

his heirs and assigns, forever."

The defendants upon the trial attempted to prove a conversation had between Charles Hobart Morgan and his father, Charles V., at the time of the execution of the deed of February 9, 1909. This conversation was ruled out. The defendant offered to prove the substance of the fourth article of the answer, but this offer the court rejected upon the ground that if proven it would constitute no defense to the action.

Samuel F. Swinburne, of New Rochelle, N. Y. (Richard Leo Fallon, of New Rochelle, N. Y., on the brief), for appellants. Michael J. Tierney, of New Rochelle, N. Y., for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] We are not disposed to disturb the finding of the trial judge upon the value of the assets. If anything, we think that he overestimated them. We may take the cash at \$225 and the agreed value of the real estate at \$4,533. The value of the accounts was certainly not over \$4,800; that is, what could be collected upon them less the cost of collection, which at \$300 was most moderate. There remained only the horses, wagons, harness, and the like, which the District Judge put at \$8,000. These assets Charles H. Morgan swore on April 25, 1916, to be worth less than \$3,000, and the chattels other than the horses realized at auction only \$2,000. Even though we were to accept the value placed upon the horses by Davis at \$175 apiece, we should have but \$4,550, and it would be necessary to place a value upon the wagons, harness, etc., at \$6,000 in order to establish a solvency. This would be three times what they sold for at auction,  $2\frac{1}{2}$  years later, and that, too, at a sale which was described as a good one.

Nor can we see any reason to differ with the District Court's treatment of the testimony of Davis and Ives. At best their estimates were no more than intelligent guesses upon a subject-matter which is not susceptible of accurate ascertainment. In such cases everything depends upon the appearance and general credibility of the witnesses, and we can see no reason why he should accept their estimates at so much higher values than the bankrupts chose to put upon them in the assignment schedules which they made at a time when they had no motive to undervalue, and when, indeed, they must have been disposed to put the value as high as in conscience they could.

Besides, this deed was kept off record for two years and more, for reasons which were not explained. The business at the time of its execution had for long been obviously going off, and must have been known to be doomed from the general conditions controlling it. All these factors we treat as of consequence. Finally, unless there is some very positive reason, we do not think we should disturb the finding below in such a case as this. Our own conclusions were certainly not so good as those of the District Court, which had an opportunity to measure the witnesses that came before it. We therefore accept the finding of insolvency.

We say this without any consideration of the effect of the payment to Downing to revive the debt. That payment was made in 1914, a year after the conveyance, and it is hard to see how it could affect the situation in 1913. Yet if we assume that it did not revive the debt, the difference is only \$2,500 in the outstanding indebtedness on October 1, 1913, which still remained \$19,615.25. The finding of insolvency is not in our judgment affected by that question.

The deed of Charles V. Morgan created an estate for life in Albert B. Morgan subject to condition subsequent with remainders over. We need not consider whether, in view of the habendum to "Charles H. Morgan or his heirs and assigns," it created less than a fee in Charles H. Morgan. New York Real Property Law (Consol. Laws, c. 50) § 240 (1). In any case Charles H. Morgan had at least an estate for life, which came into possession when the livery business came to an end by the assignment for the benefit of creditors in April, 1916. Moreover, the remainder, whatever the quantum of the estate, was alienable and was subject to the claims of creditors. As such it could be the subject of a fraudulent conveyance and such it was except for the trust.

[3] Thus in our judgment the case turns on the validity of the defense set up in the fourth article of the answer, which alleged a parol trust made at the time of the delivery of the deed, that the property should in effect be held in trust for the wife and children of Charles H. Morgan, and that trust under the statutes of New York was void. Real Property Law, § 242; Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446. But it is nevertheless well settled that such parol trusts, although within the statute of frauds, are valid to support a conveyance which would otherwise be in fraud of creditors. The doctrine originated in a ruling of Vice Chancellor Leach in Gardner v. Rowe, 2 Sim. & St. 346, which Lord Eldon affirmed in 5 Russell, 258, and his authority seems to have been sufficient to give the doctrine general currency in this country. Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. 584; Iauch v. De Socarras, 56 N. J. Eq. 538, 39 Atl. 370; Carver v. Todd, 48 N. J. Eq. 102, 21 Atl. 943, 27 Am. St. Rep. 466; Richmond v. Bloch, 36 Or. 590, 60 Pac. 385; Desmond v. Myers, 113 Mich. 437, 71 N. W. 877; Hays v. Reger, 102 Ind. 524, 1 N. E. 386; Davis v. Graves, 29 Barb. (N. Y.) 480; Dunn v. Whalen, 66 Hun, 634, 21 N. Y. Supp. 869 (G. T. 5th Dept.). Whatever may be thought of it on principle, we regard it as too well settled on authority to be disregarded, and, in so far as the case turns upon it, we feel constrained to hold that the fourth article of the defense, if proved, would be sufficient.

The cause will therefore be remanded, with instructions to try the fourth article of the answer, and, if it be proved, to dismiss the bill, but, if the defendant do not succeed in proving it, to reinstate the

decree for the plaintiff, without further proof.

## DUPLEX PRINTING PRESS CO. v. DEERING et al.

(Circuit Court of Appeals, Second Circuit. May 25, 1918.)

## No. 120.

1. Injunction \$\infty\$=101(2)—Construction of Statute—Clayton Act—Strikers.

Where union employes of open shop go out on strike for closed shop, employer's action for injunction against officers and members of union organizations to which strikers belong *held* within Clayton Act, § 20 (U. S. Comp. St. 1916, § 1243d), relating to granting of injunctions in cases growing out of dispute concerning conditions of employment.

2. Injunction \$\infty\$ 101(2)—Secondary Boycotts—Strikes.

Clayton Act, § 20 (Comp. St. 1916, § 1243d), perhaps in conjunction with section 6 (section 8835f) held to legalize a secondary boycott, at least in so far as it rests on or consists of refusing to work for any one who deals with principal offender.

Rogers, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Duplex Printing Press Company against Emil J. Deering and others. Decree for defendants, and complainant appeals. Affirmed

For opinion below, see 247 Fed. 192.

Complainant is a corporation organized and existing under the laws of the state of Michigan. It is engaged in the business of manufacturing printing presses at its factory in Battle Creek, Mich. It has always maintained the open shop policy, both in connection with its factory in Battle Creek and in supervising elsewhere the erection of its presses. When it is fully occupied, it operates ten hours a day, although in the winter it usually runs eight hours a day. Its presses are sold throughout the United States, and even in foreign countries. Special emphasis is placed by it on its manufacture of presses for metropolitan newspapers, which vary in weight from 10,000 pounds to 100,000 pounds, and which require from one to four railroad cars to transport them, and many drayloads to cart them to and from the freight yards. It is said that these presses are of a peculiar manufacture and are made under special patents with the result that the ordinary mechanic or pressman is not competent to erect or operate them, except under supervision and instruction of some one usually employed by the complainant, who is familiar with their structure and operation.

The defendants are officers and members of the International Association of Machinists. This association is divided into "districts" of which District Council, No. 15, in New York City, is one. Two of the defendants, Emil J. Deering and William Bramley, are business agents of District Council, No. 15. Michael T. Neyland is business agent of what is known as Local Lodge, No. 328, of the International Association of Machinists, existing and carrying on business solely within the city and state of New York. No jurisdiction was obtained over these unincorporated associations, as they were not served in the manner required by the statute. Deering, Bramley, and Ney-

land are members of the International Association of Machinists.

It is alleged that the International Association of Machinists is an unincorporated association of journeymen machinists, with a membership of over 60,000, and has affiliated therewith local unions and lodges in different states and territories of the United States, which are also unincorporated associations, and that each member of any local lodge is by virtue thereof a member of the International Association. District No. 15 of said International Association is one of the association's subdivisions and has its principal office in New York City. It is alleged that the Riggers' Protective Union is an unincorporated association of workingmen engaged in handling, hauling, and erecting machinery, etc., and has jurisdiction over all union men in New York City engaged in that business. It is alleged by complainant, although denied by defendants in their answer, that nearly all of the skilled machinists in New York City are members of the International Association of Machinists, and that nearly all of the riggers in New York City are members of the Riggers' Protective Union, and that the said union machinists and riggers are affiliated with another unincorporated association known as the Building Trades Council of New York City, and that said Building Trades Council is composed of the various unions in New York City whose members are engaged in the building business, and includes in its membership the unions of some 30 different trades, with an aggregate membership of from 75,000 to 100,000 members, and that, by virtue of the agreements and understanding existing between each of said unions, no member thereof is allowed to work on or in connection with any building where any nonunion man is employed, and said Building Trades Council is authorized to call strikes of all trades employed on or in connection with any building in the event that any nonunion man is employed in any of said trades, and that by reason of said rules and regulations and the affiliation of said 30 unions through the Building Trades Council it is practically impossible to erect any building in the borough of Manhattan where any nonunion man is employed in any of said trades.

The complainant states that it is informed and believes that the entire machinery of the Building Trades Council will be put into operation and effect against it, in order to prevent it from exhibiting or displaying its presses at the exposition conducted by the National Exposition Company, Incorporated, as hereinafter set forth, unless a restraining order be issued as prayed. The complainant states on information and belief that for many years past the International Association of Machinists and the local branches thereof, and the members and officers of said association and its branches, have been engaged in a combination and conspiracy to monopolize the machinists' trade throughout the United States, and to prevent the employment of any machinist who is not a member of said International Association, and that they have adopted various means and devices to prevent any employer procuring or retaining the necessary skilled organization for the production or installation of printing presses or the necessary customers for the sale thereof, unless said employers operate a closed or union shop and refuse employment to any machinist who is not a member of said International Association of Machinists, and that said conspirators have been so far successful in carrying out their said combination; that practically all manufacturers of printing presses of the kind and character manufactured by the complainant, with the exception of the complainant, have been compelled to comply with the demands of said conspirators, and to refuse employment to any person who is not a member of said International Association, and that for a number of years past the said conspirators have further combined and conspired together to attain their said monopolistic and unlawful ends by restraining, injuring, and destroying the complainant's interstate trade, business, and good will, and interfering with the sale, carting, and installation of the complainant's printing presses in New York state and the different states of the United States, for the purpose of destroying its interstate trade, contrary to the statutes of the United States and the state of New York in such cases made and provided, and contrary to the common law, because the complainant operates an open shop, and that all of the acts and doings of the said conspirators as described were done in furtherance of said conspiracy, and that if said conspirators are successful in destroying the complainant's business, because it is unwilling to become a member of said combination, such monopoly will have become complete, and no person will be able to secure employment in connection with the manufacture of printing presses of the kind manufactured by the complainant, except with the consent of the said International Association of Machinists.

It is alleged that in the month of August, 1913, a strike was called in complainant's factory by the defendants, or those acting in conjunction with them, in furtherance of said conspiracy, and 12 or 14 men quit work under orders of the union, without presenting any grievances or demands, or giving any notice, and that all of said men who quit work were members of said International Association of Machinists, and that immediately after said strike took place, and with like purpose and intent, said confederates placed pickets around said factory, to prevent the complainant from securing skilled machinists to take the place of those who had gone out on strike, and complainant is informed and believes that they have ever since persistently endeavored to induce other skilled machinists working for it at Battle Creek, or in connection with the installation of its presses in different parts of the country, to quit work, and have employed falsehoods, misrepresentations, threats, intimidation, and personal violence to induce employes of complainant to quit work, and to prevent other mechanics entering the employment of complainant, and has thereby been caused great and irreparable injury. It is also alleged on information and belief that the said conspirators have published and widely distributed letters and circulars among, and have made oral communications to, unions and teamsters, machinists, and pressmen, and their officers and members, and also to other kinds of mechanics or journeymen who do, or might have occasion to do, the work of hauling, handling, erecting, or operating printing presses, to the effect that complainant is unfair, and that no mechanics or craftsmen of any class could or should haul, handle, install, or operate printing presses produced by complainant, and that all machinists are forbidden to handle, erect, or operate such presses, and that the object and effect of said circulars has been to incite union officers in all parts of the United States to induce, prevent, and forbid all members not to haul, handle, erect, or operate such presses, and to thereby cause loss and damage to any person or corporation purchasing complainant's presses, and to deter said persons and corporations from doing business with complainant for fear of labor difficulties, and the complainant has been

thereby caused irreparable loss and damage.

It is also alleged on information and belief that said conspirators endeavored to prevent customers and those who might become customers of complainant from placing contracts with or purchasing printing presses from complainant, and they have threatened said customers with labor difficulties, which would injure their said business, if they patronized complainant, and they have made misrepresentations to complainant's customers, and those who might become customers, as to the labor conditions prevailing in its factory, and have made statements to the effect that organized labor would prevent complainant from installing said presses, and all of said statements have been made for the purpose of interfering with the complainant's interstate commerce trade and good will, and preventing it from securing orders and contracts in states outside of the state of Michigan, in order thereby to carry out the purposes of said conspiracy, and they have repeatedly ordered and caused strikes of mechanics and laborers employed by complainant and its customers in different states of the United States in connection with the hauling, erecting, and installation of presses manufactured by complainant, and they have thereby harassed, delayed, and damaged complainant and its customers, for the sole purpose of destroying complainant's interstate trade and business and compelling it to operate a union shop at Battle Creek.

The complainant claims that over 80 per cent, of its sales are made to customers outside of the state of Michigan, through the channels of interstate commerce. It also declares that most of its product is sold through salesmen in different states of the Union, who solicit orders and contracts from customers and forward them to complainant's office in Battle Creek for acceptance. It is also alleged that on account of the aforesaid combination and conspiracy, and the acts performed in furtherance thereof, the complainant has already suffered great loss and damage in its good will, trade, and business, and is suffering a continuing injury, and has no adequate remedy at law, because much of its said damage is incapable of definite proof for recovery in law, and because it would be necessary for the complainant to bring a multiplicity of suits against the great number of persons engaged in said conspiracy, and because many of said defendants are insolvent and would be unable to respond in damages, and because it is impossible for the complainant to ascertain the full extent to which its good will, trade, and business has been injured, and the name of each newspaper which has been deterred from placing contracts and orders with it by reason of the general rumors inspired by the defendants, for the purpose of frightening away any newspaper which might patronize its presses.

The complaint contains other allegations not necessary to incorporate

herein. The relief prayed for is as follows:

"1. That the defendants Emil J. Deering and William Bramley, individually and as business agents of District No. 15 of the International Association of Machinists, Michael T. Neyland, individually and as business agent of Local Lodge, No. 328, of the International Association of Machinists, and Edward F. Nielson, individually and as business agent of Riggers' Protective Union, Jacob J. Keppler, individually and as vice president of the International Association of Machinists, their and each of their agents, servants, attorneys, confederates, and all persons acting in aid of or in conjunction with them, or any of them, or under their authority, suggestion, or direction, be restrained and enjoined from combining and conspiring together to monopolize the machinist trade, and from combining and conspiring together to prevent the employment of nonunion machinists, and from combining and conspiring together to injure the complainant's business, trade, and good will, and to prevent the complainant from securing skilled me-

chanics to carry on its said work of producing, hauling, and erecting printing presses for customers in New York state and other states outside of Michigan, and to prevent the complainant from securing orders and contracts for the sale and installation of printing presses, and from interfering with the sale, carting, installation, use, or operation of printing presses made by the complainant, and from doing any and all acts whatsoever in furtherance of said combination and conspiracy to accomplish any of the aforesaid purposes, and more particularly from doing any of the following acts in furtherance of said conspiracy:

"From publishing, circulating, or otherwise communicating, either directly or indirectly, in writing or orally, to any persons or corporation, any statement or notice of any kind or character whatsoever, calling attention to the fact that your complainant or its business or its products are or were or have been declared unfair, or are on any unfair list, or that your complainant should not be patronized or dealt with, or its printing presses purchased, used, handled, hauled, operated, worked upon, or dealt in, because made in an open or nonunion shop, and from publishing, circulating, or communicating, either orally or in writing, any representation or statement of like effect or import, in any manner that will injure or interfere with the complainant's business, or with the free and unrestricted right of the complainant to dispose of its printing presses, and to obtain contracts and orders for printing presses to be manufactured and installed by the complainant; from giving notice, verbally or in writing, to any person, firm, or corporation to refrain from soliciting, making, or carrying out contracts with complainant for the purchase, carting, installation, operation, exhibition, advertisement, or display of printing presses made by the complainant, under threats that, if such contracts or purchases are made or carried out, or such work is done, they will cause the person so notified loss, trouble, or inconvenience, or that they will interfere with and prevent the complainant from carrying out said contracts, or that they will cause persons employed by others to do work in connection with said presses, or upon buildings or in connection with exhibitions where said presses are to be displayed, used, or installed, to withdraw from work upon said building or in connection with said exhibitions, or that they will cause persons not to exhibit at said exhibition; and from attempting to prevent the sale, carting, installation, use, operation, exhibition, or display of printing presses manufactured by complainant, or the performance of contracts made by the complainant, by inducing or attempting to induce any person whomsoever to decline employment, or not to seek employment, under any persons, firms, or corporations, or representatives of the complainant engaged in the work of hauling, carting, installing, handling, using, or operating said printing presses for customers, because the complainant does not observe union regulations in Battle Creek, Mich.; and from preventing or attempting to prevent the complainant from exhibiting its said presses at any exhibition or exposition, or advertising said presses, by threat-ening any persons or corporations having charge of such exposition or advertising, or any person or corporation doing business with them, with labor difficulties or loss of patronage, if your orator is allowed to exhibit or advertise, and from inducing any person or persons employed by said exposition company or advertising agency, or any person or corporation doing business with them, to cease employment, or to decline employment, or to remain out of employment of said exhibitors or exposition company as long as your complainant is allowed to take part in said exhibition; and from inducing any person or corporation not to do business with or work for any person or corporation, because such person or corporation may have, or purposes to have, or formerly had, business relations with complainant; and from inciting or intentionally causing strikes or labor troubles among men employed by customers, representatives, or agents of your complainant outside of Battle Creek, Mich., where no grievances exist against the complainant or its agents or customers other than the alleged grievance that the complainant does not operate its factory at Battle Creek, Mich., in accordance with the rules and regulations prescribed by the International Association of Machinists, or any of its officers or subdivisions; and from threatening, intimidating, or assaulting persons in the employ of your complainant, or those engaged in hauling, installing, using, handling, or operating machinery manufactured by your complainant, and from making misrepresentations or false statements concerning the labor conditions existing in the complainant's factory, for the purpose of interfering with the complainant in securing skilled mechanics to enter or remain in its employ, or in securing orders and contracts from customers for the sale, installation, and use of printing presses; and from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts, and from doing any of the forbidden acts, either directly or indirectly, or through by-laws, orders, directions, or suggestions to committees, associations, officers, agents, or otherwise."

Daniel Davenport, of Bridgeport, Conn., and Walter Gordon Merritt, of New York City (Austin, McLanahan & Merritt, of New York City, of counsel), for appellant.

Frank X. Sullivan, of New York City, for appellees.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). I am unable to concur with my Associates in the conclusion at which they have arrived, and which will appear in the opinion of Judge HOUGH, which follows. I shall, however, state the facts involved and my opin-

ion as to the law applicable to the facts as I understand them.

The complainant is a manufacturer of printing presses. It employs 250 machinists in its factories in Michigan, and some 50 additional employés as traveling salesmen and as expert machinists in supervising the work of installing the presses in the places of business of the various purchasers of its machines. In carrying on its business it has always operated an "open" shop, without discrimination against any person employed in its factories on the ground that he was or was not a member of any labor union. It has observed the same policy in the employment of persons to supervise the installation of its presses. The complainant's presses are sold throughout the United States and in foreign countries. The presses which it builds are newspaper presses only, and they vary in size and capacity from a press that weighs 10,000 pounds to one that weighs 10 times that. A single freight car suffices to carry the smaller presses, while four cars are needed to transport the largest. Its presses adapted to metropolitan uses are capable of producing 30,000 complete papers an hour.

The testimony is that complainant has three competitors: R. Hoe & Co., of New York; the Goss Printing Press Company, of Chicago; and Walter Scott & Co., of Plainfield, N. J.—each of which operates a "closed" shop. The Hoe Company plant is understood to be the largest of these, and 10 times the size of that of the complainant's; the Goss Company's is about twice that of the complainant's, while the Scott Company's is more nearly equal to complainant's, although somewhat larger. There are no other builders of newspaper presses in the country, although there are builders of job presses of some kinds upon which small country newspapers are sometimes printed. The installation of the presses is a difficult undertaking. The installation of a press of the largest type requires the labor of five men

working for two weeks. The record shows that the men employed to install the presses are employed, not by the complainant, but by the complainant's customers. The acts complained of and sought to be restrained do not relate to the manufacture of the presses, but to the installation and operation of them. The claim is that the labor difficulties complained of have been due to the fact that complainant has refused to permit its machines to be manufactured in a "closed" shop. A "closed" shop is an establishment in which the employés are all members of a labor union; and an "open" shop is one in which no such condition of employment is imposed, and no discrimination between union and nonunion workers exists.

The International Association of Machinists, with which defendants are connected, is an unincorporated association of journeymen machinists, with a membership of over 60,000. It is not a party to this suit, and no relief is asked as against it. The defendants Deering and Bramley are sued individually and as business agents of District No. 15 of the International Association. District No. 15 is one of the subdivisions of the International Association. It is a voluntary organization, and embraces Local Lodges Nos. 328, 402, 406, 429, 434, and 721, each of which is a subdivision thereof, and each has its principal office in the city of New York, and each has jurisdiction over a certain group of the members of the International Association in that city. Neyland is sued individually and as business agent of Local Lodge No. 328, which is, as has been stated, in the city of New York. The defendant Nielson is sued individually and as business agent of the Riggers' Protective Union. That organization is also unincorporated, and it is an association of workingmen engaged in handling, hauling, and erecting machinery, and it has jurisdiction over all union men in New York City engaged in that business. The defendant Keppler, sued individually and as vice president of the International Association of Machinists, does not appear to have been served, and has interposed no answer. He is therefore not to be considered.

The important fact is to be noted that no one of the defendants is or ever was an employé of the complainant, and that no local lodge or union or officer or member of any union, in the place where the complainant manufactures its presses, has been made a party defendant herein. The parties defendant are residents and citizens of New York, except the defendant Bramley, who is a resident and inhabitant of New Jersey, and the unions with which they are connected are local to New York and vicinity.

It is the duty of courts to protect the life, liberty, and property of all within their jurisdiction. Courts are not respecters of persons, and the rights of employers and those of employes are entitled to equal protection. Liberty of contract is a constitutional right secured to employers and employes alike. It consists in the ability at will to make or abstain from making a binding obligation. The employe has the right to choose his employer. The employer has the like right to choose his employe. The defendants insist that all they have done has been to exercise the right, which they claim for the organizations which they represent, to say that their members shall not work for

the complainant or handle the complainant's product; in other words, that it is their right to say for whom their members shall work and upon what they shall work. The complainant denies that that is the sole question which the facts present.

In England some years ago, in Skinner v. Kitch, 10 Cox, C. C. 493,

Blackburn, J., said that:

"A greater piece of tyranny than to insist that a master shall have his work stopped unless he consent to punish men who are his journeymen for refusing to belong to a union cannot well be."

In the above case an indictment and conviction were sustained for threatening that nearly all the employer's workmen would quit work unless he dismissed a nonunion employé or compelled him to join the union.

The question came before the Supreme Court of the United States in 1917 in Hitchman Coal & Coke Company v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497. As the jurisdiction of the District Court, from which the case came, was based solely upon diversity of citizenship, the decision was reached upon the common law of the state of West Virginia; there being no statute governing the matter. The company brought suit to enjoin the defendants, who were sued as individuals and as officers of the United Mine Workers of America and of its local branches, which had jurisdiction over the territory within which the plaintiff's mine was situated. The District Court granted an injunction as prayed. 202 Fed. 512 (1912). The Circuit Court of Appeals reversed the case and dismissed the bill. 214 Fed. 685, 131 C. C. A. 425 (1914). And the Supreme Court reversed the Circuit Court of Appeals, and affirmed the decree of the District Court, with slight modifications. As modified, the defendants were restrained from "interfering or attempting to interfere with plaintiff's employés for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employés or to any person who might become an employé of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a nonunion mine," as well as certain other acts which need not here be specified. In the above case the employés do not appear to have been employed for any definite period of time, but in applying for work they were required, as a condition of obtaining employment, to agree that they would not, while in the service of the company, be a member of the union, and if they joined the union that they would withdraw from the company's employ.

The case of Eagle Glass & Manufacturing Company v. Rowe, 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286, decided at the same time the Hitchman Case was, involved very much the same question, and the court reversed the Circuit Court of Appeals, which held that no injunction should issue, and dismissed the bill. The Supreme Court

held its action erroneous:

"(a) Because plaintiff was entitled by law to be protected from interference with the good will of its employés, although they were at liberty to

quit the employment at pleasure; (b) because the case involved no question of the rights of employés, and their right to quit the employment gave to defendants no right to instigate a strike; and (c) because the methods pursued by the defendants were not lawful methods."

The above decisions very much restrict the right of labor unions to interfere with employers of labor in the management of their business; and this court must follow the law as laid down by the court in all cases to which it is applicable. But the decision goes upon the common law of West Virginia; there being no statute affecting it and no authoritative decision of the courts of that state.

In Berry v. Donovan (1905) 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, an agreement had been entered into by shoe manufacturers with the Boot and Shoe Workers' Union, a national organization, to hire as shoe workers only members of that organization. It was also agreed that the manufacturers would not retain any shoe worker in their employment after receiving notice from the union that a worker was objectionable to it, either on account of being in arrears for dues, or disobedience of union rules, or from any other cause. It seems that after this agreement had been made the union demanded that a certain employé, who had been working for the manufacturers for several years prior to this agreement, and who was not a member of the union and refused to join it, should be discharged. This was done, and the employé brought an action for damages against the defendant, who was the representative of the Boot and Shoe Workers' Union, and who demanded and procured his discharge. The court sustained a judgment against the defendant for \$1,500, and held that the fact that the plaintiff's employment was not terminable at the will of the employer was material only as to the amount of the damages. The object was to make the plant a "closed" shop. The court said:

"If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employé would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly."

The court was unanimous in its opinion. See, also, Plant Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341.

In Connors v. Connolly (1913) 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564, it was held in a carefully considered case that a contract entered into by the United Hatters of North America and substantially all the manufacturers of hats in Danbury, to the effect that union workmen only should thereafter be employed, is contrary to public policy. The tendency of such an agreement, the court said, is to expose a nonunion workman to the tyranny of the will of others,

and to create a monoply which would exclude what he has to dispose of, and other people need, from the open market, or perhaps from any market. The plaintiff in that case was a hat maker in Danbury, and was discharged from employment and prevented from getting work by the concerted acts of the defendants, members of a labor union, who attempted to justify their conduct under the agreement not to employ nonunion workmen. The attempted justification failed; the court, reviewing the subject in an exhaustive and carefully reasoned opinion, concluded that the agreement was void, as opposed to sound public policy.

A contrary view of the matter was taken in Kemp v. Division No. 241 (1912) 255 Ill. 213, 226, 227, 99 N. E. 389, 394 (Ann. Cas. 1913D,

347), where it was said in an opinion written by Cooke, J.:

"If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance, and necessary for the preservation of their organization, through which alone they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination injury may result incidentally to nonunion men through the loss of their positions, that object does not become unlawful."

The opinion of Judge Cooke was concurred in by two other members of the court. Three judges dissented. The sole purpose of the strike in that case was to insure the employment of union men, and to compel the discharge of certain employés who had withdrawn from the union. The conclusion reached by Judge Cooke became the decision of the court by its acceptance by Judge Carter, who cast the deciding vote and wrote a separate opinion, in which he stated that he concurred in the final conclusion, but not in all the reasoning. He appears, however, to have thought that the threatened injury to the complainants was justifiable as an act of competition, and that, even if the purpose of the strike were unlawful, so that defendants would be liable in a civil action if complainants were discharged, still an injunction should not issue, as that would be in effect to compel them to continue in their employer's service unwillingly. The dissenting judges stated that the result reached was contrary to the law of Illinois as declared in repeated decisions covering a period of 14 years, citing Doremus v. Hennessy, 176 III. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, and London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185. They held that the right of a labor organization to enforce a "closed" shop for the mere purpose of strengthening the organization in future contests with the employer is not of the same character as, or equal to, the right of the individual to dispose of his labor at his own will.

In Gray v. Building Trades Council (1903) 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, the whole controversy rested on the effort of defendants to compel the plaintiffs to employ union labor only. The question was whether the efforts made in that direction were legitimate to the doctrine that members of labor unions

may singly or in a body quit the service of their employer, and for the purpose of strengthening their union persuade and induce others in the same occupation to join it, and as a means to that end refuse to allow their members to work in places where nonunion labor is employed. This the court declared to be legitimate and refused to enjoin, although it held that boycotting might be restrained by injunction.

In Bossert v. Dhuy (1917) 221 N. Y. 342, 355, 117 N. E. 582, the court referring to National Protective Association v. Cumming, 53 App. Div. 227, 230, 65 N. Y. Supp. 946, declared that it was clearly established in that case that workingmen may organize for purposes deemed beneficial to themselves, and in that organized capacity may determine that their members shall not work with nonmembers, or upon specified work or kinds of work. It declared that:

"An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith, for the purpose of bettering the condition of its members, and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action."

The court in the above case passed upon the rights of labor unions under the common law of the state of New York, which is the state in which most of the acts complained of were done, and where the defendants, except Bramley, reside. It decided that it was not illegal for the United Brotherhood of Carpenters to refuse to allow its members to work with nonunion men, and that it was not illegal for it to refuse to allow its members to work in the erection of materials furnished by a nonunion shop. A case is only authority for what it actually decides, and it has been frequently said that every decision is to be read as applicable to the particular facts proved, since the generality of the language of an opinion is not intended as an exposition of the whole law, but is to be understood as governed by the particular facts of the case which is decided. In the case before the New York court it was passing upon a general rule applicable to all nonunion mills, and to all nonunion-made materials. And the court took pains to point out (221 N. Y. 355, 117 N. E. 584) that a general rule of this sort "differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer."

The question whether a labor organization can call those of its members out on strike who work for A. because he maintains a closed shop, while permitting other members to work for B., C., and D., who also maintain closed shops in the same industry, is not the same question as that which arises when it calls out all its members who work for A., B., C., and D., and for any one else who maintains a closed shop. As we understand the New York decision, the court dealt in that case with labor organizations which made no discrimination, but applied its rules to all alike. The members were not to work for any one who maintained an open shop, and they were not to work upon any material which came out of any open shop. In the case now in this

court the record contains the testimony of the president of the Exposition Company in New York City, who said Deering told him they were going to enforce the union closed shop rule against complainant, "because it was their opportunity of getting back at Mr. Stone, the president of the company." He also testified that Neyland told him "that Stone had driven his brother out of Battle Creek, so that his brother could not get a job there, and he wanted to get back at him." When the president asked them whether anybody else in the show was on the unfair list, "they mentioned the Oswego Machine Company, stating that they might follow the same policy with that as with Mr. Stone, but they did not think they would bother about it; that Stone was fundamentally the one against whom they wanted to enforce this ruling in this show." It does not appear, however, that the Oswego Machine Company was in the same industry with the complainant. On the cross-examination the complainant's president, however, testified as follows:

"I know that the Machinists' Union was endeavoring to have this done in all the plants in the country where our industry was involved, and that they were asking the same from us as they were asking from the Hoe Company, the Goss Company and the other printing press manufacturers, so that we were not selected from the printing trades industry for these demands or the attempts to enforce them, and I understood that the Goss Company, the Hoe Company, and the Scott Company, at Plainfield, had all granted these conditions, so that the last one in which any drastic efforts were made to create the eight-hour day and establish a minimum scale was our concern."

It may be conceded that the defendants were endeavoring to establish uniform conditions in the industry in which the complainant was engaged. It follows, therefore, that under the New York law, as expounded by the New York Court of Appeals, the defendants were within their rights, unless there are other circumstances which make the rule laid down in that case inapplicable.

It is said the defendants are not engaged in a peaceful strike, but in an alleged boycott, and that their conduct seeks to coerce complainant's customers, who are in turn to coerce the complainant into

unionizing its business against its will.

A strike and a boycott are two quite distinct matters. A strike is an effort on the part of employés to obtain higher wages, or shorter hours, or a closed shop by stopping work at a preconcerted time. It is an attack made by employés upon their employer, by labor upon capital. But a boycott made by union labor against a product manufactured by nonunion labor is an attack upon both labor and capital. It is union employés on the one side and nonunion employés and the open shop employer on the other. The principles applicable to a boycott are not applicable to a strike. The strike in Battle Creek may be lawful, while the boycott of the product in New York may be unlawful. The use of the boycott is very generally held to be the use of unlawful means, and it is not material, where it is resorted to, whether the end which is sought—in this case the unionizing of the shops in Michigan—is lawful or not.

A boycott is a combination formed to injure the trade, or business, or occupation of another, by preventing other persons from doing busi-

ness with him, by threatening injury to the trade, business, or occupation of those who have business relations with him. And in Martin's Modern Law of Labor Unions, p. 104, it is said that:

"If the things done, or the words spoken, are such that they will excite fear or a reasonable apprehension of damage, and so influence those for whom designed as to prevent them from freely doing what they desire, and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit or intent."

And see State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Purvis v. United Brotherhood of Carpenters and Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; Wilson v. Hey, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 Ann. Cas. 82; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

In Quinn v. Leathem, [1901] A. C. 495, Lord Lindley, in the House of Lords, declared that a threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him "is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist." And if the defendants are engaged in an unlawful conspiracy to destroy the complainant's business, it is as though they were in a conspiracy to destroy the complainant's presses, for its business is as much property, and as much entitled to protection, as are the presses. In Martin's Modern Law of Labor Unions, § 84, the law is stated as follows:

"A person's business, aside from the money, chattels, plant, or other tangible property employed therein, is in every sense of the word property, and as such is, if lawful, entitled to protection from all unlawful interference, whether the object of that interference be to compel customers or prospective customers to refrain from patronizing him, or persons dealing in material or products necessary to his business to refrain from furnishing him therewith, or to restrain workmen from furnishing him with the labor necessary to such business."

It appears that certain persons officially connected with the International Association of Machinists, one of the defendants herein, called at complainant's office and stated that they noticed that complainant was ready to ship a press to the New York World, and that unless it unionized its factory at Battle Creek they would see that the press never turned a wheel in New York City, and that no teamster in New York would be allowed to handle or have it. The press was delivered at the office of the World after dark to avoid trouble, and the defendant Keppler on the same night called on complainant's president in New York and stated that all the men employed on it would be called out on strike that night and would not return to work the following morning. As a result of argument between the two men that threat was withdrawn, and the work of installation was allowed to proceed.

In December, 1913, the Italian Herald, of New York City, purchased a press of complainant. The defendant Deering arrived at the office of that paper before the press arrived, and informed those in charge of the paper that they had no right to purchase a press from the

complainant, as it knew it maintained an open shop, and that as soon as the press arrived "we will give a trouble for the Italian Herald and the Duplex, and we try to make all the trouble possible to the Duplex." The trouble was made as promised. The trucking company was told not to handle any more of the press after a part of it was delivered. Deering stated that the members of different building trade unions that were at work on the building would be called off on strike. The owner of the building feared that the completion of the building would be held up for two or three weeks if the Herald went on with the installation of the press, and said that it would have to be discontinued until after the union men in all the other trades "had completed their work on the building and left entirely," as the other trades would be ordered out on strike. The work of installation was stopped until Saturday afternoon, and then it was completed by working that afternoon and night and Sunday morning, when the men employed on the building were not working. The defendant Deering the next day told the complainant's representative:

"You put one over on me this time, but you will never do it again, and I am going to make it more and more difficult for the Duplex Printing Press Company to make installations, and will interfere with their work in every way possible. I am very sorry for the salesmen; it is going to be more difficult for the salesmen to get orders for Duplex presses."

In February, 1914, the Italian Herald put in another of complainant's presses, and when the press was being carted to the Herald's office Deering instructed the truckman to quit work, and the delivery of the press was stopped. Later, when the press was delivered and was being installed, Deering informed two of the workmen that they had better quit or he would take their cards away. When they refused, he walked out, saying, "Very well, my laddie." On the following day, when these two men were on their way home from their work, they were struck from behind and knocked senseless on the sidewalk about a block away from the building in which they had been at work. One of the men testified that "two or three men assaulted us, clubbed us, kicked us, and left us unconscious on the sidewalk." They did not know the men who assaulted them, and it does not appear that they were connected with the defendants; but, as the motive does not appear to have been robbery, the inference that the assault grew out of the pending difficulties is perhaps not unnatural.

The New York Law Journal purchased one of complainant's presses, and Deering at once informed those in charge of that publication that they would not be able to have the press hauled to their plant. When the press was delivered at the Journal's place of publication, and after several crates had been carried into the building, Deering made his appearance upon the scene and said, "Here, I told you fellows not to do this; you know you should not do it"; and he directed the truckmen "to quit the job," which they did. He also informed the Journal

people:

"That he was going to do all possible to prevent the wheels of the Law Journal press revolving. If he could help it, the press would never be started up in the city of New York. He said that the unions had unlimited financial means with which they could fight the Duplex Printing Press Company,

and which they were to use for that purpose; that eventually the Duplex Company would have to give in to the union, as other manufacturers had given in to the union."

The complainant sold a press to the Bolletino della Sera, at New York City, and the work of erection was supervised by one Young. Deering told him not to erect the machinery and after he started to unload it ordered the men that were working with him to quit work, which they did. They stopped at Deering's direction, when they were unboxing and cleaning the machinery and carrying it into the building. A half a load of machinery was left on the sidewalk, and had to be loaded on the dray again and taken away. A day or two later Deering again met Young and stated he would do everything he could to prevent that machinery going into the Bolletino della Sera, and that he had notified the repair shops in that locality not to do any repairing on that machinery. He also said that he had heard of one or two breakdowns on Duplex machinery lately, and that there would be more the first of the year, as they were going to take aggressive action against the Duplex Company; that there was a prospective purchaser for Duplex machines in the Bronx, but that he had put a stop to that deal.

The complainant sold a press to Nicolletti Bros. in New York City. Deering asked Young, who was to supervise its installation, if he sided with the union or the Duplex Company, and Young, who was a member of the Machinists' Union, replied that he sided with the Duplex Company. Deering told Young he did not have to look after the installation of that machine, and that he could send word to the complainant that he was afraid to install it. Young replied that this would be untrue, but Deering stated that he "had good reasons to be afraid to look after the Duplex Printing Press Company's work." Deering stated to Young that he would take his card away from him and would blacklist him as a scab all over the East. He told Young as a member of the union not to work upon the machinery of the Duplex Company. He followed Young down to the office of the trucking company, and directed the truckman "not to haul the machinery"; that "it would make trouble" for him if he did. The truckman accordingly refused, because Deering "would pull the men off the job." One of the men was told that he was to stay away from the job, because something was going to happen, and that if they got hold of him that he could prove an alibi.

The Plainfield Press, of Plainfield, N. J., purchased a press from the complainant, and had so much trouble in getting it installed that it declined to consider making further purchases from complainant, and on December 3, 1915, it wrote complainant as follows:

"You will perhaps remember that we had considerable difficulty, and not a few subscriptions stopped, when we put the Flatbed Duplex in, \* \* \* and we do not care to encounter anything of that kind again. There are a large number of union machinists in this city, and the union is recognized by practically every shop, so that we do not care to run any risks again."

The complainant had a contract with the National Exposition Company of New York City, which entitled it to place its presses in an

exhibit to be made in the Grand Central Palace in that city. The defendant Deering informed the president of the Exposition that a strike would be called if any exhibits were unloaded or installed in any of the trades except by union men. When he was informed that some of the exhibits could not be put in place by his men, because they would not know how to erect the machinery, and would have to stand around and draw money while other men did the work, he replied:

"Anyhow you will have to hire our men, whether they can or not, or else there will not be anything else unloaded, or there will not be any machinery put up."

He informed the president of the Exposition that the complainant "could not exhibit and he would not allow them." The testimony of the president of the Exposition is:

"I said, 'Do you realize that in doing it [excluding the complainant] you are apt to ruin my business?' And they said, 'Yes; but they could not help it, and the only way out of it was to cancel the Duplex contract.' I said I could not do that, as I had a legal contract, and Deering said, 'You have got to cancel it, or else there will be a strike on this show, if they try to put that exhibit in.'"

The Exposition was to receive \$675 under its contract with the complainant, which it did not want to lose, and Deering was asked, if the contract was canceled, whether the Machinists' Union would make good what the Exposition Company lost, or would stand any damages it might sustain if sued for a breach of contract. The answer was that the Machinists' Union would do nothing.

The Charles Britton Trucking Company was usually employed to haul heavy presses and machinery in New York, and the head of the company testified that he was informed by defendant Deering that the company was not to haul any Duplex presses, and if it did there would be trouble. When the company undertook to haul the presses, Deering

appeared and called the men off the job.

The testimony shows, not simply that union men have been instructed not to haul or install the complainant's machines as being the product of an unfair shop, but that coercion has been resorted to, by threats of taking their cards away (a very serious matter for a union man), and by telling them that they had good reasons to be afraid to look after the work of the Duplex Printing Press, and that they would blacklist the men as scabs and make trouble for them; and men under most suspicious circumstances have been assaulted and felled unconscious to the ground. They have intimidated complainant's customers by threats to call out men engaged in other trades. The members of different building trade unions would be called off on strike and compelled to quit work on a building not yet completed, and in which it was intended to install a press manufactured by complainant, so that the owner of the building feared the work on the building would be held up two or three weeks. Pickets were employed. No repairs were to be made on machines installed. Threats of putting the machines out of order were likewise indulged in by defendants. The defendants in at least one instance sought to obtain the cancellation of one of complainant's contracts; and they have sought by direct and indirect

means to prevent customers from buying any of complainant's machines. The facts of the case seem to us to be very different from the facts which appear in Bossert v. Dhuy, supra. There was no attempt in that case to cancel contracts, no attempt to coerce union men to quit their jobs, no attempts to commit violence.

In Quinn v. Leathem, [1901] A. C. 495, a trade union notified Leathem that they would not work for him unless he unionized his shop. This he refused to do, and the union thereupon notified one of his customers that they would not work for the latter if they bought Leathem's goods. Thereupon the customer ceased to buy from Leathem, who brought suit against members of the union. It was held by the House of Lords that Leathem was entitled to recover. The Earl of Halsbury in his opinion said:

"If upon these facts, so found, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community."

The case shows that the injury inflicted upon the complainant was without any justification whatever. And Lord Macnaghten in the same case said that the defendants conspired to do harm to Munce (customer) in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union. So in the case at bar defendants propose to injure complainant's customers in New York, in the hope that they will bring pressure to bear upon the complainant in Michigan, to the end that it will discharge all nonunion workmen from its factories in that state.

In Hopkins v. Oxley Stave Co. (1897) 83 Fed. 912, 28 C. C. A. 99, the Circuit Court of Appeals for the Eighth Circuit said:

"The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right, and coerce his will by intimidating his customers and destroying his patronage."

In Iron Molders' Union v. Allis-Chalmers Co. (1908) 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, the Circuit Court of Appeals in the Seventh Circuit declared that striking workmen may not coerce third persons, not directly concerned in the strike, in refusing to buy or use the products of their late employer, any more than he may lawfully coerce third persons into refusing them shelter or food, but the only means of injuring each other which are lawful in such contest are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it; and the court said that attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. In the case at bar the immediate injury is to the New York purchasers of complainant's presses, and the refusal to allow union labor to be employed in their installation is not because of any dispute with the New York owners of the presses, or to raise wages in New York, or to shorten hours there, but is to coerce the New York customers, so that they will coerce the manufacturer in Michigan.

In American Federation of Labor v. Buck's Stove & Range Co. (1909) 33 App. D. C. 83, 32 L. R. A. (N. S.) 748, an injunction was granted to restrain a conspiracy which threatened damage to persons having business dealings with the complainant, and to restrain threats which tended to prevent others from freely transacting business with it. The principle upon which the decision went way that interference by a labor union with another's patronage is not justified by the fact that the remote object sought is a benefit to its own members. And an appeal to the Supreme Court of the United States was dismissed in 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345 (1911), on the ground that the question involved had become moot because of a settlement between the parties. In the opinion of Mr. Justice Robb of the Court of Appeals he said:

"It matters not that the remote object of the combination was to benefit such members of the local unions as should be employed by complainant, because the law looks to the immediate, and not to the incidental, object of the combination. If the immediate object is unlawful, the combination is unlawful. If the immediate object is lawful, as in the case of legitimate trade competition, including strikes, the combination, generally speaking, is unlawful."

In Pickett v. Walsh (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, it was said that a refusal to work for A. with whom the strikers have no dispute, because A. works for B. with whom the strikers have a dispute, for the purpose of forcing A. to force B. to yield to the strikers' demands is without legal justification and may be enjoined.

In Burnham v. Dowd (1914) 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778, the doctrine of Pickett v. Walsh, supra, was adhered to, and the plaintiffs were held entitled to an injunction restraining defendants from threatening to strike or to leave the work of any owner, builder, or contractor by reason of such persons having purchased masons' supplies from the plaintiffs or having dealt otherwise with the plaintiffs, and from ordering or inducing any strike against an owner, builder, or contractor for such reason. It was in intention and effect a boycott.

In Purvis v. United Brotherhood of Carpenters and Joiners (1906) 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, the purpose of the defendants was to compel the plaintiffs to unionize their mill by working injury to their business. The right of the plaintiffs to an injunction was upheld, and defendants were restrained from representing to the plaintiff's customers that they were likely to suffer loss or trouble in their business for purchasing building materials from the plaintiffs, and—

"from attempting by any scheme, combination, or conspiracy, among themselves or with others, to annoy, hinder, or interfere with or prevent any person or persons or corporation from purchasing building materials, or making contracts for the purchase of the same, from the plaintiffs, and from any and all acts \* \* \* which, \* \* \* by putting or attempting to put any person or persons or corporation in fear of loss or trouble, will tend to hinder, impede, or obstruct the plaintiffs from making sale, or making contracts for sale, of building materials," etc.

In Door Co. v. Fuelle (1908) 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492, it was held that a combination to injure or destroy the trade, business, or occupation of another by threatening or producing injury to the trade, occupation, or business of those who have business relations with him is an unlawful conspiracy which can be restrained by injunction. The court also held that combinations between the officers and members of a labor union, or between such union and its executive officers and kindred associations, having for its direct object the immediate effect to injure and damage the business of persons at whom they are directed, and thereby to compel them to discharge their nonunion employés and replace them with members of the union, and thereby incidentally and indirectly to benefit the parties to the combination is an unlawful conspiracy.

In concluding this phase of the subject, it appears that, although the defendants were engaged in an undertaking which the law of New York recognizes as legitimate, the unionization of complainant's factories, they have resorted to measures in the accomplishment of that end some of which the law does not countenance. The law does not permit either party to a labor dispute to use force, violence, threats of force, intimidation, or coercion; and words or acts which are calculated to cause one to fear injury to his person or to his business are equivalent to threats. Moreover, the law does not permit any attempt to be made to cancel contracts which an employer has made with third persons.

There is, as we have seen, evidence of threats to call out men in the building trades from work on a building under construction for a customer of the complainant, because a press made by the complainant was about to be installed in the building. A strike of that kind is a sympathetic strike; that is, one in which the striking employés have no demands or grievances of their own, but strike for the purpose of indirectly aiding others, having no direct relation to the advancement of the interests of the strikers, and courts have held that such a strike is an unjustifiable invasion of the rights of the employer. Labatt on Master and Servant, vol. 7, p. 8346 (Ed. 1913).

But there is, in conclusion, another phase of the matter, and one which is not the least important, which remains to be considered. The complainant is engaged, as we have seen, in the business of manufacturing printing presses in its factories in the state of Michigan. But it is also engaged in interstate commerce, as over 80 per cent. of its presses are sold to customers outside the state. The defendants, not being able to prevent the complainant from manufacturing its presses in its factories in Michigan by nonunion workers, who are contented with their hours and their wages, have sought, it is charged, to restrain its trade and commerce by making its products nonsalable in other states by the means already set forth in this opinion. The action of defendants is claimed to be contrary to the anti-trust legislation of Congress.

The Sherman Anti-Trust Act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209) had its origin in the evils of massed capital, but the intent of Congress in its enactment was that the channels of interstate commerce should be kept free from all unreasonable obstruction whether of capital or labor. The interdiction laid upon capital was laid also upon labor, and embraced all combinations which placed obstructions in the currents of commerce between the states.

In Loewe v. Lawlor (1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, the defendants had sought to unionize the plaintiff's factory by first instituting a strike to prevent production, and then by driving his nonunion products out of interstate commerce through a boycott which rendered those products unsalable in the different states. The ultimate object was, in that case as in this, to unionize the plaintiff's factory; but the court held illegal any combination whatever to secure action "which essentially obstructs the free flow of commerce between states, or restricts in that regard the liberty of a trader to engage in business," and it held that a combination of labor organizations and the members thereof to compel a manufacturer whose goods are sold in other states to unionize his shops, and, on his refusal to do so, to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forced him to comply with their demands, was a combination in restraint of interstate trade or commerce within the meaning of the Sherman Act. The case was again before the court in Lawlor v. Loewe (1914) 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 316, and it was again affirmed that the conduct of the labor organization was within the prohibition of the Anti-Trust Act of 1890. In both cases the decision of the court was unanimous; Chief Justice Fuller writing the opinion in the first case, and Mr. Justice Holmes writing in the second case.

In Eastern States Lumber Association v. United States (1914) 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, the court held that the circulation of a so-called official report among members of an association of retail dealers calling attention to actions of listed wholesale dealers in selling direct to consumers tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibitions of the Sherman Law.

In Paine Lumber Co. v. Neal (1917) 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256, an injunction was asked to enjoin what was alleged to be a conspiracy to restrain interstate commerce. The bill was brought by certain corporations engaged in the manufacture of doors, sash, etc.. in open shops, against the representatives of the United Brotherhood of Carpenters and Joiners of America and others. The unions had entered into an agreement not to erect material made by nonunion mechanics, and because of the refusal of union men to work with nonunion men, and because employers quite generally found it to their interest to employ union men, it became largely unpracticable to erect carpenter work except by union labor. An injunction was asked to prevent the defendants from conspiring to refuse to work upon mate-

rial because not made by union labor. It involved an attempt to drive open shop products out of commerce, and in that respect the case resembles the one before the court. The majority opinion, as we understand it, does not decide whether the acts complained of constituted a violation of the Sherman Act. The minority opinion of three of the justices did not hesitate to say that the acts were in restraint of interstate commerce and were prohibited by the Sherman Law. The case arose in this circuit and we affirmed the action of the District Court which dismissed the bill. The Supreme Court affirmed the decree on the ground that under the Sherman Anti-Trust Act, if the acts complained of amounted to a violation of that act, a private person could not maintain a suit for an injunction under section 4 of that act. 8 U. S. Compiled Statutes Ann. 1916, p. 9655. There seems to be an intimation in the dissenting opinion (page 473) that the court as a whole thought that the facts showed a violation of the Sherman Act. If the court had actually so decided this court would be bound to hold it decisive, and that the defendants' conduct in this case was in violation

But I am unable to see any sound distinction between what was done in Loewe v. Lawlor and what was done in the instant case. In Loewe v. Lawlor circulars were sent to dealers for the purpose of intimidating and coercing them into not purchasing from the complainant. In the instant case the plaintiff's customers do not seem to have been to any great extent, if at all, circularized; but organized labor was informed by letters and resolutions that complainant's product was not to be installed and that members of the unions were to use their influence to prevent the placing of orders for the purchase of presses manufactured by it. All organized labor throughout the country was acquainted with the dispute, and instructed not to install the machinery "and if possible influence your employer not to have such machinery installed by unfair men, or that they will not let any more contracts to the Duplex Printing Press Company until organized labor is fairly dealt by"; and the International Association of Machinists' Monthly Journal, which circulated through all the local lodges and on news stands, contained full information as to the attitude of labor toward the complainant and the installation of its presses. The method pursued was intended to prevent the sale of the complainant's product.

In Loewe v. Lawlor, supra, and in Eastern States Lumber Association v. United States, supra, and in Gompers v. Buck's Stove & Range Co. (1911) 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the publication and use of letters, circulars, and printed matter were the means resorted to in the attempt to restrain commerce. In the case last cited it is declared that the protective powers of the court extend to every device whereby property is irreparably damaged or interstate commerce restrained; otherwise the law would be made impotent.

In my opinion the things done and threatened to be done by the defendants tend to the destruction of the complainant's interstate trade. Whether an injunction can issue depends upon the construction to be placed upon what is known as the Clayton Act, which was passed by

Congress in 1894. That act modified the Sherman Act in certain important particulars. Under the Sherman Act the opinion prevailed that a private person could not maintain a suit for an injunction to restrain violations of the act, in view of the fact that the act made it the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings to that end. 8 U. S. Compiled Statutes Ann. 1916, § 8823. The act (Act Oct. 15, 1914, c. 323), however, expressly provides:

"That any person, firm, corporation, or association shall be entitled to sue for, and have injunctive relief, in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the Anti-Trust Laws," etc. 8 U. S. Compiled Statutes Ann. 1916, § 88350, p. 9697.

The defendants, however, claim that, while the act authorizes a "person, firm, corporation or association" to sue for injunctive relief, the right to do so is nevertheless restricted by other provisions of the statute, and that it is inapplicable to the facts of this case. The defendants base this claim on the provision contained in section 6 of the act which is found in the margin. That section in effect declares that labor organizations, merely because organized, are not to be held to be illegal combinations or conspiracies in restraint of trade, and that they are not to be restrained from "lawfully" carrying out their "legitimate" objects. In his opinion in the Paine Lumber Co. Case, supra, Mr. Justice Pitney declared that:

"Neither in the \* \* \* section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them."

It is true this language was used in a dissenting opinion of three of the justices. But the majority opinion indicates that the majority of the justices must have entertained the same opinion, for Mr. Justice Holmes in his opinion states that he is a minority of the court in thinking that upon the facts involved in that case the Clayton Act established a policy inconsistent with the granting of an injunction. The injunction simply was withheld because at the time the decree was entered a private person or corporation could not sue for injunctive relief in that class of cases.

In the same connection attention may also be called to Stephens v. Ohio State Telephone Co. (D. C. 1917) 240 Fed. 759, 771, in which

1 "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." U. S. Compiled Statutes Ann. 1916, p. 9686.

District Judge Killits passed upon the second paragraph of section 20 of the Clayton Act, which is found in the margin.<sup>2</sup> He there says:

"The statute but enacts the position which courts have universally taken; there is nothing new in it," etc.

It is my opinion that, if the acts complained of in this case would not have been lawful prior to the passage of the Clayton Act, they are not lawful now. The first paragraph of section 20 of the Clayton Act is found in the margin.<sup>2</sup> It relates to injunctions in a case between an employer and employés, etc. So far as the purposes of this case are concerned, it would seem to suffice to say that the parties to this suit do not come within the classification therein named. No one of the defendants is now or ever was an employé of the complainant, and the relief prayed for does not contemplate protection from strikes among complainant's employés engaged in the manufacture of its printing presses. If, however, it be contended that the intention of Congress was that the act should apply to any case growing out of a labor dispute, even though none of the parties defendant had ever been in the complainant's employ, it would not prevent the issuance of the injunction, for it is to be noted that the act does not absolutely prohibit the granting of an injunction, even in cases between an employer and employés.<sup>3</sup> The injunction may still be granted between employer and employés, when "necessary to prevent irreparable injury to property, or to a property right of the party making the application"; and it is so well settled that no citation of authorities is necessary that acts that will cause the destruction of one's property or business, and acts that interfere with the carrying on of one's business, destroying his custom

<sup>2 &</sup>quot;And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United Stafes." 2 U. S. Compiled Statutes Ann. 1916, p. 1964.

<sup>3 &</sup>quot;No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney." U. S. Compiled Statutes Ann. 1916, p. 1964.

or his profits, do an irreparable injury and authorize the issuance of

an injunction.

The achievement of the end sought by these defendants is not through an appeal to the purchasing public not to buy nonunion-made machines; and the defendants have not confined themselves to withdrawing union men from complainant's factories. The course which has been pursued has made the complainant's presses "a contraband of commerce," "a kind of commercial leper." The plan has been to make complainant's machines unmarketable by preventing their being hauled, installed, operated, or repaired, or even exhibited to the public. If this can be done under the laws of the United States, then it seems that no manufacturer of printing presses in this country can maintain an "open" shop, and no machinist engaged in the manufacture of such presses can earn his living at his trade, unless he consents to join a union, and be bound by all its rules and regulations, and the channels of interstate commerce are practically closed against the products of an "open" shop. If the truckmen are in the unions and cannot handle nonunion goods, of what use is it to ship goods from Michigan to New York? And if the unions have a right to say what goods their members shall handle, or shall not handle, what reason is there for saving that union men employed by the railroads cannot refuse to handle any goods not made in an "open" shop? The railroads are common carriers, it is true; but all the persons who hold themselves out as willing to carry goods for the public, draymen, carters, truckmen, wagoners, and moving van companies, proprietors of taxicabs, omnibuses, and baggage wagons, are in like manner common carriers. 10 C. J. 49. And they may be engaged in interstate commerce, as the goods they carry are being shipped outside the state, or have been shipped into the state to be delivered to the consignees therein.

My Associates do not agree with me in the conclusion at which I have arrived. The reasons for their disagreement will be found in the opinions which follow. Therefore, in accordance with their opin-

ion, and contrary to my own, the decree is affirmed, with costs.

HOUGH, Circuit Judge. The record at bar contains uncontradicted testimony (since defendants offered no evidence) divisible into two parts—one relating to acts of violence and threats of the same, directed against some or all of the persons managing or aiding in plaintiff's business and directly tending to destroy that business through fear of physical injury; the other part showing conclusively (what, indeed, defendants avow) a purpose long formed by the organizations represented only locally by the individual defendant threatmakers, to advise and persuade all workers whose labor would in any way benefit any business effort of plaintiff to abstain from such labor, and further to spread through the purchasing public a knowledge that, if any one bought what plaintiff made, its transportation, erection, operation, and repair would be rendered as difficult for the purchaser or user as the influence of the defendant unions could make it.

This action by the associations that are the real defendants was and is directed against plaintiff in particular, because it manufactures only

one kind of printing press, and is the only maker of such presses which at date of bill filed still refused to unionize its establishment and obey defendants' orders by operating a "closed shop." If there had been more than one similar nonunion factory, all would have been equally obnoxious to defendants, though for very obvious reasons the campaign against numerous open shops would not have been along quite the same lines as that against a single rebel; the larger the party, the more united the majority, the easier it is to dispense with physical force, and rely on the persuasive suggestiveness of numbers. It is also easier to get assistance from other unions in other trades for a powerful and successful organization than for one representing only

a minority of workers in its own specialty.

The plaintiff was entitled in strictness of law to an injunction against the individual men who threatened, suggested, and probably incited actual physical injury. They were also entitled to have prevented the open efforts to break or abort plaintiff's contract with the Exposition Company. The latter wrong, however, was (apparently) stopped partly by temporary injunction and partly by treaty, and there is no continuing business relation between plaintiff and that company; while the acts of violence all occurred years before trial, were not shown to have been more than the result of personal malice or bad judgment on the part of a few defendants then acting as union officials, and all or most of them out of office before the cause was brought on for hearing. Let it be assumed (though not decided) that the comparative antiquity of these wrongful acts and their sporadic nature would not affect the legal rights of plaintiff, yet we think no injunction should issue by reason of them. This opinion is entertained. because plaintiff by its counsel in this court has plainly recognized in the principal point raised by the facts something far and away more important than the attempted muzzling by writ of a few foolish men, who fell back on open threat or secret violence, instead of relying on that social discipline which is the real strength of labor unions, as well as of most other originally voluntary associations of human kind. He has therefore at this bar announced that no injunction was desired, because none would or could be of importance or effect, unless it went on the ground of illegality in the efforts of the defendant associations as such to unionize plaintiff's shop, such efforts consisting in words alone—peaceful enough in their literal meaning but necessarily as minatory in suggestion as the diplomatic note of a great power that it would view with concern that which a weaker neighbor insisted on doing.

Thus the only matter we are asked to consider, and therefore the single point on which we shall express opinion, is whether the secondary boycott, used or attempted by defendants against plaintiff, is in the present state of controlling statutes and decisions unlawful. All substantial efforts to enforce such boycott took place in New York. In so far, then, as what is loosely called common law—i. e., the public policy of a state, as ascertained and announced by its highest court—is concerned, we think the recent decision of Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, fully recognizes and upholds the secondary

boycott as lawful in New York, if unaccompanied by malice, force, violence, or fraud; and, even if so accompanied, what is unlawful is not the essential purpose of advancing the unification and control of a mass or masses of workers in a common field, but the purely accidental and temporary means used for attainment. This is the very accident we have been so frankly and wisely asked to overlook or disregard on this appeal. It is not necessary to expand comment on this holding so far as the writer of this opinion is concerned; all that he could say was said in Gill, etc., Co. v. Doerr (D. C.) 214 Fed. 111, a decision cited with apparent agreement in the Bossert Case.

As plaintiff's business is largely interstate, and the attentions paid by defendants to plaintiff consisted essentially in trying to make it impossible for plaintiff to get its machines from Michigan to New York, or have them used there even if they successfully ran the gauntlet, it seems plain that the defendant associations have agreed to do and attempted performance of the very thing pronounced unlawful in Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 316. Therefore such interference with interstate commerce should be enjoined, unless the Clayton Act of October 14, 1914, forbids it.

It is not suggested that any other than sections 6 and 20 of that statute can affect this case, and we feel so assured of the inapplicability of section 6 that it is not thought necessary to discuss the mat-

ter. Section 20 applies to cases—

"between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment."

In such cases the statute proceeds to enumerate as lawful, notwith-standing any earlier statute or decision emanating from national authority, every peaceful and all the really important things the defendant associations have done. Thus the question becomes this: Is the present litigation one between employers and employés, or an employer and employés, growing out of a dispute concerning terms or conditions of employment? The answer depends on whether the catalogued injuries are to be permitted only in litigations between an employer or employers and the workmen in (or perhaps lately in) their several establishments, or also in cases, however promoted, when the parties are generically the hired and the hirer, and the dispute even an offshoot or by-blow of the endless quarrel over terms of employment?

The solution of the puzzle raised by a statute so blindly drawn as this one is not easy, and the intimation as to the present division of the Supreme Court on the subject, given (purely obiter) in Paine, etc., Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256, merely adds embarrassment. There is no ruling decision on the subject, and prognosis as to the probable disposition of the matter in a higher court, based on anything as yet published in the United States Reports, would be both unprofitable and improper. It is necessary to form opinion as upon new matter.

[1] There was a dispute, and one concerning conditions of employment, and at plaintiff's Michigan factory, long before this suit was brought, and before the plan of campaign—the boycott, which is the thing really complained of—was seriously attempted. The Machinists' Union created the dispute, by calling a strike at plaintiff's place, if it never existed before; that dispute did relate to conditions of employment, in that every striker and every affiliated machinist disputed the right of plaintiff or any other concern similarly situated to employ any one but a member of the union; and so far as statutory interpretation is concerned it seems immaterial that no more than a trifling proportion of the workers in plaintiff's factory paid any attention to the strike order. The dispute existed, and existed from the beginning, between this plaintiff and the principal defendants, among whom are included by representation the dozen or so obedient union men in the factory. In strict truth this is a dispute between two masters, the union, or social master, and the paymaster; but, unless the words "employers and employés," as ordinarily used, and used in this statute, are to be given a strained and unusual meaning, they must refer to the business class or clan to which the parties litigant respectively belong. We perceive no logical standing ground between this certainly broad meaning, and a holding that, if all one's workmen strike (as they call it), or are summarily discharged (as the paymaster calls it), the usual plaintiff is not an employer, and the frequent defendants are not employés, because the formal relation of master and servant has ended. Yet such an interpretation would take nearly all meaning from section 20, as scarcely could a suit arise to which it would apply.

[2] In so far as courts are permitted to study legislative proceedings and contemporary history for aid in statutory interpretation, we consider it plain that the designed, announced, and widely known purpose of section 20 (perhaps in conjunction with section 6) was to legalize the secondary boycott, at least in so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender. We are earnestly told that this rule gives to the workman the choice of being a pariah or a guildslave, and to the employer a doubtful escape from bankruptcy by the path of commercial servitude. If this be true (and the writer is not disposed to question it) the result is imposed by act of Congress; the remedy is political, not judicial.

LEARNED HAND, District Judge (concurring in result). I think that section 20 of the Clayton Act has legalized secondary boycotts in cases between an employer and employes, and that this was such a case, at least after the strike was declared on August 27. I do not think that the section applies only when the employer is plaintiff and his present or former employes are the defendants. Further, I think that the dispute here under any definition included the conditions of employment. I therefore concur in general in Judge HOUGH'S reasoning and in the result, though I do not concur in all the expressions in his opinion.

# TURNER & DAHNKEN et al. v. CROWLEY.

(Circuit Court of Appeals, Ninth Circuit. August 5, 1918. Rehearing Denied October 14, 1918.)

No. 3138.

1. Copyrights \$\infty 28\$\infty Deposit of Copy\(-\text{Sufficiency.}\)

Where the composer of an unpublished song desired a copyright authorized by Copyright Act March 4, 1909, § 11, as amended by Act Aug. 24, 1912, held, that the depositing of a printed copy was sufficient, although the rules of the Copyright Office specified a typewritten or manuscript copy.

2. Copyrights \$\infty 28\$—Sufficiency.

Where the composer of an unpublished song took all the essential steps necessary to procure a copyright prior to publication under Copyright Act March 4, 1909, § 11, as amended by Act Aug. 24, 1912, a slight variance in dates as to the time of delivery of copy of the song *held* not to affect the validity of the copyright.

3. Copyrights \$\infty\$29-Sufficiency.

Where the composer of a song, in compliance with Copyright Act, deposited two copies of the work when published, and the copyright notice was appended to the published copies of the song, *held*, that the composer acquired a good copyright, notwithstanding the copyright as an unpublished work was insufficient.

4. APPEAL AND ERROR €=1009(3)—REVIEW—FINDINGS.

Where the evidence was conflicting, but the findings of the chancellor were supported by substantial evidence, they will be upheld on appeal.

5. Copyrights \$\iff 87\$—Violation—Provisions of Statute.

Under Copyright Act March 4, 1909, \$ 25, as amended by Act Aug. 24, 1912, the court may in its discretion, and subject to the qualification that the damages must be just allow \$1 for each infringing copy of a copyrighted song, etc. made or sold by, or found in the possession of, the

6. Copyrights €==87—Infringement—Damages.

infringer, his employés, or agents.

Under Copyright Act March 4, 1909, § 25, as amended by Act Aug. 24, 1912, the court has power to award more than \$5,000 damages, where there has been an infringement after notice provided the evidence warrants a finding that complainant was damnified in excess of \$5,000.

7. Copyrights @==87-Infringement-Damage.

Under Copyright Act March 4, 1909, § 25, as amended by Act Aug. 24, 1912, while the discretion of the court may be used to award damages where no proof of actual damage is offered, yet the award should have relation to such inferences as are reasonably deducible from the whole case of infringement, and damages cannot be awarded on the idea of punishment.

S. Copyrights \$\sim 87-Infringement-Damages.

In a suit for infringement of a copyrighted song, an award of \$1 per copy for 7,000 copies found in the hands of the infringer *held* improper; it appearing that the composer would not have made a profit of more than 8 cents per copy.

9. Copyrights \$\sim 90\$—Infringement—Attorney's Fees.

In an infringement suit, where it appeared that defendants had infringed a copyright, an award of attorney's fees in favor of complainant *held* proper.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by Alma A. Crowley against Turner & Dahnken, a corporation, and others. From a decree for plaintiff, defendants appeal. Modified and affirmed.

The plaintiff, appellee here, alleged that she is the author and proprietor of the words and music of a song called "My California Rose"; that before publication of the song, in order to secure copyright, on September 21, 1914, she mailed to the Librarian of Congress at Washington a printed copy of the title, words, and music of the song, together with a fee for recording the same, and claimed a copyright; that before beginning this suit she mailed to the Register of Copyright two complete copies of the song of the best edition thereof then published, and further complied with all legal requirements necessary to establish her right to the copyright; that she caused to be printed on each copy of the song, on the first page, the word "Copyright," together with the year the copyright was entered and the words "By  $\Lambda$ . A. Crowley"; that Turner & Dahnken, a corporation, appellant, was conducting a moving picture theater in San Francisco, and without authority, about May 14, 1916, pirated the copyrighted song, and caused 10,000 copies of the music and words to be printed in certain programs, and distributed the programs to its patrons at the Tivoli Opera House in San Francisco; that distribution commenced May 14, 1916; that plaintiff first knew of the publication and distribution on May 18, 1916, and on May 19th served notice and demand on appellant to refrain from further publication or distribution, but that appellant continued for some days to distribute the program. Plaintiff prayed for injunction, accounting, award of profits, damages, costs, and attorney's fees.

Turner & Dahnken denied authorship and copyright proprietorship, or that the necessary steps for obtaining copyright were taken; denied infringement, copying, or piracy, or that the programs were piracies, and alleged that plaintiff expressly consented to the use and distribution of the song in the manner in which it was in fact used and distributed; denied that the programs contained an exact reproduction, and alleged that the song printed in the programs was unsuitable for use and was an authorized advertisement of the song; alleged that the programs were furnished to appellant by an independent contractor under a general contract for the furnishing of programs, and that plaintiff authorized the use and publication by the contractor and the distribution by Turner & Dahnken; denied that the distribution prevented sales by plaintiff, or that any profits were realized by Turner

& Dahnken, or that any damage was done to plainitff.

In the decree in favor of plaintiff it was found that valid copyright was duly issued to plaintiff on September 26, 1914; that defendant infringed by copying, publishing, and distributing copies of the words and music, as charged; that 7,000 copies of the copyrighted song "were actually found to be in the possession of and under the control of' the appellant; and that certain of the said copies were distributed by Turner & Dahnken after actual written notice of infringement. Plaintiff was awarded as damages \$1 for each and every copy of the song found in the possession and under the control of appellant, together with costs, including attorney's fees, and also a perpetual injunction. From this decree appeal was taken.

William M. Abbott and William M. Cannon, both of San Francisco, Cal., for appellants.

E. D. Wilbur and R. G. Hudson, both of San Francisco, Cal., and Albert C. Agnew, of Oakland, Cal.. for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] It is said that the District Court erred in ruling that the copyright described was valid, because the plaintiff failed to sustain the burden resting upon her of establishing compliance with the conditions prece-

dent to the acquisition and existence of a copyright. Section 11 of the Copyright Act of March 4, 1909 (35 Stat. 1078, c. 320) as amended in 1912 (Act Aug. 24, 1912, c. 356, 37 Stat. 488), so far as material, reads as follows:

"Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a \* \* \* musical, or dramatic-musical composition. \* \* \* But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale." U. S. Comp. St. 1916, § 9532.

But, as we read the evidence, it shows that the plaintiff, before publication, sent a copy of the title, words, and music of the song to the Register of Copyright at Washington, D. C., as an unpublished work, and received from that official a certificate of registration. It is said that under the rules of the Copyright Office (rule 20, subdivision 1), in order to secure copyright of an unpublished work, it was necessary for plaintiff to "deposit one typewritten or manuscript copy of the work." Plaintiff, however, having proved that she deposited a printed copy, by every reasonable construction the legal effect must be the same as if there had been a deposit of a written or typewritten manuscript. Plaintiff forwarded two copies of the words and music, and made a second registration after publication, and received certificate of copyright. The certificate issued after publication recited that the copies were received September 5, 1914, and that the date of publication was September 10, 1914, while the first certificate for the unpublished work recites that the copy was received by the Register of Copyright on September 26, 1914. The certificate showing that the date of publication was September 10, 1914, varies from the allegations of the plaintiff's complaint, wherein it is alleged that, in order to secure copyright, on September 21, 1914, she mailed to the Librarian of Congress a printed copy of the title, words, and music of the song, together with the necessary fees. This variance, possibly due to an error on the part of plaintiff, or to a clerical error in the certificate of registration, ought not to deprive the plaintiff of the benefit of her original registration to secure copyright of the unpublished song.

[3] We assume that the rules of copyright require reasonable strictness of interpretation; but, where it is shown by a claimant that the essential steps have been taken to secure copyright of an unpublished work prior to publication, slight variance in dates ought not to destroy the proof of copyright. Macgillivray on Copyright, p. 257. But in the present case, even if the first registration could not be sustained, surely plaintiff, by proof of the second registration, fulfilled the terms of the Copyright Act, inasmuch as the record proves that that copyright notice was appended to the published copies of the song. Bobbs-Merrill v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086.

[4] As to distribution by appellant, the proof was conclusive. It is said, however, that the distribution was authorized by the plaintiff, and that the copies distributed were printed, published, and distributed by authority of the plaintiff, through one Lorden, who, it is argued, acted as plaintiff's agent. Upon this point the evidence is not clear as

it might be; there being some conflict between the testimony of Lorden and the plaintiff. The District Court has resolved this conflict by a finding directly in favor of the plaintiff's position, and, there being substantial evidence to sustain the finding, we accept the fact to be as found by the lower court.

[5-8] We next come to the most important feature of the case, namely, whether, infringement being established, it was error to award the plaintiff \$7,000 damages. Section 25 of the Copyright Act of March 4, 1909, as amended August 24, 1912 (U. S. Comp. St. 1916, vol. 9, pp. 10952, 10953), provides that, if any person shall infringe the copyright protected under the copyright laws, such person shall be liable:

(a) To an injunction, and (b) "to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may in its discretion allow the amounts as hereinafter stated, \* \* \* such damages shall in no other case exceed the sum of \$5,000, nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit, or other written notice served upon him. \* \* \*

"Second. In the case of any work enumerated in section five of this act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés."

The findings and award of the District Court having been made under the in lieu provision of the statute, conceded to be controlling, appellant argues that a copyright proprietor may recover from an infringer such damages as may be just in assessing which the court, in its discretion, may allow \$1 for each infringing copy made, sold or found in the possession of the infringer or his agents, but that the damages so awarded shall not exceed \$5,000, nor be less than \$250, and shall not be regarded as a penalty. Appellant concedes that the limitations as to amounts do not apply to infringements after notice but argues that in such cases only damages, not penalties, may be awarded, the court being obliged even in such instances to make the best approximation it can of the possible damage suffered. In Hendricks Co. v. Thomas Publishing Co., 242 Fed. 37, 154 C. C. A. 629, the Court of Appeals for the Second Circuit, through Judge Hough, commenting upon the language of section 25 of the Copyright Act relating to the assessment of damages and profits, traced it as the growth of years resulting from the efforts of Congress "to avoid that strictness of construction which historically attaches to any statute inflicting penalties and to confer upon an injured copyright owner some pecuniary solace even when the rules of law render it difficult if not impossible, as it often is, to prove damages or discover profits," and held that the statute limits the discretion of the court to a minimum

award of \$250, and a maximum of \$5,000, in lieu of actual damages and that it was the intent of Congress to preserve the right of the plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do and to give the new right of application to the court for such damages as shall appear to be just in lieu of actual damages. Gross v. Van Dyk Gravure Co., 230 Fed. 412, 144 C. C. A. 554, was approved by the court. In the last case Judge Learned Hand said that it was the duty of the court under section 25b to estimate the damages by the best inference it can even though the complainant would fail for lack of evidence if the issue were tried before a jury and that it was intended that a plaintiff should not fail for lack of proof.

Weil on Copyright deduces from the later decisions that a copyright proprietor now has three means of monetary compensation afforded him upon infringement of his rights. He may recover profits made by the infringer. He may recover actual damages in addition to such profits or in lieu of profits and actual damages he may, if he so elects, recover arbitrarily as damages, not by way of penalty, and which in the case of musical compositions, as referred to in section 5 of the Copyright Act, are fixed at \$1 per copy found in the possession of the infringer, or made or sold by him.

There is also in section 25b, following the exceptions named in the statute, a provision to the effect that the exceptions "shall not deprive the copyright proprietor of any other remedy given him under this law nor shall the limitations as to the amount of recovery apply to infringements occurring after actual notice to a defendant either by service of process in a suit or other written notice served upon it." As it was very clearly proved upon the trial of the present case that notice of infringement was served upon the appellants and that there was a continuance of the infringement after such notice was served, this provision must be considered in reviewing the damages which the lower court allowed.

In our opinion the rule of the better authorities is that the court may, in its discretion and subject to the qualification that the damages must be just, allow \$1 for each copy made or sold by or found in the possession of the infringer or his agents or employés; and, penalties in the strict sense being done away with, the court has power to award more than \$5,000, where there has been an infringement after notice, provided the evidence warrants a finding that the complainant was damnified in excess of \$5,000. Westermann Co. v. Dispatch Printing Co., 233 Fed. 609, 147 C. C. A. 417; 13 Corpus Juris, 1180.

Appellants argue that the evidence showed that Turner & Dahnken merely purchased the couriers from an independent advertising company, and did not copy or publish the songs in the couriers. The testimony, however, shows that the programs were printed for appellants herein, to be given by the appellants to their patrons at their moving picture theaters, and that they were distributed as the gift of Turner & Dahnken. The programs or couriers have upon the opening or cover page the words "Compliments of Tivoli Opera House, My California Rose," the inside principal page containing the music and

the words of the song as "My California Rose, by August Dalma [the nom de plume of the appellee herein]; Copyright MCMXIV by A. A.

Crowlev."

Appellee offered no proof of actual loss or of profits, but we gather from the testimony that at a retail price of 15 cents a copy for the song the profit to the plaintiff would not have exceeded 8 cents per copy. If, therefore, the plaintiff had received 8 cents per copy upon 7,000 copies found in the possession of Turner & Dahnken, her total damage would have been \$560, which we think would be a fair estimate. Plaintiff said that she expected and authorized orchestrations of her song to be used, but did not authorize use of it as made by defendant. The allowance of \$7,000, or \$1 per copy of the song and music, seems to have been based upon the view that \$1 per copy is a fixed sum, to be allowed under any circumstances of infringement after notice. But, as we do not so construe the law, the duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial. Thus, while the discretion of the court may be used to award damages where no proof of actual damage is offered, yet the award should have relation to such inferences as are reasonably deducible from the whole case of infringement, and such damages are not to be awarded as based upon the idea of punishment. 13 Corpus Juris, p. 1179.

[9] The allowance of attorney's fees was proper (Haas v. Leo Feist, Inc. [D. C.] 234 Fed. 105), and as the case before the court showed the exact number of copies which were found in the possession of the infringers, and no accounting in other respects was called for, there was no need of reference to a master.

The decree is affirmed in all respects, except as to the award of \$7,000 damages. In respect to that item the direction is that the sum awarded shall be \$560, and the decree is modified accordingly, and, as so modified, it is affirmed.

MAYES, Collector of Internal Revenue, v. CASEY et al. (Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3093.

1. INTERNAL REVENUE \$\sim 38\$—Action to Recover Tax Paid—Burden of Proof.

An additional tax assessed because of claimed withdrawal of untaxpaid whisky from warehouse, under authority of Rev. St. § 3182 (Comp. St. 1916, § 5904), is prima facie valid, and in an action for its recovery after payment plaintiff has the burden of proving its invalidity.

2. Internal Revenue \$38—Action to Recover Tax Paid—Instructions. In an action to recover an additional internal revenue tax assessed and collected because of the claimed withdrawal of whisky untaxpaid, instructions virtually placing the burden on defendant to show that any, and if so how much, of the whisky withdrawn, was not taxpaid, held erroneous.

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge. Action by Albert B. Casey, administrator, and another, against T. Scott Mayes, Collector of Internal Revenue. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Perry B. Miller, U. S. Atty., of Louisville, Ky., and William C. Fitt, Asst. U. S. Atty., of Washington, D. C., for plaintiff in error. Wm. Marshall Bullitt, of Louisville, Ky., and Alfred S. Austrain, of Chicago, Ill., for defendants in error.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. This writ of error aims to reverse a judgment for \$40,205.84 recovered in an action based upon payment under protest of an assessment, made in form pursuant to law by the Commissioner of Internal Revenue, for taxes upon spirits removed from plaintiffs' bonded warehouse between January 1, 1910, and No-

vember 30, 1914, untaxpaid.

When whisky is entered into a bonded warehouse, it is gauged by the government gauger; when it is withdrawn, it is similarly regauged. By evaporation and soakage, some of the contents gradually disappear; taxes are paid upon the actual contents at the time of withdrawal, subject to this exception; that if the loss exceeds certain allowances called the "Carlisle Allowances," fixed by statute and gradually increasing at two or three months' intervals during a period of seven years (although the goods may remain in bond not exceeding eight years), payment must be made as well on such excess outage. Act Jan. 13, 1903, c. 134, 32 Stat. 770 (Comp. St. 1916, § 6054).

The amended petition alleged in detail the operations during the period specified; withdrawal of 50,868 barrels containing originally nearly 2,500,000 gallons, payment of tax in accordance with the governmental regauges at withdrawal on 2,014,295.4 gallons, actual contents, and 13,405.9, excessive outage; the difference nearly 400,000 gallons, representing the Carlisle Allowance. It further alleged that the additional tax was assessed on account of 33,843.3 gallons, claimed to have been removed untaxpaid after entry in bond; that no stamptax spirits were removed untaxpaid during such period; that

the taxes and interest were unjustly and illegally assessed.

The answer denied that no stamptax spirits were removed untax-paid during such period; that all taxes imposed by law were paid before removal of the goods; that the assessment was unjust or illegal; it specifically denied each of the detailed allegations of the petition and by amendment alleged affirmatively that on each spirit withdrawal day, during the period, plaintiff removed from the warehouse untaxpaid spirits, aggregating 33,843.3 gallons, with intent to evade the payment of the tax; that this was part of the spirits contained in the 50,868 barrels when entered into bond; and that the removal was effected by equalizing the barrels, that is, "by underweighing and underproofing the contents as they were removed from bond and by transferring a portion of the contents of the barrels containing respectively more than the requirements of the Carlisle

Allowance to barrels containing respectively less than the minimum

contents required by the Carlisle Allowance."

[1] 1. To recover, plaintiffs must sustain the allegation that the assessment was without warrant of law. To do this, they must prove that all legal taxes have been paid, even though it involve proof of the negative allegation that no spirits had been removed untaxpaid.

This burden rested upon them throughout the trial, whatever shifting there may have been in the duty of going forward with proof

to meet a prima facie case.

The burden is not met by proof that payment was made in accordance with the governmental regauge; for, whatever presumption of regularity might otherwise attach to such regauges as official acts, none can be given them in the light of the later assessment concededly based upon the alleged inaccuracy of the regauge returns, an assessment which is expressly declared by statute to be prima facie evidence of the amount due. Revised Statutes, §§ 3182, 3309, 3437 (Comp. St. 1916, §§ 5904, 6089); Western Express Co. v. United States, 141 Fed. 28, 72 C. C. A. 516. Nor does the added fact of long delay in making the assessment overcome its prima facie evidentiary effect. In other words, an assessment made contrary to the regauge returns must stand as valid, until some other evidence of its incorrectness or of the correctness of the regauge returns is introduced.

The error in not directing a verdict for defendant at the close of plaintiff's case was, however, waived. Defendant offered affirmative evidence supposedly in support of the validity of the assessment. Thereafter, it was proper to submit the entire case to the jury on the

single issue made by defendant's general denial.

[2] The trial judge considered and dealt with the affirmative allegations of the answer as if they were distinct affirmative defenses, rather than specifications in explanation and support of the general denial. This resulted, not only in the erroneous instruction that the burden of proving these defenses rested upon defendant and in the holding that the defenses must be disregarded as not proven, but necessarily in a confusion both as to the exact question to be determined by the jury and the burden of proof thereon.

Instead of advising the jury that any evidence bearing upon equalizing should be considered by the jury, the court, while reluctantly permitting the jury to weigh the comparison evidence hereinafter referred to, expressly stated that the only issue before them involved the question whether, apart from equalizing, untaxpaid spirits had

been removed.

The entire controversy, however, turned upon the question of equalization. The evidence offered by defendant was directed towards showing that equalization had been practiced in one or the other of the ways specified in the amendment to the answer. This eivdence consisted in the testimony of gaugers. When suspicion was awakened by the belated discovery that the regauge returns showed that of the 50,868 barrels, 9,892 were exactly on the line of the Carlisle Allowance, 48 per cent. were within .1 of a gallon and 61 per cent. within .2 of a gallon of the line, a regauge was directed to be

made for the purpose of comparison. This was done in January, 1915. At that time, there were on hand whiskies of 1909, 1910, and 1911. While the evidence shows that a few hundred of earlier years were on hand November 30, 1914, it does not affirmatively appear that any of them remained in January, 1915. Seven lots of 100 barrels each were taken at random for regauge and comparison with similar lots of the same age and length of storage included in the 50,868 barrels. The result was that while, of the latter, 18 per cent. had been reported as exactly on the line, 47 per cent. as within .1, 68 per cent. as within .2, and 77 per cent. as within .3 of a gallon of the line, of the former only 4 per cent. were on the line, 9 per cent. within .1, 13 per cent. within .2, and 18 per cent. within .3 of a gallon of the line.

The 700 barrels were, in our judgment, a fair sample of the 20,000 barrels which remained on hand November 30, 1914, and the evidence was properly admitted. But in the instructions, its scope was improperly and unduly limited by the direction to disregard the matter of equalization. This proof tended to show equalization by underweighing, if not by actual transfer, especially when coupled with the positive testimony that some of the regauge returns had been made on the basis of weights found by the regauger already marked on the barrels, the avowals based upon the improperly excluded testimony of a witness that while he could not tell exactly what proportion of the regauges were so made, in at least one-third he had accepted such weights, and upon the improperly excluded testimony of expert gaugers of long experience and some knowledge of the actual conditions, as to what the percentage of excessive outage would ordinarily be in such cases.

That a better comparison with the 50,868 barrels could not be made, because there were no longer on hand any whiskies of the earlier ages, did not make this evidence improper for comparison, not merely with the 1909, 1910, and 1911 withdrawals but with all

the withdrawals.

Whether or not under all the circumstances, including the physical condition of the warehouses, with the many possibilities it afforded for tampering with the goods notwithstanding the presence somewhere in the many buildings of an aged custodian, the assessment made on the basis of this comparison was to be overturned, was a proper matter for the jury to determine under clear instructions as to the issue and the burden of proof. They could have upset it in whole or in part; it was for them to determine whether and to what extent, in the light of all the evidence, the average surplus above the Carlisle Allowance of .868 gallons per barrel found in the 700 barrels was improperly used as a basis to increase to the same amount the average surplus of .199 shown by the withdrawal regauge reports for the 50,868 barrels. But to permit even a partial recovery, the burden was on the plaintiffs to show what, if any, part of the assessment was wrongful. It was error therefore to charge that if from a preponderance of the evidence, the jury found any part of the 50,868 barrels removed not taxpaid, they should find the number of untaxpaid gallons removed, deduct the amount at

the rate of \$1.10 per gallon from plaintiff's claim, and give plaintiff a verdict for the difference. This amounts to a direct charge that plaintiffs had sustained their case except as to so much as defend-

ant might disprove by a preponderance of the evidence.

It may be added that other pertinent evidence was before the jury; 11,473 barrels of 1909, 1910, and 1911 whisky showed on withdrawal regauge in 1915, immediately after the investigation had been made, only 6 per cent. on the line, 13 per cent. within .1, and 19 per cent. within .2 of a gallon of the line.

For the errors indicated, the judgment must be reversed, and the

cause remanded for retrial.

### LAWHEAD v. MONROE BLDG. CO.

## In re LAWHEAD.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

#### No. 3123.

1. BANKRUPTCY \$== 446-MOOT QUESTION-ABANDONMENT OF PREMISES.

Where trustee in bankruptcy petitioned court to declare his title to bankrupt's lease valid and to quiet claim that such lease had been canceled, and court's decree directed surrender of the premises, abandonment thereof by trustee pending petition to revise did not make proceedings moot; such abandonment having been involuntary, and trustee being entitled to reobtain possession, should decree be reversed.

2. BANKBUPTCY \$\simeq 465\$\to Petition to Revise-Appeal.

Where parties agree that petition to revise is proper method of reviewing court's decree on trustee's petition to quiet title to lease, and it is immaterial to the result whether the matter is heard on petition to revise or on appeal, an appeal therefrom will be dismissed.

8. BANKRUPTCY ≥288(1)—JUBISDICTION OF COURT—PETITION TO DETERMINE

ADVERSE CLAIMS TO LEASE.

Where trustee in bankruptcy had possession of the leasehold formerly held by bankrupt, bankruptcy court had summary jurisdiction, on petition of trustee, to determine if title to lease was in bankrupt estate or in adverse claimants.

4. LANDLORD AND TENANT \$\infty 109(4) \to Lease Termination - Relinquish-

Statement by lessee's secretary to lessor's secretary that he was making assignment for benefit of creditors, and that he was done with the store and the business, does not constitute relinquishment of lease, but mere expression of desire to get rid of the obligation, and does not terminate lease, where secretary had no authority to surrender premises, and where surrender, if tendered, had not been accepted.

Appeal from and Petition to Revise Order of the District Court of the United States for the Southern Division of the Eastern District of

Michigan; Arthur J. Tuttle, Judge.

Petition by Frank Lawhead, trustee in bankruptcy, against the Monroe Building Company and others. From decree for respondents, petitioner appeals, and petitions to revise. Appeal dismissed; upon petition to revise, decree reversed, and cause remanded.

For opinion below, see 243 Fed. 459.

Selling & Brand, of Detroit, Mich., for petitioner. Welsh, De Foe & Kahn, of Detroit, Mich., Frank A. Stivers, of Ann Arbor, Mich., and Max Kahn, of Detroit, Mich., for respondents.

Before WARRINGTON, KNAPPEN, and MACK, Circuit Judges.

MACK, Circuit Judge. Plaintiff in error filed a petition on May 7. 1917, alleging that at the time of the filing of the petition in bankruptcy the bankrupt was the lessee of certain premises; that it had been in actual possession thereof until February 23, 1917, when under a creditor's execution the sheriff closed the store; that the bankrupt surrendered the keys to him, so as to preserve the goods therein; that thereupon the petition in bankruptcy was filed, a receiver appointed, and possession taken by him of all the property and the premises; that the receiver remained in sole possession until the qualification of petitioner as trustee, whereupon the property and keys were surrendered to him; that neither receiver nor trustee ever surrendered possession or the lease or the rights of the bankrupt and of the estate therein; that in due course a sale thereof was advertised for May 4, 1917; that two days prior thereto the lessor, Monroe Building Company, by Kolb, its secretary and treasurer, delivered a note to the receiver, claiming to be in possession of the store: that at the sale Hutchins, as agent of Hutchins & Co., announced that he held a lease from the Monroe Building Company, executed after the bankruptcy, and objected to the sale of the lease; that the sale was had after petitioner's election as trustee, under the terms that the trustee would defend the possession of the purchaser against the claims of the lessor, Hutchins, and Hutchins & Co., and, if unsuccessful, would repay to the purchaser, in full settlement, one-half of the difference between the highest amount bid for the stock and fixtures when offered separately and when sold jointly with the lease; that this difference, on the sale for \$3,000 to one Hartle, amounted to \$800; that the sale had been confirmed, but proper instruments conveying title had not yet been executed.

In view of alleged threatened ejectment proceedings as soon as the purchaser should take possession of the premises, petitioner prayed that the parties named be decreed to have no rights therein as against petitioner and the estate, that their claims that the original lease had been canceled or surrendered be quieted, that they be enjoined from interfering with the sale so made, and that the petitioner be decreed to have a valid title to the lease and for general relief. Respondents, appearing specially, alleged that they were adverse claimants, and denied the jurisdiction of the court, except in a plenary action, and then only

with their consent.

The District Judge held that under the allegations, the court had jurisdiction, but that the exercise thereof depended upon the truth of the allegation as to the trustee's possession. In re Seger Bros. Co., 243 Fed. 459. On reference to a master, the facts thus held essential to the exercise of jurisdiction were found; but the master found as a conclusion of law that the lease had been surrendered by operation of law before the filing of the petition in bankruptcy, that likewise the rights thereunder had been repudiated and abandoned by the original lessee.

and had been lost by estoppel against him, and that the lease had been terminated by breach of covenant. Pursuant to request, the court, in overruling the trustee's exceptions to the report, made findings of fact in substance as follows:

The lease was executed June 21, 1915, for five years, at a monthly rental of \$75. It provided for right of re-entry on default of covenant. On February 1, 1917, February rent became due. It was not paid on demand. On February 21, or 22, lessor's secretary met lessee's secretary and informed him that they "must have the rent." The secretary, who was also the general manager of the lessee, replied:

"I am making an assignment for the benefit of the creditors, and Mr. Meyers is to be the trustee. I am all through with the thing, and if you want the rent you will have to go and see him. I am all done with the store and the business; there are other businesses I can make more money at."

While the assignment was drafted, it was not perfected. February 27, 1917, between 10:30 and 11:30 a. m., petition in bankruptcy was filed. Between 12:30 and 1 p. m. lessors instituted summary proceedings to recover possession. In these proceedings, it specifically alleged that "Seger Bros. & Co., defendant, is the tenant and unlawfully withholds possession," and on the trial, March 12th, the lessor's secretary claimed rent for February and 12 days in March to be due, and secured judgment therefor, with order for restitution of possession.

A week before bankruptcy, the sheriff levied as alleged in the petition; while in possession, he refused to pay a demand for \$80 monthly rent. The receiver's possession began March 1st. On March 23d, the lease to Hutchins & Co. was executed. Trustee's sale was made as alleged in the petition. No proceedings were taken to compel the receiver to elect to assume or reject the lease. No notice to quit was served on any one; there was no written surrender or cancellation of the lease. Neither sheriff nor receiver had knowledge of the restitution proceeding.

Subsequent to the sale, the trustee tendered rent, and has kept the tender good from month to month, and at the hearing, June 21, 1917, in addition, tendered the rent due February 1st.

The decree now before us for review ordered the trustee and Hartle to surrender and deliver up possession to Monroe Building Company, or Hutchins & Co., not later than September 20, 1917, and to pay rent at \$75 a month from May 6, 1917, until such vacation; "that being the time the premises were wrongfully withheld."

[1] 1. Respondents have moved to dismiss these proceedings on the ground that that matter has become moot. This is based upon the allegation that on September 19, 1917, the purchaser voluntarily abandoned the lease and premises, taking with him so much of his stock of merchandise as he had not theretofore disposed of, that no legal proceedings had ever been commenced against the purchaser to recover possession of the premises, that no attempt to oust him had ever been made, and that respondents have been in peaceable possession of the premises since September 19, 1917. It is apparent, however, from the affidavits, that any relinquishment of possession by the purchaser was not voluntary, but was due to the terms of the decree, now before us

for review, under which, though not a party to the proceedings, he was ordered to surrender possession not later than September 20, 1917.

If, on the merits, the decree is found to be erroneous, and is reversed, nothing presented in the record, or on the motion, would clearly preclude the purchaser from reobtaining possession. Whether or not the indemnity agreement subjects the trustee to liability to the purchaser, under the circumstances under which he lost possession, need not be and, in the absence of the purchaser, will not be determined; the trustee clearly has an interest in securing a review of the decree, in view of the fact that, if possession was yielded thereunder, he might be subjected to such liability; until the question is determined, the estate cannot safely be closed. We hold, therefore, that the matter before us is not, as between the parties to this record, moot, and that the motion to dismiss must be denied.

[2] 2. The parties are agreed that petition to revise is the proper method of review. As it is immaterial to the result reached, we adopt this view, without expressing any opinion thereon. The appeal will

therefore be dismissed.

3. On objection to the jurisdiction, the court properly directed that there be considered, first, the evidence bearing on that question, specifically, whether the allegations of the trustee's petition that the bankrupt had possession of the property, the leasehold, at the time the petition in bankruptcy was filed, and, if so, whether that possession had been acquired, and at the institution of instant proceedings was held by the trustee. The master's findings of fact do not appear in the record; his conclusion therefrom was that, under the opinion of the District Judge, the court had jurisdiction. The District Judge, who, in confirming and adopting the master's report, made findings of fact, found inter alia that the actual possession of the premises covered by the lease was "prior to and up to the aforesaid [trustee's] sale peaceably held by said sheriff, receiver and trustee, and after said sale such actual possession was transferred to and is now held by the \* \* \* purchaser at said sale."

The trustee's petition alleged that the sale had been confirmed, that proper instruments conveying title had not yet been executed, and that the respondents threatened to eject the purchaser as soon as he should take possession. In the light of these allegations, of the opinion of the District Court as to the basis of jurisdiction, and of the conclusion of both master and court that the court had jurisdiction, the words "after said sale," in this finding of fact, necessarily mean, not immediately after and prior to the filing of the trustee's petition, but at some time after the sale subsequent to the filing of the petition. In other words, the finding is consistent with the view of the court that possession of the lease by the trustee at the time he filed his petition was essential to the summary jurisdiction of the bankruptcy court to prevent interference therewith and to determine any adverse claims thereto.

[3] Assuming for the purpose of this hearing that the respondents saved all exceptions to the conclusion as to jurisdiction, and that therefore the matter is properly before us, we concur in the views expressed by the District Judge, and in the conclusion based thereon, that the

bankruptcy court was vested with jurisdiction in the premises. Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338. It is unnecessary, therefore, to consider whether the trustee's agreement to reimburse the purchaser in case he lost possession through legal proceedings, coupled with possession by the purchaser, would have given the court jurisdiction, on petition of the trustee, to determine claims adverse to the purchaser in a proceeding in which the purchaser was not a party, but in the determination of which the trustee had an interest, or to determine whether, under the peculiar facts of this case, the District Court would have had jurisdiction to determine the controversy raised, even if the trustee in bankruptcy had before the actual filing of his petition below delivered to Hertle the possession of the premises held by the estate when bankruptcy occurred, and with the expectation of filing and prosecuting that petition.

4. The basis of the decree on the merits is not clear. If the court agreed with the master's conclusion of law that the leasehold interest had been lost by surrender or abandonment prior to bankruptcy, it would follow that the possession had been wrongfully withheld (though by his predecessor, the receiver) from that time and not only from May

6th, as recited in the decree.

[4] But we cannot agree that, on the facts found by the court, any surrender or abandonment took place. The secretary was not authorized to surrender or abandon the premises; the bankrupt's goods were there; his conversation with lessor's secretary evidences, at best, but a desire to get rid of the obligation, not a present relinquishment of a right essential to the protection of its goods located on the premises. Moreover, even if surrender had been tendered, it clearly was not accepted. The action in the state court, the claim made therein, and the judgment there obtained evidence beyond question that up to March 12th lessor deemed the lessee to be rightfully in possession, though subject to ouster for breach. Of course, this action, begun after the bankruptcy petition was filed, could not affect the estate, as the trustee's title to the lease vested as of February 27th; it evidences, however, none the less clearly, the lessor's then point of view.

The decree must be reversed, and the cause remanded for further

proceedings in accordance with the views herein expressed.

# CITY OF LA FOLLETTE et al. v. LA FOLLETTE WATER, LIGHT & TELEPHONE CO.

(Circuit Court of Appeals, Sixth Circuit. June 14, 1918.) No. 3115.

MUNICIPAL CORPORATIONS \$\infty 285\to Power to Contract\to Grant of Franchise.

A contract by a city for the supplying of water and electric lights for public purposes for 30 years, and fixing prices therefor, made under express legislative authority, with a company to which it granted an exclusive franchise for a like term, held valid and enforceable, so far, at least, as it relates to the city's contract, in its proprietary capacity, for a public supply of water and light.

2. MUNICIPAL CORPORATIONS \$\ightharpoonup 111(4)\$—Ordinances—Partial Invalidity.

An ordinance contracting for water and electric lights for public purposes, and incidentally granting to the company furnishing the same an exclusive franchise therefor, which was within the franchise power of the city, and also granting an exclusive franchise to use the streets for supplying water and lights to the inhabitants, which was not within its powers, is divisible, and valid, at least, as to the feature relating to the supplying of water and electric lights for public purposes.

3. Specific Performance =16-Defenses-Hardship.

The matter of hardship as a defense to a suit for specific performance is in general to be determined in the light of the circumstances and conditions at the time the contract was made.

 Specific Performance \$\sim 94\$—Right to Relief—Substantial Performance by Complainant.

Substantial performance of a contract by complainant is in general sufficient to authorize a decree for specific performance.

5. Specific Performance \$\sim 94\$—Right to Relief—Substantial Performance by Complainant.

To entitle a water company to specific performance of a contract with a city to furnish water for public purposes, it must show substantial performance of a further part of the contract to supply water, impliedly of good quality, to the inhabitants for domestic use.

A city, which approved of the source from which a company was to supply water, cannot resist specific performance of a contract for water for fire protection because of minor defects in the water, due to such source, which cannot be removed by use of reasonable appliances and methods.

7. Specific Performance \$\iiii 130\)—Continuing Contract—Conditions to Granting Relief.

In decreeing specific performance against a city of a contract for hydrants and street lights, which has a number of years to run, the court may properly, as a condition, require complainant to assent to such modifications as may be just and equitable.

8. Specific Performance \$\infty\$130—Conditions on Granting Relief.

Conditions imposed by the decree upon complainant as preliminary to granting specific performance *held* just and equitable.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by the La Follette Water, Light & Telephone Company against the City of La Follette and others. Decree for complainant, and defendants bring error. Affirmed.

The city of La Follette, by ordinance contract of June 6, 1905, in terms granted appellee an exclusive franchise for 30 years for constructing and maintaining a system for supplying water, electric light, and telephone service to the city and its inhabitants and vicinity. The ordinance contained provisions fixing rates to consumers generally for each of the three classes of service, and with express provision for furnishing the city, during the entire term of 30 years, with 40 hydrants for fire purposes at \$40 each per year, and for public lighting with 50 arc lamps at \$75 each per year, and for an annual tax levy of nine-tenths of 1 per cent. on the taxable property in the city during the entire contract period, for meeting the payments for such fire hydrants and public lights. The city was incorporated by chapter 161 of the Acts of the Tennessee Assembly of 1897, section 9 of which authorized the city to contract and provide for the lighting of streets, public buildings, and other public places; to contract and provide for water within and beyond

the city limits for all public and corporation purposes; to provide for the prevention or extinguishment of fires; and, in apparent effect, generally to make other provisions for the protection of the health and comfort of the inhabitants of the city. By section 14 of that act the La Follette Land & Improvement Company (whose rights were later assigned to appellee) was given an exclusive 30-year franchise for supplying the city and its inhabitants with water, electric light, and certain other service; by section 15 all corporate franchises were limited to 30 years or less, and the city was authorized, in its discretion, to make contracts for a public supply of gas, water, and electric lights for the full period of any franchise granted by the act or by the council of the city. The original franchise ordinance of 1905 called for a water supply from wells; the system was later changed to dam and reservoir; and by ordinance in 1907, in consideration of the additional expense of the change, the annual price of the fire hydrants was increased to \$50, the number being decreased to 32—the total rental being unchanged. An amendment to the city charter, in 1911 (Laws 1911, c. 655), limited the aggregate tax levy for any one year to 2 per cent. of the assessment, with the proviso that "in making such levy full compliance with existing contracts and ordinances for the maintenance of public electric street lighting and fire protection by maintaining a water hydrant system shall be observed, nor shall any existing obligations of \* \* \* be impaired." By section 14 of the amendatory act the future renewal, granting or extension of franchises for occupying or using the city streets, etc., was forbidden except on petition signed by a given percentage of the legal voters and on approval of the ordinance by the electors, with provision that "nothing in this act shall affect or annul any franchises heretofore granted within said city." The water system was completed to the satisfaction of the city by December 31, 1907, and the entire electric light, telephone, and water systems were accepted by the city on December 31, 1907, as in compliance with the franchise. Appellee put out a bond issue of \$150,000, secured by mortgage on its plant.

From December 31, 1907, the contract payments for hydrants and lights were duly met by the city until January 25, 1915, when the city officials notified appellee, in writing, that it regarded the franchise contract as "void, for reasons which are not necessary to be here stated," and refused payment "upon any charge hereafter made" unless upon the making of a new and suggested arrangement, by which the number of hydrants and lights should be reduced, the location of some of them changed, and half lights substituted for some of the full lights. These changes would greatly reduce the rental.

Thereupon appellee, treating the notice as an attempt to revoke or repudiate the franchise, filed its bill for specific performance of its contract, including the levying of the tax provided for meeting rentals, and the administering of an asserted trust in the taxes already collected for that purpose and on hand.

Defendant's answer asserted the invalidity of section 14 of the city charter of 1897, as well as of the original franchise ordinance of 1905 (including its taxation provisions), and of the 1907 amendment to the ordinance, and denied that the charter amendment of 1911 had the effect to impose on the city any duty with respect to the levy and collection of the taxes mentioned or their application to the payment of rentals. In denial of the asserted right to specific performance the answer alleged that the water plant was inadequate to supply fully the demands made on it; that it had not been operated conformably to the contract; that the water furnished thereby to the city and its inhabitants, especially during the late summer and fall seasons, is contaminated with impurities and liable at any time to become impregnated with disease germs; that appellee has failed to install a public horse drinking fountain as required by its contract; that the lights provided furnished but three-quarters of the contract power; that the contract itself is unconscionable; that in its municipal acts with reference to the contract the city had been dominated by the personal interests of La Follette and his associates; and that the contract itself had been obtained by "sinister influences"; that many of the existing hydrants were useless and others located where there was little or no need for them: that many of the lights were of no service and the rentals therefor excessive; that the city is unable to raise enough to pay the rental for the water and the lights and observe its municipal requirements generally. It offered to make payment for lights and hydrants during the pendency of suit according to the proposal for modified contract before referred to.

After hearing upon proofs taken in open court, Judge Sanford filed an opinion holding the ordinance-contract valid and enforceable, at least so far as it relates to the public supply of water and light for purely municipal purposes, and holding appellee entitled to specific performance in respect to those features upon complying with certain conditions. The opinion of Judge Sanford follows:

"After careful consideration of the evidence and arguments of counsel, my conclusions are:

[1] "1. Secs. 9 and 15 of the Act incorporating the City of La Follette (Tenn. Acts of 1897, c. 161, p. 351), unquestionably authorized the City to enter into contracts for the public supply of water and electric lights for the period of thirty years.

"2. Under this legislative authority the City could, in my opinion, lawfully enter into a contract for the furnishing of City water and electric lights for such period, and provide therein for the number and character of hydrants and electric lights to be maintained, and the prices to be paid therefor during such period. Obviously, unless authorized to so contract, it would be, as a matter of business, practically impossible to obtain a party willing to make the necessary investment in a plant adequate to enable such water and lights to be furnished. Sec. 15 of the charter specifically provided that 'the city council may, at its own discretion, enter into contracts for the public supply of gas, water and electric lights for the full period of any franchise granted, by this ACT or by said council,' that is, for a period of thirty years. The right to enter into such contract necessarily embraced, as I view it, the right to agree as to its essential terms, including both the number and character of the public facilities to be furnished, and the price to be paid therefore during the contract period. The case of Freeport Water Co. v. Freeport City, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679 (in which four justices, including the present chief justice, dissented), relied on by the defendants, is not, as I view it, a conclusive adjudication to the contrary. That case involved a statute materially different from that now under consideration, which was held capable of being reasonably construed distributively, so that the statutory period related only to the maintenance of the water works and not to the rates to be paid. and was, as it appears, largely determined on the ground that the Supreme Court of Illinois had so construed it, and that hence, under the doctrine of Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359, this construction was to be followed by the Federal Courts, if the true construction of the statute was a matter 'balanced with doubt' (180 U.S. pages 595 and 597, 21 Sup. Ct. 493, 45 L. Ed. 679). In the instant case, however, the charter has not been construed by the Supreme Court of Tennessee; and it is the duty of this court to give effect to its own construction of the charter, which appears to me to be entirely plain.

"3. The right given the City by Sec. 15 of the charter to enter into a contract, in its proprietary capacity, for the public supply of water and electric lights for thirty years, necessarily authorized it to give, as an incident of such contract, an exclusive franchise in the streets of the city for the purpose of furnishing the public service contracted for. See, by direct analogy, Walla Walla v. Water Co., 172 U. S. 1, 17, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg v. Water Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; and Vicksburg v. Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155.

"4. It did not, however, either expressly or by necessary implication, give the city the right to give, by ordinance, in its legislative capacity, an exclusive franchise in the streets of the City during such period, for the purpose of supplying water and lights to the inhabitants of the city for private purposes. Water Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257. And see Detroit Street Railroad v. Detroit Railroad, 171 U. S. 48, 55, 18 Sup. Ct. 732, 43 L. Ed. 67, and Nelson v. Murfreesboro (C. C. Tenn.) 179 Fed. 905.

"5. Nor was such exclusive franchise for private purposes legally conferred by Sec. 14 of the City charter (p. 365) purporting to give the La Follette Land & Improvement Co., the plaintiff's assignor, such exclusive

franchise for thirty years after the acceptance of the City Charter. This section of the City Charter is in my opinion, void for the following reasons, if not otherwise: (a) Such provision is not expressed in the title of the Act, and hence violates Sec. 17 of Art. 2 of the Constitution of Tennessee; and (b) it seeks to enlarge the corporate powers of the La Follette Light & Telephone Co., a private corporation, by special legislation, and hence violates Section 8 of Art. 11 of said Constitution.

[2] "6. I do not think, however, that the ordinance contract of June 6, 1905, was rendered void in its entirety by reason of the fact that in addition to lawfully contracting for a supply of City water and lights for thirty years, it also sought, without authority, to give the plaintiff an exclusive franchise for thirty years for supplying water, lights, etc., to the inhabitants of the city. The franchise for supplying facilities to the inhabitants for private use related to an entirely separate and distinct matter from that of supplying facilities to the City for public use, and the fact that it was sought, without authority, to make the franchise for supplying the inhabitants exclusive, does not render the other separable features of the contract void, especially those in reference to the supplying of facilities for public use, but merely has the effect of rendering invalid the exclusive feature of the franchise sought to be given for the purpose of supplying the inhabitants. In this respect the instant case differs, as I view it, from Manhattan Trust Co. v. Dayton (6th Circ.) 59 Fed. 327, 8 C. C. A. 140, and other cases relied on by defendants, in which it was held that under statutes authorizing a municipality to enter into a contract with public service corporations 'not exceeding' a certain term of years, a contract entered into for a single term of greater length was, in effect, prohibited by the statute, and, being single and indivisible, could not be changed by the court, either by inserting a term of limitation where none existed, or substituting one term for another, so as to render it a lawful contract for any period, the contract itself not being so worded as to enable the court to separate the lawful from the unlawful. If, however, the contracts in these cases had provided for two separate periods, one within the lawful power of the municipality and one for an additional period beyond such power, it seems clear that the courts would have separated the lawful from the unlawful provisions and held the former to be valid. And in the instant case, I am of opinion that the contract ordinance is clearly divisible; that the provisions as to public and private service are not bound up indivisibly in a single provision, and that the court may and should separate the lawful from the unlawful, and while holding that the contract was invalid insofar as it sought to give an exclusive franchise in the streets of the city for thirty years for the purpose of supplying inhabitants of the City with water, etc., that it was nevertheless valid otherwise, and especially insofar as it contracted for the supply of water and light for the City itself during such period and gave an exclusive franchise for such purpose. The distinction, in short, is this: In the Dayton and other cases, the contract was single and indivisible, and for a term, which, as construed by the court, was prohibited by the statute, thereby rendering the contract void in its entirety. In the instant case, the contract relates to two distinct subject matters; one a contract entered into by the City in its proprietary capacity in relation to its own public service; the other a contract entered into by it in its legislative capacity in reference to the supplying of water to its citizens. These provisions, entered into by the City in different capacities, are clearly separate and divisible. Neither of them is forbidden by statute. The one entered into by it in its proprietary capacity is, in my opinion, clearly authorized by the charter; while the other, entered into in its legislative capacity, although not authorized, insofar at least as its exclusive feature is concerned, is neither expressly nor impliedly forbidden. I am hence of opinion that there is nothing in the doctrine of the cases relied on by the defendants which should prevent the court in the administration of justice from separating this contract into its component parts, and from holding that part which relates to the furnishing of public facilities and the exclusive franchise therefor to be valid, unaffected by the invalidity of the provision relating to the exclusive franchise sought to be given for supplying facilities to the inhabitants of the city.

"This conclusion is in accordance with the statement in Patton v. Chattanooga, 108 Tenn. 197, 229, 65 S. W. 414, and cases therein cited, that where a city authorized to grant a franchise, seeks, without authority, to make such franchise 'exclusive,' this could 'only make the exclusive features invalid,' and that the 'franchise might still be valid, though not exclusive.' And it was furthermore said in that case that the purported exclusive feature of the franchise could only be questioned by someone claiming the right to do something contrary to the exclusive feature (108 Tenn. at page 230, 65 S. W. 414),

that is, under another and conflicting franchise granted by the City.

"Furthermore, in Morristown v. Telephone Co. (6th Circ.), 115 Fed. 304, 308, 53 C. C. A. 132, in which Circuit Judges Lurton and Day both sat, the court, speaking through Judge Lurton, who had previously delivered the opinion in the Dayton case, upon which the defendants chiefly rely, said: 'An ordinance conferring street easements in excess of the power of the municipality to grant is not necessarily void. For example, ordinances conferring exclusive rights by a municipality having no power to grant exclusive rights have been held valid so far as to convey a right, subject to the right of the city to grant like privileges in same streets to others. Levis v. City of Newton (C. C.) 75 Fed. 884: City of Waterloo v. Waterloo St. Ry. Co., 71 Iowa, 193, 32 N. W. 329. The same rule would apply to an ordinance valid in part and invalid in part which is applicable to a statute. If the grants are so distinctly separable that each can stand alone, and the court is able to see that there is no such interdependence as to make the validity of a part depend upon the validity of every part, the ordinance will be upheld so far as valid.' To the same effect are: Kimball v. Cedar Rapids (C. C.) 100 Fed. 802, 803 (Shiras, J.); Bellevue Water Co. v. Bellevue, 3 Idaho, 739, 753, 35 Pac. 693; Gadsden v. Mitchell, 145 Ala. 137, 40 South. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. Rep. 20; and Clarksburgh Light Co. v. Clarksburg, 47 W. Va. 739, 749, 35 S. E. 994, 50 L. R. A. 142. These authorities are conclusive of the present question, and necessarily result in the holding that the invalid 'exclusive' feature of the franchise sought to be granted the plaintiff for supplying facilities to the inhabitants does not render the contract invalid otherwise.

"As the plaintiff's bill does not allege any denial by the defendants of the right to enforce so much of the ordinance as relates to the supplying of facilities to the inhabitants of the city, and when properly construed seeks only to enforce so much of the ordinance as relates to the contract with the City for the supply of public water and lights, and no other relief can in any event be predicated, I find it unnecessary to determine whether so much of the ordinance as relates to the furnishing of facilities to the inhabitants is otherwise irrevocable and binding upon the City, especially in reference to so much of the ordinance as purported to fix the rates to be charged the inhabitants for such service, being of the opinion that whatever may be the effect of such provision in the ordinance, it can not, for reasons analogous to those already stated in reference to its exclusive feature, render invalid the separable part of the contract relating to the furnishing of lights and water to the City itself.

"8. I do not find under the evidence that this contract ordinance was fraudulently procured or was not in fact the lawful act of the City Council. While apparently some of the members of the City Council may have been largely influenced by the relationship which they bore to the La Follette Coal, Iron & Railway Co., I do not find any satisfactory evidence of undue influence exercised in that regard. Furthermore, while the contract appears to have been agreed upon between the plaintiff and representatives of the La Follette Coal Company before it was submitted to the city council and to have been passed without any especial discussion (although not secretly), I find that the La Follette Coal Company had a much larger proportionate interest as a taxpayer in the City than it did as a prospective stockholder in the plaintiff, and that it was hence in a position to desire only a just and equitable contract, since if inequitable provisions were imposed upon the City, it would, as a taxpayer, have to pay out a larger sum of money than it would receive back in dividends on its stock in the plaintiff, and that it did in fact negotiate what appeared to be a fair and just contract, for twenty years shorter period than the plaintiff desired and with provisions looking to reduction in rates in the event of the

growth of the city in proportion. In fact the ordinance adopted appeared to have met with the entire approval of the citizens generally and to have been discussed and approved in a public meeting of the Board of Commerce. Some provision for waterworks system was imperatively needed in view of the recent conflagration which had so seriously injured the city, and the absence of protection from fire which had greatly raised the insurance rates and rendered them very high if not prohibitive. I find no evidence that as conditions then existed the City could have reasonably expected to make a contract with anyone else upon substantially better terms than those embodied in this ordinance, or that there was either bad faith or lack of public necessity, as it then appeared, in the provision of the ordinance, either as originally passed or subsequently amended in reference to the extent of facilities to be supplied; nor evidence that the rates fixed for such service, either in the original or amended ordinance, upon the faith of which the plaintiff extended its mains, etc., were unreasonably high.

[3] "The matter of hardship as a defense to a suit for specific performance is, in general, to be determined in the light of the circumstances and conditions at the time the contract was made, and not on that of a subsequent change in circumstances." Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 472, 473, 12 Sup. Ct. 900, 36 L. Ed. 776: Lee v. Kirby, 104 Mass. 420, 428; Southern R'y v. Franklin R. R., 96 Va. 693, 709, 32 S. E. 485, 44 L. R. A. 297.

"Nor does the evidence show that the rates charged the City are even now unreasonably burdensone, or substantially higher than the rates charged for similar services generally; especially in the light of the fact that the net earnings of the plaintiff, over and above operating expenses, appear from the beginning to have been no more than sufficient to enable it to pay the five per cent. interest on its \$150,000 of bonded indebtedness, representing an actual cash investment of about \$110,000: that is, a little over seven per cent. on the actual investment, with no payment of dividends to stockholders and no setting aside of any sinking fund to discharge the bonds on their maturity, and leaving it largely indebted even for its president's salary.

"The provision in the contract for a public (horse) fountain I furthermore find to have been informally released, for what was supposed to be a valuable consideration, by a subsequent council, and as no request for its installation is shown to have been made by the present or any other subsequent council, this

is clearly not a ground for denying specific performance.

[4, 5] "9. The question as to whether the plaintiff has substantially performed the contract on its part so as to now entitle it to a decree for specific performance presents greater difficulty. Substantial performance of a contract is, in general, sufficient to authorize a decree for specific performance, literal and exact performance not being required. Secombe v. Steele, 20 How. 94, 104, 15 L. Ed. 833; 36 Cyc. 697. On the hearing the plaintiff excepted to the evidence bearing upon the potability or quality of the water furnished to domestic consumers, which was tentatively overruled, and at the conclusion of the first hearing moved to exclude all this testimony on the grounds, in substance, that it was not material to the questions involved in this suit relating to the water furnished the City for fire hydrants, and that there is no representation in the ordinance as to the character of the water to be furnished. I am of opinion, after careful consideration, that this evidence was properly admitted, and that the motion to exclude should be overruled. Under the contract, the plaintiff agreed (Sec. 2) to establish a water works system 'necessary to provide a complete outfit for the supply of water for domestic, commercial and fire purposes,' of such design and capacity as necessary to enable it to fully supply the demand for service at the time of completion of the original system, with extensions from time to time as there should be a reasonable demand for increased service, with certain provisos as to extensions of service not necessary to be now referred to. It was, I think, necessarily implied as a term of this contract that the water supply for domestic purposes should be reasonably adapted in quality to domestic use. See as to high police duty resting upon a municipality in this respect in respect to furnishing pure and wholesome water, Columbus v. Mercantile Trust Co., 218 U. S. 645. 659, 31 Sup. Ct. 105, 54 L. Ed. 1193. Furthermore, as the City in this ordinance contract acted not only in its proprietary capacity for public service, but also in its legislative capacity for service to its inhabitants, it can not be assumed, I think, that it would have made the contract which it did in reference to public service or agree to pay the prices which it did for such service independently of the contemplated benefits to be received by the inhabitants in private service to be furnished under the contract, and I am of opinion that a substantial performance of that portion of the contract relating to private service to consumers, with its implied terms, is essential in order to entitle the plaintiff to a decree against the City for specific performance of that portion of the contract relating to the public service, as well as substantial performance of those provisions of the contract relating to the public service. See, by analogy, Winfield v. Water Co., 51 Kan. 70, 32 Pac. 663.

"In reference to the performance by the plaintiff of its contract, I find the following facts to be established by the greater weight of the evidence:

"The plaintiff built its water and electric light system to the satisfaction of the city council, and the same were accepted by the council as in full compliance with the contract. The water works system was supplied by reservoir which was located about a mile from the City and was constructed by damming up a creek on the water shed, which contained some thirteen square miles or about 8,500 acres, part of which was flooded by the dam. There were at that time various people living on this water shed, some of them near the tributaries of this creek, but mostly at some distance from the dam. greater part of this water shed was neither owned nor controlled by the plaintiff. This water shed had been used to a considerable extent for stock grazing. These facts were known to the city council. After the dam was constructed. various people continued to live upon the water shed and cattle and hogs to be grazed or herded thereon. At different times certain sawmills were also located within this water shed and logging camps established; and at one time a considerable number of people lived on the water shed. At the time the proof was taken in this case, however, the number of people living thereon had been reduced to forty-four. There was no filter in the reservoir, and at the beginning the plaintiff depended for purification of the water merely upon the settling process, due to the length of time which the water stood before it was used, and which was effectual in removing a considerable portion of the impurities. During the dry seasons of the year, however, the supply of water was considerably diminished and there were at time a potential failure of a full supply; which, however, never became actual in such sense as to deprive either the City or its inhabitants of the use of the water. There was also some trouble with the water due to algae, a microscopic vegetable growth, which did not, however, affect its healthful properties, but gave it an unpleasant odor at times; these algae first appearing in 1911, and being a common water trouble in many other places. The plaintiff took advice from United States authorities in reference to this matter, but as the trouble re-appeared in 1912, employed an engineer, who recommended heightening the dam. The plaintiff thereupon, at its own expense, heightened the dam six and a half feet, increasing its capacity from seven million five hundred thousand gallons to at least twenty-five million gallons, the additional time which the water stands in the reservoir before being used being now about thirty days, thereby materially increasing its purification by settling; this being a common method of purifying water derived from surface supplies. Since the raising of the dam it has contained a full and sufficient supply of water for all purposes, public and domestic. During all this time the water was used both by the City and its inhabitants, both in the fire hydrants and for domestic use. A majority of the citizens who took water service appear to have used this water all the time for drinking as well as bathing and other household purposes; although some, especially before the height of the dam was increased, seem to have usually stored the water in cisterns during the flood seasons and in the dry seasons drunk the water from the cisterns. The great weight of the testimony, especially that of physicians resident in La Follette, indicates that no diseases, either typhoid or otherwise, could at any time be traced to the use of this water, the weight of the evidence indicating that such typhoid as has existed

is more directly traceable to the use of springs, which were still resorted to by people who did not take the plaintiff's water.

"Even since the dam was raised there appears to have been some trouble in the use of hydrants due to the collection of muddy sediment where hydrants had been standing unopened for some time. It does not appear that the Water Company ever opened the hydrants to permit this muddy sediment to escape. However, the proof does not satisfactorily establish that the City ever made any complaint in this regard, or asked permission to open the hydrants for this purpose, or that the same was ever refused. At one fire some two or three years ago, in which a church was burned, there appears to have been some trouble in getting a full flow of water due to this muddy sediment, although the lack of sufficient flow was apparently contributed to, if not entirely caused, by failure to turn on the hydrant to its full extent.

"In the year 1914 the plaintiff, apparently of its own volition, commenced making bacteriological tests of the water for the purpose of improving its character. These analyses indicated that while the water was, in the main, of good character, there were some specimens which indicated possible sources of danger, as indicated by the percentage of colon bacilli. The percentage of colon bacilli, however, does not, in my opinion, under all the evidence, necessarily indicate dangerous impurity in the water the safety of the water depending not upon the colon bacilli, which in themselves are not harmful, being merely intestinal germs and not disease germs, but upon the presence or absence of the typhoid germ, which under the weight of modern scientific opinion, comes from contamination by discharge from a human being having typhoid fever. Vital statistics indicate, however, that with the small number of people now living on this water shed, there is only a probability of one case of typhoid fever in the whole water shed every ten years. When there is added to this the uncertainty as to whether the typhoid germs from such patient would reach the water source, the possibility of typhoid infection of the water supply through the persons living on the water shed is, in my judgment, very

"Since these bacteriological analyses were made, however, the plaintiff, after first resorting to a system of purification by alum, has employed Professor Switzer, hydraulic engineer at the University of Tennessee, and an expert in these matters, and under his direction has established additional method of purifying the water supply supplementing the settling process, namely, an improved treatment by a solution of alum and soda ash, producing an artificial sedimentation, and also by a treatment with chloride of lime. These methods of treatment, in addition to the raising of the dam, have materially reduced the trouble from algae, as well as lessening the chance of infection, and I think it is shown by the weight of the proof, especially by the testimony of Professor Switzer, which appears to me to be clear and convincing, that the water supply for domestic use is and has been for some time reasonably safe and free from impurities and fully as pure and safe as that ordinarily supplied for domestic purposes in other cities. It likewise appears that it is reasonably free from algae, and that a reasonable effort has been made to eliminate this annoyance. At times there has also been a difficulty with the water due to the presence of the stenothrix or iron germ, which has a tendency to discolor clothes when washed with this water. No entirely satisfactory method of dealing with this problem yet appears to have been discovered, but the purifying methods introduced by Professor Switzer, as shown by the daily samples taken from June 20th to November 2, 1915, indicate that this trouble from stenothrix was present only a few days, and that the algae had been practically eliminated.

"As to the matter of electric lights, I find that the company was not, just before the proof was taken, furnishing the full quantity of wattage, measured at the lamps required by the contract. How long this had existed does not appear. This was apparently due primarily to the failure to properly regulate the lamps. Such deficiency as existed however, did not, according to the greater weight of the evidence, in my opinion, perceptibly lessen the light furnished or effect an ordinarily visible impairment of the light; and no data

appear from which the injury to the city, if any, could be reasonably estimated. Practically, however, I think there was no damage done to the city in this respect; and this matter was entirely corrected as soon as it was brought to the plaintiff's attention by the testimony taken at the original hearing.

"The original contract further provided that the plaintiff should install and maintain for the city a horse drinking fountain. This has never been installed. While there is no record of any subsequent contract waiving this feature of the ordinance, it appears that the matter was taken up by former council and a conclusion reached that at a still earlier date the council had waived this fountain for a valuable consideration. The fact that it was so waived for a valuable consideration is not, however, satisfactorily established, though it does appear that the subsequent council understood that it had been waived, and that no demand was thereafter made on the plaintiff to establish

the fountain by the present commission or otherwise.

"It furthermore appears from the communication of January 25, 1915, sent by the defendants to the plaintiff before the institution of this suit, and which directly led to this litigation, that no complaint was made by the city with reference either to the amount of water or electric light furnished, either to the city or to private consumers, or to the character of the water; the sole objection to the contract, as expressed in this communication from the city authorities, being that the number of city hydrants and lights provided for by the contract were excessive, the prices too high, and the location of some of the lights and hydrants inadvisable; its sole insistence, before the institution of this suit, being that the number of city hydrants and electric lights should be reduced, the location of some of them changed and half lights substituted for some of the full lights. And I specifically find from the proof that up to the time of the institution of this suit the city had not in any way complained of any alleged nonperformance of the contract by the plaintiff, either in reference to its own water and lights or to that furnished private consumers, except one complaint made some years ago as to the quality of the water before the dam was raised, which seems to have been adjusted to the satisfaction of the committee by the raising of the dam; and that since the dam was raised it has never made any complaint whatever of the service furnished by the plaintiff under the contract, either to the city or to private consumers, or demanded that any improvements be made in such service, either as to quantity or quality. And prior to the accruing of the installments of rental for the collection of which this suit was brought, the city appears to have paid all the installments of rental, both for light and water, as they accrued, with perhaps sometimes slight and incidental delay, without any complaint whatever that the plaintiff was not fully performing the entire contract upon its part. Complaint is also made that the plaintiff has not kept the lights burning the full number of hours required.

"From all the proof, my conclusions in the matter of substantial perform-

ance are:

[6] "(a) That as the city accepted the water works with a knowledge that the dam was built in this water shed, which was to be the source of supply, it is only entitled to insist that, except in matters actually inimical to public health, such reasonable appliances and methods be established from time to time, in the light of advancing science, as are adapted to improving the character of the water derived from such source, and is not entitled to resist specific performance of this portion of the contract by reason of minor defects in the water due to the source from which it is and was to be derived, which are not capable of being removed by the use of reasonable appliances and methods, under all the circumstances.

"(b) The plaintiff's right to specific performance, if it otherwise exist, as to the city's part of the contract, can not be defeated by reason of defects either in the quantity or quality of the water, which have been waived by the payment of past accruing rentals without complaint on its part. See, by analogy, Winfield v. Water Co., 51 Kan. 71, 85, 32 Pac. 663; Water Co. v. Lamar, 140 Mo. 145, 39 S. W. 768; Water Co. v. Monroe, 110 Wis. 11, 21, 85 N. W. 685; Water Co. v. Creston, 101 Iowa, 687, 70 N. W. 739.

"(c) The plaintiff has continuously supplied since the dam was heightened

an adequate amount of water for all purposes, both to the city and domestic consumers.

"(d) The quality of the water furnished for fire purposes in the city hydrants has been reasonably adapted for such use, and the city having failed to demand the occasional opening of the hydrants for the purpose of discharging any muddy sediment is not entitled to rely upon the presence of this sediment in the past as constituting a ground for denying specific performance.

"(e) The electric lights have been furnished in substantial accordance with the contract, the technical failure to supply the full wattage not resulting in any appreciable loss or material injury to the city. And this defect has been fully and completely remedied since the institution of the suit and promptly remedied after this defect was first brought to the plaintiff's atten-

tion through the evidence in this case.

"(f) That the evidence does not satisfactorily show that the plaintiff has failed to keep the lamps burning during the 'dark hours' of the night, as required by the contract. While there is some evidence tending to show that this is a fact, yet this phrase is itself very indefinite; and in the absence of any evidence tending to show that any complaint was ever made to the plaintiff on this ground or that any insistence was made that the lamps were not kept burning during sufficient hours, the practical construction given this term of the contract by the parties now precludes the city from relying on the possible failure in this regard as a defense to specific performance.

"(g) The water furnished to consumers has at all times been reasonably safe, so far as health is concerned; and the raising of the dam and the improvements installed by the plaintiff before the time the rentals accrued which are now in controversy, rendered the water reasonably free from algae or other minor troubles incident to a water system derived from surface supplies, and

reasonably pure and wholesome for use by the inhabitants; and

"(h) Lastly, that on the whole there has been such substantial compliance by the plaintiff with the obligations resting on it under this contract, both as to the public and private supply of facilities, in all matters not waived by the conduct of the city, as to entitle it, so far as this feature of the case is concerned, to specific performance of the contract on the part of the city.

"10. I am furthermore of opinion that the plaintiff, if otherwise entitled to relief, is entitled to have a trust declared in its favor on the special taxes collected for the purpose of paying the water and hydrant rentals, which have, as shown, been collected by the city, and deposited in bank to await the result of this lawsuit, and the payment of such moneys to the plaintiff specifically directed. A special tax levy of 90 cents on each one hundred dollars is provided for this purpose by Sec. 4 of the ordinance. Certainly the legislature could have authorized such special levy in the city charter. And, pretermitting the question whether originally this provision of the ordinance was authorized by the charter, I am of opinion that it was clearly ratified and made effective by Sec. 6 of the Acts approved July 7, 1911, ch. 665, whereby the charter of the city was amended and it was specifically provided that in making the authorized tax levy of two per centum 'full compliance with existing contracts and ordinances for maintenance of public electric street lighting and fire protection by maintaining a water hydrant system shall be observed.' Clearly this provision is more than a mere recognition of the existence of the provisions of the ordinance-contract in reference to the special tax levy, and can only be construed as a legislative sanction and recognition of its validity—in fact a mandate that it be performed—thereby plainly validating and confirming the provision in question. Muse v. Lexington, 110 Tenn. 655, 665, 76 S. W. 481; Furnace Co. v. Railroad, 113 Tenn. 697, 87 S. W. 1016; Dill. Munic. Corp. (5th Ed.) § 129.

[7, 8] "11. It does not, however, necessarily follow that the plaintiff is now entitled unconditionally to a decree for specific performance of the city's contract. Detriment to the public may be ground for denying specific performance of the contract, although the plaintiff may be otherwise entitled thereto. 36 Cyc. 620, and cases cited in note 5. Furthermore in cases where hardship develops in the enforcement of the contract due to changed conditions, the court may properly, as a condition of granting to the plaintiff the equitable relief of specific performance, require it to assent to such equitable modifications of the contract as are just and proper. In Willard v. Tayloe, 8 Wall. 557, 566, 567, 19 L. Ed. 501, the court said: 'It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties. \* \* \* It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in Davis v. Hone, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

"I do not think that specific performance of the city's contract should be denied by reason of the alleged hardship to the defendant arising out of the fact that the city revenues have materially decreased since the ordinance was passed owing to loss of revenues from saloons. This was a contingency which should have been contemplated by the parties. Nor do I think it would be just for the court to fix as an equitable condition that the plaintiff should consent to a reduction in either the number of hydrants and lights or the prices to be paid therefor; the plaintiff's plants having been erected and extended on the faith of the city's contracts calling for this number of hydrants and lights at the stipulated prices. And as such prices do not yield more than a fair return on its investment when all the circumstances are considered, it would, in my opinion, be unjust to require a modification of the contract which would seriously impair its earning capacity, as well as impair its ability to make such further improvements as may be from time to time needed in the water, as disclosed by advancing science, and would otherwise tend to impair its ability to carry out in full its contract with the city. I am of opinion, however, from the proof that it is fair and just to require as a condition of granting the plaintiff the equitable relief of specific performance that it assent to the following conditions:

"(a) That it forthwith install and thereafter maintain the horse drinking fountain provided for in the contract; the installation of which does not appear from the proof to have been formally waived for a valuable consideration.

"(b) That it agree to open each of the City hydrants for a reasonable time at reasonable intervals for the purpose of allowing any sediment to escape and keeping the hydrants in good condition for use in case of fire.

"(c) That the term 'dark hours,' as used in the contract as hours which the City lights are to be kept burning be definitely defined by the decree.

"(d) That equitable modifications be made in the contract as to the re-location of certain hydrants and electric lights. The proof shows that owing to the direction in which the town has grown, certain of the hydrants and lights are not now advantageously located, and that it is a hardship on the public to compel the City to pay for all the hydrants and electric lights as now located, from which commensurate benefit is not received. While, as stated, I do not think it would be equitable to require the plaintiff to consent to a modification of the contract reducing the total number of hydrants and lights or the prices to be paid, and thereby materially impair its revenue, I do conclude that it should equitably be required to consent to a re-location of certain hydrants and lights upon just division of the expense incident thereto. It is true that the contract provides for the location of the hydrants and lights by the Board of Public Works of the City; and they appear to have been originally located by

The contract does not, however, provide for a subsequent re-location, although it has been the custom of the company to permit a re-location not requiring an extension of mains or of the electric feed wires, provided the City pay the expense. This does not, however, meet the present situation. am of opinion from the proof that the four hydrants or water plugs set forth in clause '3d' of the City's proposition of January 25, 1916, would be much more beneficial to the City than any of the eight hydrants mentioned in the '2d' clause, which it desires to have cut out; and that it should be permitted on equitable terms to substitute the four new hydrants which it desires for any four which it may select of the other eight. Furthermore I find from the proof that the six half lights mentioned in the '5th' clause of said proposition which it desires to have located would be much more advantageous to the public than the three full lights mentioned in the '4th' clause which it desires to have cut out. And I see no objection to the substitution of six half lights for three full lights, provided the same aggregate rental is to be paid therefor; that is that the same rates be paid for two half as for one full light. I do not think, however, that it should equitably be permitted to cut out any of the hydrants for which others are not substituted or to substitute for full lights merely the half lights in equal number which it desires, as set forth in the '6th' clause of its proposition. It appears from the proof, however, and the map exhibited on the hearing, that to re-locate four of the present water hydrants and to cut out three of the present full lights and substitute six half lights, will require an extension of both of the water mains and the electric pole line. The ordinance, however, provides that the plaintiff shall not be required to make an extension of its mains unless it receives one hydrant contract from the City and three hydrants from private consumers for every four hundred foot extension, nor to extend its pole lines unless it receives a contract from the City for one arc light and three contracts from private consumers for every three hundred foot extension. In view, however, of the hardship to the public in requiring the City to pay full prices for hydrants and electric lights which are disadvantageously located, I am of opinion that as a condition of granting the plaintiff the equitable relief of specific performance. it should be required to assent to a modification of this contract by which the City shall be permitted to substitute the four new hydrants which it desires for any four of the present hydrants of which it complains, and to substitute the six half lights which it desires for the three full lights to which it objects, upon condition that one-half of the expense incident to such substitution, including the cost of extending the water mains and the electric pole lines, and the cost of installation of new hydrants and new lamps, shall be paid by the plaintiff and one-half by the City. This, after careful consideration, is, I think, a fair and equitable condition under all the circumstances.

"(e) It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract or advancement in science shall disclose new methods of improving the water, which can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect. See as to such supplemental proceedings: Joy v. St. Louis, 138 U. S. 1, 47, 11 Sup. Ct. 243, 34 L. Ed. 843.

"If, therefore, the plaintiff consents to the equitable conditions hereinabove indicated, a decree will be entered providing that upon these conditions it is entitled to enforce the contract rights vested in it against the City under the original and amended ordinances, and to be paid by the City the agreed rentals as they from time to time mature, and enforcing specific performance of such obligations by requiring the City from time to time to make the tax levies provided for by the contract for the purpose of paying the rentals and to pay over to the plaintiff the proceeds of such tax levies as have heretofore

been collected by it and are now held in trust by the City for the purpose of

paying the rentals now due.

"Since, however, the testimony heretofore taken does not show whether the plaintiff has continued up to this time to furnish the City with water and lights, nor the amount of rentals now due from the City, nor the amount of the tax levies made and collected, or any facts from which the court can properly define as a basis of future conduct the meaning of the term "dark hours," as used in the contract, nor fix reasonable requirements as to the opening of hydrants, and as to the kind of fountain to be installed, the case will be reopened for further proof upon these questions. If the parties so desire, they may at any time within two weeks from this date file a stipulation as to any of these matters; and such as may not be covered by such stipulation will be open to proof, which will be heard in open court at a time and place to be hereafter fixed, upon application of either of the parties.

"The entry of a decree in accordance with this opinion will await the filing

of said stipulation or the taking of such additional proof.

"One-fourth of the costs of the cause heretofore accrued will be awarded

against the plaintiff and three-fourths against the City."

After the filing of Judge Sanford's opinion the parties, in open court, stipulated as to the amount of rentals due from the city to February 1, 1917, and the amount of tax levies for water and light rentals collected and on hand, as well as to the method of performance of conditions (a) and (b) and the definition of the term "dark hours" in condition (c) of paragraph 11 of the opinion, agreeing, also in open court, to the retention of the cause upon the docket for the purpose stated in subdivision (e) of that paragraph. waived the immediate execution of condition (d), relating to the relocation or substitution of hydrants and electric lights, reserving, however, the right to thereafter call for its execution. Appellee also formally assented to the terms on which its relief was conditioned. Within such limitations, appellee was given decree for specific performance to the extent stated in the opinion, with declaration of trust on the taxes which had been collected; defendant being required to pay over the amount already due and to make good the deficiency in the amount levied. It is stipulated that defendant has paid to appellee all the sums due at the date of the decree below, and that appellee has in all respects complied with the terms of the decree relating to conditions (a), (b), and (c) above mentioned.

"The appellants insist here, as in the district court, that the ordinance contract of 1905 is for various reasons void and nonenforceable. The more prominent grounds of this contention sufficiently appear from Judge Sanford's opinion and from what has already been said in this statement. Appellants also insist here that if the contract is to be enforced it should only be upon the further conditions that the number of hydrants and lights be reduced

and that effective water filtration be installed.

J. A. Fowler, of Knoxville, Tenn., and L. H. Carlock, of La Follette, Tenn. (H. G. Fowler, of Knoxville, Tenn., of counsel), for plaintiffs in error.

Charles T. Cates, Jr., of Knoxville, Tenn. (J. Will Taylor, of La Follette, Tenn., of counsel), for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCH-RAN, District Judge.

PER CURIAM. The view we take of the merits of the case makes it unnecessary to consider appellee's motion to dismiss the appeal, on the ground that appellants waived their right thereto by accepting the benefits of the terms of the decree in their favor, imposed on appellee as conditions of granting it relief.

After careful consideration of the record, and of the able and thorough briefs and arguments of counsel, we are convinced that Judge Sanford made an eminently proper disposition of the case. His painstaking discussion of both the testimony and the applicable law make

extended discussion on our part unnecessary.

In our opinion, and for the reasons stated by Judge Sanford, the ordinance contract is valid and enforceable, so far at least as it is involved here; that is to say, so far as it relates to the city's contract in its proprietary capacity for a public supply of water and light: and this is as far as we have any occasion to consider.

Upon the equities we think appellants have no ground of complaint. We are impressed that the record will not justify further modification of the contract than provided by the decree with respect to hydrants and lights; that the increased storage capacity and the chemical treatment installed have rendered the water supply reasonably pure and wholesome; and that the retention of the cause upon the docket under subdivision (e) of paragraph 11 of the opinion affords additional and reasonable assurance against future danger to health,

The decree of the District Court is affirmed.

# DRENNEN v. SOUTHERN STATES FIRE INS. CO. et al.\* (Circuit Court of Appeals, Fifth Circuit. April 18, 1918.)

No. 3031.

1. Corporations \$\infty 320(11)\$—Fraud of Directors.

Evidence held sufficient to sustain a finding of conspiracy between members of interlocking directorates of two corporations, pursuant to which they diverted most of the assets of both corporations for their own personal benefit.

- 2. Corporations \$\sim 560(12)\$—Suits by Receivers—Grounds of Recovery. The general rule that a receiver for a corporation can recover only in the right of the corporation is not universally applicable, but the receiver represents, not only the corporation, but its creditors and stockholders, and is also an instrument of the court, and may be used to establish and protect the equitable rights of all parties in interest.
- 3. Corporations \$\sim 316(1)\$—Directors—Dealings with Corporation. A sale of property to a corporation by a director can be sustained only where there was good faith on the part of both the seller and of those who represented the corporation in the transaction.
- 4. Fraud €==58(1)—Proof.

While fraud, when alleged, must be proved, it may be established, like any other fact, by evidence from which it must be inferred.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the North-

ern District of Alabama; William I. Grubb, Judge.

Suit in equity by Felix M. Drennen, receiver of the American Mortgage & Loan Company, against the Southern States Fire Insurance Company and others. Decree for defendants, and complainant appeals. Reversed.

J. L. Drennen, of Birmingham, Ala. (H. L. Stevens, of Warsaw, N. C., and Joseph E. Johnson, of Atlanta, Ga., on the brief), for appellant.

Nathan L. Miller, of Birmingham, Ala., for appellee Southern States Fire Ins. Co.

Forney Johnston, John S. Stone, W. T. Hill, and Sterling A. Wood, all of Birmingham, Ala. (Richard V. Evans and Tillman, Bradley & Morrow, all of Birmingham Ala., J. H. Bankhead, Jr., of Jasper, Ala., and Lamkin & Watts, of Birmingham, Ala., on the brief), for other appellees.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The plaintiff, Drennen, as receiver of the American Mortgage & Loan Company, brings suit against the Southern States First Insurance Company, Sibley P. King, Sumter Cogswell, McLane Tilton, Eugene F. Enslen, J. G. Cooke, D. E. Manasco, and R. B. Watts. The allegations of the complaint are substantially to the effect following:

The Southern States Fire Insurance Company ceased active business in December, 1913. Defendants King and Watts were directors of both the American Mortgage & Loan Company (hereafter called the American Company) and the Southern States Fire Insurance Company (hereafter called the Insurance Company); defendant Enslen was a director and treasurer of both companies: defendant Manasco was the president and a director of the Insurance Company and one of the organizers and promoters of the American Company; defendant Tilton was director of the Insurance Company; defendant Cogswell a director, vice president, and general manager of the Insurance Company; defendant Cooke had been one of its directors. The defendants, other than the Insurance Company, being directors and officers of the companies as named, entered into a conspiracy to sell to the American Company 4,647 shares of the capital stock of the Insurance Company, and, in pursuance of the scheme, on February 2, 1914, with the fraudulent intent to enrich themselves at the expense of the American Company and its stockholders and creditors, and with the unlawful assistance of the Insurance Company, pretended to sell to the American Company the stock at \$10 per share; said defendants knowing that the Insurance Company had ceased to do business, and that the price greatly exceeded the value of the stock. Defendants, pursuing the scheme to defraud, by and with the connivance of defendant E. F. Enslen, who was at that time president of the Jefferson County Savings Bank, obtained from the bank a temporary loan wherewith to partly finance the pretended purchase, until such time as they could obtain from the treasury of the Insurance Company the additional money required therefor, taking the money from the Insurance Company and pretending to loan it to the American Company, to be paid over by the latter in turn to the defendants. Defendants obtained the loan from the bank, and, with the connivance of Enslen, borrowed from the Insurance Company the additional money needed to effect their plans, and executed and delivered the promissory notes of the American Company, for the sums borrowed, to the Insurance Company, and deposited, with some of said notes as security, the identical 4,647 shares of stock that they pretended to sell, and paid over to themselves the sums of money borrowed.

By pretending to sell the 4,647 shares to the American Company, defendants passed the shares from their hands into the custody and control of the Insurance Company, thereby ultimately taking out of the trensury of the American Company \$46,470, for which it received and holds nothing in return. Defendant Insurance Company, by loaning or pretending to loan the American Company the sum of \$3 a share on the 4,647 shares, made the fraud successful, and the effect was to gather into the treasury of the Insurance Company 4,647 shares, leaving the American Company with nothing whatever to show for the transaction, except its obligations to the Insurance Company for the pretended loans. After making the pretended sale of the 4,647 shares, the defendants, further pursuing the conspiracy, began systematically to loan, or pretend to loan, to the American Company large sums of money from the In-

surance Company, and then converted the money to themselves, or some of themselves, and their confederates. The ultimate effect of the wrongful acts was to leave the American Company indebted to the Insurance Company \$50,053, with accumulated interest, and with nothing to discharge the indebtedness, except 16,684 shares of the capital stock of the Insurance Company, delivered as security for the pretended indebtedness, and all of which stock the Insurance Company is now threatening to dispose of for the purpose of paying the pretended indebtedness.

At the time of the transfer by the natural defendants of said 4.647 shares of the capital stock of the Insurance Company, the American Company had no money with which to pay the purchase price of the stock, and a part of the purchase price was obtained from the Jefferson County Savings Bank upon the notes of the American Company, secured by the stock and other securities, and the balance of the purchase price was evidenced by notes of the American Company, made payable to the natural defendants or some of them. Before the maturity of any of the notes given to the bank or the natural defendants, one J. A. Gorham, who was at the time president of the American Company, became also president of the Insurance Company, and was president at the time the notes matured. As the notes matured, sufficient money was obtained from the Insurance Company and applied in payment of the notes, and in this way all of the purchase price of the 4,647 shares was ultimately paid out of the loans of the Insurance Company, the notes of the American Company being given to the Insurance Company in evidence of the loans and in substitution of its notes to the bank and the natural defendants; the notes to the Insurance Company being secured by 16,684 shares of its own stock, and all of which it still has. Included in the 16,684 shares are the 4,647 shares obtained from the natural defendants. At the time of the loan Gorham was president of both corporations, and as such executed the notes and permitted them to be secured by the stock. The Insurance Company had knowledge, at the time the money was obtained, that it was being obtained for the purpose of being used to pay the purchase price of said shares of stock, and that the American Company would be unable to pay the money, and that said shares of stock would be sacrificed in order to repay the same; and it had knowledge of the fraud being perpetrated upon the American Company by the transfer of said 4,647 shares, and had knowledge that the fraud could not be consummated, except through the Insurance Company's furnishing the money with which to pay the purchase-price notes, and with such knowledge the Insurance Company actively participated and joined with the natural defendants in carrying out the fraud perpetrated upon the American Company, and with such knowledge assisted the natural defendants in thus placing beyond its reach and control the shares of stock belonging to the American Company, knowing that by loaning the money it would bring about the deprivation to the American Company of said shares of stock and perfect the injury resulting to the American Company by the transfer of said 4,647 shares of stock. By so doing the Insurance Company actively assisted the natural defendants in getting full payment of the purchase price of their shares of stock out of and through the assets belonging to the American Company, knowing of the injury being done and that it was not possible, except by its assistance.

The plaintiff prayed for a decree against the defendants for \$46,470 and interest, and for a temporary order restraining the Insurance Company from selling or otherwise disposing of any of the American Company's collateral deposited with it as security.

On February 2, 1914, the natural defendants sold to the American Company 4,647 shares of the capital stock of the Insurance Company at \$10 per share. The face value was \$5, the nominal book value \$5.61, and the evidence established a market value of not exceeding \$3. The interest of the natural defendants in this stock was distributed as follows: Cooke and Manasco, 1,346; Cooke, Manasco, and Watts, 1,237; D. E. Manasco, 695; Sumter Cogswell, 452; McLane Tilton, 48; Sibley P. King, 250; E. F. Enslen, 619—a total of 4,647 shares. The

American Company on that day, February 2, 1914, borrowed \$23,-183.67 from the Jefferson County Savings Bank, effecting the loan through the defendant Enslen, who was president of the bank. Of the money borrowed from the bank, \$16,523.17 was paid to the bank to take up notes due the bank of Cooke, Manasco, and Watts; \$3,520 was used to pay notes of Cooke, Manasco, and Watts to the Jasper Trust Company, and \$1,400 to pay a note of Manasco and Cooke to W. J. Ruby; \$1,500 of the amount was paid in cash to Cogswell, and \$240 to McLane Tilton. At this time Manasco owed the American Company \$950 for money previously borrowed, which he secured by depositing 165 shares of the Insurance Company stock. In the sale of the 4,647 shares the American Company charged him with this amount as cash. In the settlement of the balance of the \$46,470, after deducting the \$23,183.67 and the \$950, the American Company gave its notes as follows: Cogswell, \$3,020; Tilton, \$240; King, \$2,500; Enslen, \$6,-190; Enslen, trustee, \$796.33; Watts, \$616.66; Cooke, \$3,000; Cooke, \$5,973.34. The notes bore 8 per cent. interest, and were afterwards paid by the American Company with money obtained from the Insurance Company.

The result of the transaction is that with 4,647 shares of stock, worth \$13,941, according to the evidence, the natural defendants paid indebtedness (including that which they had incurred for the purchase of the stock) to the amount of \$24,133.67, and obtained notes, which were subsequently paid, to the amount of \$22,336.33. At this time R. P. Watts, S. P. King, and E. F. Enslen were directors, and the lastnamed also treasurer. Manasco had organized the company, but was not then a director. He was in control of the Insurance Company. Cooke, Cogswell, Tilton, King, and Enslen were officers of that company, and supported him in his control and policies. J. A. Gorham, president of the American, by whom, at least nominally, the purchase for the American was conducted, became, as the result of the purchase, president of the Insurance Company. On February 9, 1914, a week after the purchase by the American of the stock from the defendants. the transaction was ratified by the finance committee of the American Company. The members of the committee participating, according to the minutes, were T. P. West, L. J. Haley, G. T. Brazelton, R. L. Seals, and J. A. Gorham.

On the same day a committee, known as the "conservation committee" of the Insurance Company, consisting of its secretary, W. R. Major, an employé of Manasco, and the defendants Cogswell and Watts, mailed a letter to the stockholders of the Insurance Company, in which the committee states that the company had reinsured all of its business on the 3d of October, 1913, and that no policies had been issued since December of that year; that the officers found this course necessary because of continued excessive losses, and the application filed for receivership by a few of the stockholders; that the expenses of operating the company had been greatly reduced; that the losses were being adjusted and paid, and litigation disposed of as rapidly as possible; that if it were feasible to liquidate the company at that time, it ought to pay the stockholders approximately \$5 per share; that, how-

ever, on account of litigation, outstanding contracts, and the law governing corporations, the company could not be dissolved; and that, pending the time when the company would be in position to distribute its assets, in the opinion of the committee, it would be to the interest of the stockholders to keep its funds invested and loaned upon high-class security. The letter concludes with a paragraph to the effect that, in accordance with the policy of the management to keep the stockholders informed, they report that the American Mortgage & Loan Company is offering to exchange with the stockholders of the Insurance Company its stock on a par basis; that the president is Mr. J. H. Gorham, a "well-known local business man, who, from the reports of his company, has been able to operate it at a very low expense." "This company," the letter says, "we are informed, has paid two cash dividends. From the records of our company it appears that the American Mortgage & Loan Company has already acquired a large amount of stock in our company."

On the next day a letter was mailed to the stockholders of the Insurance Company by E. F. Enslen, president of the Jefferson County Savings Bank, addressed to the American Company, in which he acknowledges receipt of the letter explaining the plan of exchange of American Company stock for Insurance Company stock, and expresses the opinion that the plan and opportunity "seems to me to be a good one," and stating that his bank would act as transfer agent. On the 23d of the same month the Jefferson County Savings Bank, in a letter to a stockholder of the Insurance Company, stated that the bank, as transfer agent, had, in accordance with the request of the stockholder, inclosed certificate for 10 shares of the capital stock of the American Company for 20 shares of the Insurance Company, and stating that the par value of the American was \$10 per share, and the par value of the

Insurance Company was \$5.

On March 9th following, the finance committee of the American Company authorized an exchange of its stock for the stock of the Insurance Company on the basis of one share of American Company for two shares of the Insurance Company, and authorized its president, Gorham, to vote the stock of the Insurance Company owned by the American Company at the next meeting of the Insurance Company to be held on March 11th. Griffin Lamkin, partner of defendant Watts, and attorney for both companies, offered the resolution authorizing the exchange. The other members of the committee participating were Gorham, West, Brazelton, and Haley. On March 11th, stockholders of the Insurance Company elected J. A. Gorham, then president of the American Company, a director. He was then by the directors elected president of the Insurance Company. Defendants Watts, Enslen, and King were elected directors. Haley, at that time member of the finance committee of the American Company, was also elected a director. The companies had adjoining offices in the Jefferson County Savings Bank building.

Some of the notes executed by the American Company in part payment of the stock of the Insurance Company bought from the natural defendants matured on May 7, 1914. On that day the finance com-

mittee of the Insurance Company met and authorized the loan to the American Company of \$3,000, to be evidenced by a note for that amount, secured by 700 of its own shares, and a loan of \$7,000, to be evidenced by another note, and secured by 2,400 of its own shares. The finance committee consisted of defendant King, defendant Watts, defendant Enslen, L. J. Haley, Gorham, and two others. On the same day the finance committee of the American Company met, and Gorham, who was then president of both companies, presided. A resolution was passed to borrow \$3,000 and \$7,000, and to put up as security the Insurance Company stock indicated. Another resolution was to the effect that it accepted a certain mortgage then held by the Insurance Company, and known as the Morris mortgage, for the \$7,

000, instead of cash.

On May 30th following this mortgage was obtained from the Insurance Company, and on the same day was traded to the defendant S. P. King, in which trade his \$2,500 note, given to him as part of the purchase money for the 4,647 shares of stock, was paid. On the next day the note for \$796.33, given to the defendant E. F. Enslen as part of the purchase price of the 4,647 shares, was paid with interest. On June 2, 1914, the finance committee of the Insurance Company passed a resolution authorizing a loan of \$20,000 for one year to the American Company, to be secured by 6,670 shares of its own stock. Those present at the meeting of the committee were Gorham, president of both companies, and defendants King, Enslen, and Watts, all directors of both companies, and Haley and one Mackey. This \$20,000 was used in taking up notes given by the American Company to the Jefferson County Savings Bank on February 2, 1914, for money used in the purchase of the 4,647 shares of stock. On July 7, 1914, the note executed by the American Company to R. B. Watts for \$616.66 as a part of the purchase price of the 4,647 shares was paid by the American Company, partly by check, and partly by new note. On August 11, 1914, the American Company paid the note executed by it to McLane Tilton for \$240 as part of the purchase price of the 4,647 shares of stock.

On August 14, 1914, the finance committee of the Insurance Company met and directed the treasurer of the Insurance Company to loan the available funds of the company for periods of not longer than one year to the American Company, and to accept as security the stock of the Insurance Company at a value not exceeding \$3 a share. At this meeting were present Gorham, Watts, Mackey, King, and Major, a majority of whom were directors of the American Company. On the same day President Gorham called the finance committee of the American Company, and they agreed to borrow \$3,600 from the Insurance Company, and did borrow it, putting up 1,200 shares of stock as collateral. Upon the blanket authority of the finance committee of the Insurance Company, the American Company began to borrow sums from the Insurance Company, putting up stock at the rate of \$3 per share. The first loan was on August 14th, the next on August 26th,

for \$6,300, and subsequently other loans were made.

On August 26, 1914, the day the American Company borrowed \$6,300 from the Insurance Company, it paid one of the notes given

to the defendant Enslen for \$1,045.74, paid \$5,139.55 on note due defendant Cooke, and paid \$327.29 claimed by Cooke as a commission; all these payments being included in one check, aggregating \$6,185.29. On August 27, 1914, the American Company sold the Insurance Company its city lot for \$3,000. On the same day the American Company paid the balance due on the note given defendant Watts, and paid the balance of \$1,433.01 due on a note of Cooke, and also paid the \$3,000 note due to Cooke; these notes being given Cooke as part of the pur-

chase price of the 4,647 shares of stock.

The loans to the American Company by the Insurance Company continued until 16,684½ shares of the Insurance Company's stock were put up to secure loans aggregating \$50,053.50. On February 2, 1914, when the American Company purchased the 4,647 shares of stock from the natural defendants, the American Company put up with the bank as collateral all its unincumbered property. This consisted of certificate of deposit for \$4,000, a deed to 280 acres of land in Florida, and a deed to a city lot, which was afterwards sold to the Insurance Company for \$3,000. On that day the American Company owned 348 shares of the Insurance Company stock. On that day it secured the 4,647 shares from the natural defendants. The balance of the stock acquired by the American Company was through the campaign to exchange its own stock for that of the Insurance Company. All of the stock so acquired was put up with the Insurance Company, except 80 or 90 shares.

The result of the transactions up to this time may be thus summarized: The American Company started with 348 shares of stock of the Insurance Company, \$4,000 in cash, a city lot worth \$3,000, land in Florida, and a note of Manasco for \$950. It had acquired 16,684½ shares of the Insurance Company stock, all of which was hypothecated. It had parted with its title to the city lot. It had surrendered the Manasco note. It owed, as a result of its transactions, \$50,053.50. The debt was the result of the acquisition of the 4,647 shares of stock procured from the defendants; for the balance of the stock its own stock, not paid for, was given. The result, so far as the Insurance Company was concerned, was that it had parted with a mortgage worth \$7,000, and cash, \$46,053.50, and had in exchange a city lot worth \$3,000 and notes of the American Company for \$50,053.50, secured by stock of the Insurance Company.

The result, so far as the individuals who had engaged in the transactions, a majority of whom were officers and directors of both companies, was: At the beginning Cooke, Manasco, and Watts owed the bank \$21,443.67; Manasco owed \$950 to the American Company; they owned together 3,278 shares of stock, worth \$9,834. As the result of the transactions, entirely financed by the American Company and the Insurance Company, their indebtedness was paid, and they received \$9,690 in cash, together with some interest. Sumter Cogswell owned 452 shares of stock, worth \$1,356. He received as the result of the transactions, financed entirely by the American Company and the Insurance Company, \$4,520, together with some interest. McLane Tilton owned 48 shares of stock, worth \$144. He received \$480 in cash.

S. P. King owned 250 shares of stock, worth \$750. He received \$2,500 cash. E. F. Enslen owned 619 shares of stock, worth \$1,857. He received \$6,190; he also received \$796.33 in a note given him as trustee.

The further result of the operations was that the owners of more than 1,100 shares of stock of the Insurance Company, acting upon the misleading statements of officers of their company, exchanged their stock for a like amount of stock in the American Company, and thereafter had, instead of stock in a corporation with available assets of at least \$50,053.50, a like amount of stock in a corporation that had substantially no assets, and debts aggregating at least \$50,053. It will be observed that all of the money involved in these transactions was furnished by the Insurance Company. The period of time required for transferring these assets of the Insurance Company to the natural de-

fendants was from February 2, 1914, to August 27, 1914.

The relationship of the parties who profited by the transaction, and of the parties who aided them in securing that to which they were not entitled, is indicated by the following statement: S. E. Manasco was the organizer of the American Company, and had been its president. While he was president, J. A. Gorham, who succeeded him as president, was its general manager. Manasco had also organized the Insurance Company, and at the time of the transactions he controlled it, as he and his friends had controlled it ever since its organization. Among the friends who co-operated with him in this control were Cooke, King, and Cogswell. Six of the defendants, King, Cogswell, Tilton, Enslen, Manasco, and Watts, were, on February 2, 1914, the date of the first act in the transfer of funds from the Insurance Company to the other defendants, directors of the Insurance Company. The defendants King, Tilton, Cogswell, Enslen, Manasco, and Watts were at that time members of the finance committee of the Insurance Company. The defendants Cogswell and Watts were members of the conservation committee of the Insurance Company, who signed the letter, the purpose of which was to induce the stockholders of the Insurance Company to exchange their stock for stock in the American Company. Cogswell was vice president and general manager of the Insurance Company. The law firm of Watts were attorneys for the Insurance Company.

On February 2, 1914, the defendants King, Enslen, and Watts were directors of the American Company. Enslen was at that time also its treasurer, and became a member of its finance committee on June 29, 1914. The law partner of R. B. Watts was a member of its finance committee. John G. Cooke was a stockholder of the Insurance Company, and a member of its appraising committee, and he had been a director. Defendants Cooke and Watts had indorsed notes at the Jefferson County Savings Bank for Manasco, and Cooke was acting as trustee for their stock which was in his name. A part of Manasco's stock stood in his name. L. J. Haley, not a defendant, was a member of the finance committee of the American Company, and while acting in this capacity he became a director and member of the finance committee of the Insurance Company. W. R. Major, not a

defendant, was a director and member of the finance committee, and secretary and treasurer of the Insurance Company, and received a salary from Manasco. He was also a member of the conservation committee which sent out the letter to the stockholders. He was instrumental in getting together some of the stock that was sold by the natural defendants to the American Company. J. A. Gorham had been general manager of the American Company while Manasco was its president, and succeeded him as president. He controlled the meeting of the Insurance Company in March, 1914, at which he was elected director; he succeeded Manasco as president of the Insurance Company. He was present at the finance committee meetings of both companies authorizing the loans by the Insurance Company to the American; and, while president of both companies, executed the American Company notes to the Insurance Company upon which the loans were made. Griffin Lamkin, not a defendant, was a law partner of defendant Watts. They were attorneys for the American Company and the Insurance Company. He was a member of the finance committee of the American, and offered the resolution at the meeting of that committee authorizing the exchange of stock. On March 11, 1914, he was a director of the American Company.

[1] The facts which have been heretofore detailed could very well be accepted by a trial judge as evidence of a conspiracy, the purpose of which was to accomplish that which was done. The American Company had been organized by Manasco, but was not doing any business, and much of its stock remained in the treasury unsubscribed. The only unincumbered property which it owned was a certificate of deposit for \$4,000, a tract of land in Florida, a city lot in Birmingham, a note of Manasco for \$950 (secured by 165 shares of Insurance Company stock, worth not more than \$495), and 384 shares of the Insurance Company stock. So far as the evidence indicates, it had no sources of revenue, unless the certificate of deposit and the unsecured note of Manasco were drawing interest. The Insurance Company had been organized by Manasco, but it had been so operated, under the control of Manasco, that it was no longer able to do business. It had reinsured its risks and had suspended active operations. actual financial condition was at the time is very inadequately developed by the testimony; but it had on hand some money, which was apparently greatly needed by some of the natural defendants. A statement (called by its officers "an approximate statement of the financial condition of the company") of its assets and liabilities on December 31, 1913, showed cash in bank and office, \$29,581.90. This statement. which, in the light of subsequent events, must have been very misleading, had been prepared for the uses of Manasco, but it was spread upon the minutes of the directors of the company. Upon the face of the books there was a surplus of \$24,905.67, making the stock show a value in excess of par, or \$5.61 for a share of par value of \$5. Whatever may have been the value of the stock and the assets of the Insurance Company, it is apparent that the cash and liquid assets were sufficient to pay the price of the stock sold by the defendants to the American Company.

Manasco and the other defendants knew exactly the condition of the American Company, exactly the condition of the Insurance Company, and exactly what was required to pay their own debts and to secure the available assets of the Insurance Company. It would take no exercise of the imagination to assume that these persons devised the scheme by which the available assets of the Insurance Company were to be converted to their use. The process involved the acquisition of approximately 5,000 shares of the stock of the Insurance Company. A part of this stock was already on hand, being used as collateral to a loan from the Jefferson County Savings Bank. The additional shares were acquired. This stock was to be sold to the American Company. The American Company at the time was entirely without available funds, and entirely without funds of any kind sufficient to purchase this amount of stock at even its value, \$3 a share. It was, of course, less able to purchase it at more than three times its value, \$10 a share. This circumstance was one, however, which need not embarrass the defendants, for they were in a position, not only to have the American Company borrow money, but to have the Insurance Company lend It could be conceived that the scheme, therefore, involved the borrowing by the American Company from the Insurance Company of a sufficient amount of cash to pay them for their stock at a price greatly in excess of its value. The stock, however, which the American Company was to purchase, had to be used primarily as collateral for that part of its purchase price furnished by the defendant Enslen through his Jefferson County Savings Bank. The plan could, then, have involved the execution by the American Company of notes to the sellers of the stock for the balance of the purchase price, the amount not furnished by the bank.

In order to borrow money with which to pay these notes, it became necessary to secure additional collateral of some kind, and it could well be held that the scheme involved acquiring Insurance Company stock, and using that stock as collateral for a loan from the Insurance Company. The acquisition of such stock would, ordinarily, have required the use of money, and it could be conceived that it was not a part of the plan of the defendants that any money of their own should be used in their financial operations. It could be assumed the conspirators exercised the power which they had, and formed, from the directors of the Insurance Company, a committee to be called the "conservation committee," to address a letter to the stockholders of the Insurance Company, detailing the condition of the company and advising that its available assets be put in well-secured, interest-bearing notes pending the dissolution of the company, and stating that, in pursuance of the policy of keeping the stockholders advised, the stockholders were informed that the American Company had indicated a willingness to exchange its stock for the stock of the Insurance Company. It could be conceived that the design intentionally involved absence in the letter of information to the effect that the American Company was without revenue, and that its assets were much less than its obligations.

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The scheme of the conspirators might have involved the exchange of Insurance Company stock, which had at least some value (probably about \$3 per share) for American Company stock, which had never been subscribed for, and upon which and for which nothing had ever been paid, and which carried along with it participation in the assets and business of a concern that had neither a net capital nor revenue. The plan could have involved the active campaign to secure this exchange of stock, as a result of which more than 11,000 shares of stock of the Insurance Company were exchanged for stock in the American. It might have involved, as these exchanges were consummated, the putting up of the Insurance Company stock as collateral with the Insurance Company, to borrow the money of the Insurance Company. The management at this time of both concerns was in the same hands. The members of the finance committee of the Insurance Company were all familiar with the condition of the American Company. They realized that the lending of money to the American Company was without any security whatever, other than Insurance Company stock. They knew that the American Company had no revenue with which even to pay interest, and must have realized that the loans would never be paid, and that, substantially, they were encouraging their own stockholders to sell their stock for nothing, to persons who immediately used the stock, by exchanging it for such assets of the Insurance Company as were valuable. All this could easily be held part of a fraudulent conspiracy.

In the letter of the conservation committee to the stockholders it had been suggested that the policy should be to invest the assets of the Insurance Company in good, interest-bearing securities. In making their loans to the American Company, not only was the available cash used, but, in order to make a loan which the American Company needed to pay its notes to defendants, a real estate mortgage for \$7,000, payable to the Insurance Company, and drawing interest at 8 per cent., was loaned to the American Company. This campaign for the acquisition of Insurance Company stock, upon which money was borrowed from the Insurance Company, was kept up until all of the notes which had been given by the American Company to the defendants for their stock had been paid with the money borrowed.

The difficulty to be encountered by a court is not in concluding that the natural defendants in this case had entered into a conspiracy and had successfully carried it out, whereby they had acquired the property of other people to the amount of approximately \$50,000, but in devising some method by which the persons who have suffered by this conspiracy may be given a remedy. In the suit instituted by the appellant as receiver for the American Company, the Insurance Company is made a party, and is, in substance, charged with participation in the conspiracy. It is charged that the Insurance Company permitted itself to be used in imposing obligations upon the American Company which have resulted in losses. It could, with just as much propriety and force, be said that the American Company permitted itself to be used in looting the treasury of the Insurance Company. Indeed, the treasury of the Insurance Company was the only place in

which there was available money. The activities of the defendants were successfully directed to placing it elsewhere. While it could hardly be said to have reached the American Company, that concern furnished the name in which the transaction was carried on. That which was accomplished is that the natural defendants have acquired from the treasury of the Insurance Company more than \$50,000, for which they have parted with value that certainly did not exceed one-third of that amount. The American Company has not profited; but, on the other hand, its losses have been small, because it was substantially without assets at the beginning of the operations.

The receiver of the American Company has instituted a suit in which the Insurance Company is a party, and all of the persons shown to have profited directly by the alleged conspiracy (though not all of the persons who participated in it) are defendants. If there was a conspiracy, no good reason appears why the property that has been fraudulently acquired by the natural defendants should not be recovered at the suit of the receiver, and thereafter applied to restore, as nearly as possible, the conditions as they existed before the conspiracy was

entered into.

While the natural defendants did not equally share in the profits, each of them, if there was a conspiracy and he participated, is responsible for the entire amount secured. A recovery of the illegal gains will furnish a fund that will enable the court to go far in restoring the original status. The accomplishment of this end will, undoubtedly, present difficulties. The facts are complex, and if the fraud charged was perpetrated there was a careful effort to give to the transactions the appearance of legality. The skillful use of two corporations, one against the other, to bring about the undoing of both, apparently presents possibilities not fully realized by manipulators of finance or writers of fiction. It seems to open an easy approach to the shadowy domain where low morals and high finance reach a common level.

The actual losers by the transactions under consideration are those of the stockholders of the American who were innocent, and those of the stockholders of the Insurance Company who were duped. It may be that they have been placed in a position where it will be legally difficult to restore to them that which should be theirs. The giving of complete justice may require judicial procedure not lacking elements of novelty. But courts should show as much ingenuity and enterprise in protecting the innocent as is manifested by the unscrupulous in part-

ing them from their property.

[2] The proposition is made that the receiver cannot recover, except where recovery could have been had by the corporation. This may be true as a general proposition, but it is not universally true; and it can very well be insisted that the present case presents a situation where, if further extension of the right of the receiver to recover is required, the extension should be made. It is not, however, true that the receiver stands in the place alone of the corporation. He is, in addition, an instrument of court; he is acting also for the stockholders of the corporation, and the creditors of the corporation. In the instant case, all of the parties affected by the transactions upon which the suit is based

are before the court, and, under proper pleadings, their rights could be adjudicated and protected.

It may be questioned if the proof sustains the allegations with reference to the Insurance Company. If the petition charges it with being a party to the conspiracy, the evidence is insufficient. It is the case, however, that, arising out of the transactions under investigation, the company has acquired certain rights, or has apparently acquired them; and a part of the relief sought, and which can be given against the Insurance Company, is to prevent such an assertion of these rights as would be inequitable. If it be established that sale of the stock to the American Company, and the borrowing of money from the Insurance Company, and the putting up of collateral to secure the loan were all parts of the single fraudulent scheme of conspirators who had charge of the affairs of both corporations, relief, to some extent, at least, could be given.

The stockholders of the Insurance Company, who were induced, as a part of the scheme, to part with their stock, in exchange for stock of the American Company, while not before the court by name, are nevertheless represented by the receiver as stockholders of the American Company, and the receiver is in position to assert and enforce their

rights.

Assuming a conspiracy, there would seem to be no reason why the receiver should not be permitted to recover against the natural defendants the money secured by them by their fraudulent transactions, and apply the fund in such a way as to protect, and, as nearly as possible, make whole, the stockholders, primarily of the Insurance Company, but now of the American Company, who were the victims of the fraud. Nor is there any reason why his suit should not be maintained to prevent the Insurance Company from getting a benefit from a transaction essentially illegal, and in which its officers, as officers, participated. While the Insurance Company appears to be more a victim than a conspirator, and has suffered losses which must be considered in an equitable disposition of the case, it has, if the acts complained of were illegally participated in by its officers, acquired claims against the American Company, which, it may be, should not, on account of the circumstances under which they arose, be enforced against that company. It is clearly within the right of the receiver, the equities of the Insurance Company being conserved, to secure a judgment preventing the prosecution of those claims, if, in fact, the officers of the Insurance Company were engaged in a conspiracy against the American Company, and the acts out of which the Insurance Company's claim arises were in furtherance of the conspiracy. Even if it be true that the receiver cannot assert a claim that could not be recovered on by the American Company, it does not follow that at least a part of the relief prayed for in this case should not be decreed.

It is asserted that no recovery can be had by the American Company against the Insurance Company on account of the fact that nothing was done by the Insurance Company until it had become completely under the domination of the American Company. It is true that the

stock which was acquired by the American Company as the result, it is charged, of the scheme to defraud, was used, as was intended, by the conspirators in selecting directors and other officers for the Insurance Company, who immediately proceeded to do that which was necessary in the carrying out of the scheme to secure the money of the Insurance Company. But the circumstances are not such as to preclude the American Company from relief. In fact, one of the parties charged as a conspirator, Manasco, with others of the defendants, had already been in control of the Insurance Company. Neither company was in control of its affairs. Both had apparently fallen into the hands of men who entirely disregarded the rights of the stockholders. Neither company was a conspirator. Both were victims. Any consideration of the matter, or any decision with reference to it, which goes no further than to give force to the mere form which the transactions were made to have, disregards the essential fact that the men who had devised the scheme were utilizing the American Company for obtaining the funds of the Insurance Company, and giving to the Insurance Company as collateral that which furnished no substantial security, but the giving of which jeoparded what little assets the American Company

[3] The suggestion is made that the directors of the corporation are not precluded from dealing with the corporation, and that it is not the province of the court to substitute its judgment of values for the judgment of those persons who, by the laws of the corporation, are charged with the management of its affairs. A recovery in this case, if one can be had at all, must be based, not upon the mere sale of property at an excessive price, but upon the theory of a conspiracy to defraud the American Company, the carrying out of which involved the sale of property to the company at a price in excess of its value. If such a conspiracy existed, the effect of it will not be excused or condoned simply by the fact that the conspirators were able to impose upon the directors of the corporation. Much less will its effects be excused in law, when the evidence would justify the conclusion that the directors were completely under the domination of the conspirators, and that they were either operating with them, or were permitting themselves to be used entirely without regard to the interests of the corporation.

If it can be established that the corporation, by fraud of the conspirators, was made to part with value, or was made to assume obligations without a corresponding value being given to it, in other words, was defrauded of that which belonged to it, it is certainly the case that suit could by the corporation be instituted, not alone against the conspirators who had profited by the fraud, but against its officers who had, by their active participation, their connivance, or their criminal neglect, brought about or permitted the fraudulent results.

Such a corporation could also maintain a suit against another corporation to prevent it from enforcing obligations which it had secured as the result of fraudulent transactions between the officers of the two companies. Ordinarily it is not possible to establish that a corporation is a conspirator. But, even when it may not be held

as a conspirator, the circumstances may be such that it may be made to suffer for the illegal acts of its officers; it may be held as if it had participated in such illegal acts. In the instant case, as heretofore suggested, the evidence indicates that the Insurance Company was rather a victim than a conspirator; but, nevertheless it is alleged and it is proved that certain of its officers co-operated with the natural defendants in bringing about results which took away money from the Insurance Company, imposed liabilities upon the American Company, and induced certain of the stockholders of the Insurance Company to part with stock which had some value, in exchange for stock which had none. The Insurance Company may not be held as conspirator, but it may, nevertheless, be compelled to forego any advantage or profit which it acquired by reason of the illegal acts detailed. Any judgment that may be rendered, of course, cannot ignore the rights of the Insurance Company; but these rights may, in a measure, at least, be protected by giving to its original stockholders who were defrauded that which belongs to them, and restoring them, as nearly as possible, to the status which they primarily had. That which has been said is in an effort to maintain that even the American Company would have been in a position to sustain a suit of the kind instituted by its receiver,

Reference has already been made to the contention that recovery cannot be had by, or on behalf of, the corporation simply upon the ground that stock or other property has been sold to it at a price in excess of its value, and that this is true even where the sale is made by the directors or officers of the company, if they did not participate in the act of the directors or other officers by which the purchase was made. There are circumstances under which a sale may be made by officers of the corporation at a price in excess of its value, which would, nevertheless, be sustained. But it could be held the transaction here involved is not of that character. There is evidence of an absence of that quality which is absolutely essential to the maintenance of such a sale—good faith on the part of those who represented the corporation, and on the part of those who sold to the corporation. An officer of the corporation cannot excuse the acquisition from it of something to which he is not entitled, by the mere circumstance that, when the proposition to be acted upon is before the board of directors, he abstains from voting or absents himself. The burden is upon the officer to show that no advantage was taken of his position, and that the transaction was in good faith. It may easily occur that such an officer may sell property to the corporation at a price in excess of its value; but it is essential to the validity of the sale that he, and those representing the corporation, thought it within the value, or thought that some benefit would accrue to the corporation by the purchase. The good faith in the transaction will preserve it. But there must be good faith; there must be no imposition upon the corporation; there must be no taking advantage of the position; there must be no exercise of an improper influence upon the persons charged with the management of the affairs of the corporation.

The application of these principles to the case under consideration would suggest that, if there is any additional evidence to support the transaction, it should be produced. The evidence, while meager in all of its phases, leaves no doubt of the fact that the American Company was not engaged in active business, and that it had very limited assets. The evidence also makes it clear that, while the Insurance Company was not without assets, its affairs had been so conducted by some of the persons who are defendants in this case that it had ceased to do the business for which it had been chartered; that it had large and undetermined liabilities: that it was in process of liquidation. The circumstances were such that any purchaser of its stock must have been a transaction of a very speculative character. this, however, there was no doubt. There could be no possible consideration of its assets and liabilities which would have placed the value of its stock at more than \$5.61 a share. The market value did not reach this figure, and, so far as the evidence indicates, did not exceed \$3 per share. There is no doubt, also, of the fact that the American Company was entirely without funds with which an investment, even of one-fourth the size of that involved, could have been made.

So far as the evidence indicates, its total available assets did not exceed \$7,000. With assets to this amount, its directors purchased the stock of a moribund corporation to the amount, according to the price paid, of \$46,470. It had to borrow the entire purchase price of the transaction; it paid interest at 8 per cent. to acquire stock that was paying no dividends, and the face value of which was only one-half of the amount which it agreed to pay. In other words, it borrowed \$46,470 and paid interest thereon at 8 per cent., in order to secure stock, the face value of which was \$23,235, upon which no dividends were being paid, stock in a corporation in process of liquidation, and from which, accepting all of the assets of the corporation at their complete face value, the total amount which could, under any circumstances, be realized would not exceed \$25,871.67. In the absence of evidence showing a reason for this transaction, a mere consideration of the purchase itself would justify the conclusion that the parties who sold to the corporation, and the persons who, in charge of the corporation, permitted the transaction to occur. were acting together to defraud the corporation.

The only justification which has been undertaken for the purchase was a clause, inserted in the resolution by which the purchase was authorized, to the effect that it was to the interest of the corporation to secure the control of the Insurance Company. 4,647 shares of stock constituted a little more than 10 per cent. of the stock of the Insurance Company. The same amount of money employed in purchasing stock at its market value would have secured 15,490 shares of stock, still less than a majority, but, at least, having more than three times as much potentiality of control as was acquired by the transaction under question.

It is perhaps true that the American Company, or the persons who were in charge of its affairs, desired to control the Insurance

Company. Indeed, it may be safely said to have been a part of the scheme of those in charge of its affairs to secure or maintain this control; but this control, while it might have carried out the purposes of the schemers, could not have served any proper purpose of the American Company. Certainly the circumstances are such that any court would be authorized to come to the conclusion that the purpose of the directors in purchasing the stock was to accomplish the end which was, in fact, accomplished; that is, to enable conspirators to utilize the name and the limited funds of the American Company to abstract the cash in the treasury of the Insurance Company.

It is not, however, necessary to rely alone upon the convincing language which the transaction speaks. On the very day of the sale the officers of the Insurance Company (one of the defendants acknowledged that the corporation was under his control) announced to the stockholders of the Insurance Company that the directors of the American Company had secured a "large part of the stock" (less than one-eighth, in fact) of the Insurance Company, and would exchange its own shares for shares of the Insurance Company. It would be difficult to come to any conclusion other than that the officers of the Insurance Company were cognizant of the plan already made prior to the sale of the stock to the American Company, to effect the exchanges which were afterwards brought about, and to make loans to the American Company on the stock thus secured. The campaign immediately instituted to secure Insurance Company stock resulted in the acquisition, by the time the notes given as purchase price for the 4,647 shares matured, of a sufficient number of shares to borrow from the Insurance Company enough money to discharge them. The circumstances are such as not even to permit the assumption that the plan of borrowing was conceived after the consummation of the sale. The persons who made the sale, and the directors of the American Company who authorized the purchase, were both familiar with the fact that the American Company would be without funds in the ordinary course of the business as it had been conducted, or as it could be conducted properly, to pay the notes given as the purchase price of the stock when the notes became due. A court would be amply authorized to find that the sellers and the buyers knew that the payment of the purchase price was to be with funds of the Insurance Company.

Good faith upon the part of the officers of the Insurance Company, who were, as Manasco admitted, under his control, can be assumed only by the exercise of a charity which would amount to inexcusable credulity. These persons knew or by the exercise of the slightest degree of that care with which their duty charged them must have known, that the American Company, to whom it was lending money, was already so involved that its personal obligation was entirely without value, and they knew that the transaction which they were authorizing was substantially the utilization of the cash and liquid assets of the company in making payments to some of the stockholders at \$3 per share, while the value left to repay the balance of the stock was indefinite, intangible, and subject to deductions, the amount of which could not be fore-

seen. It had just been announced as the policy of the company to invest its funds in good interest-bearing securities pending its liquidation. Among the securities in which the funds had been invested was what was known as the Morris note, secured by real estate, for \$7,000. This bore interest at 8 per cent. This note was loaned to the American Company as money, and the note of the American Company, drawing 8 per cent. interest and secured alone by Insurance Company stock, was taken instead. The directors of the Insurance Company, controlled by Manasco, continued to make the loans of its money until an amount had been furnished to the American Company sufficient to pay off what was due to the sellers of the 4,647 shares of stock, and, when that was done, the loans ceased.

[4] Appeals are made to the proposition that fraud must be proved, and not presumed. Fraud must be proved. So must any other fact relied upon for judicial action. That fraud is charged, however, is no reason for suspending the rules of logic in the administration of the law. If facts are established from which an inevitable inference is to be drawn, the conclusion will not be rejected because the conclusion is Throughout this transaction, these facts stand out strongly: (1) The natural defendants had a limited amount of Insurance Company stock, which had little value; it being stock in a corporation in process of liquidation, subject to unliquidated demands, with little revenue, considerable expense and incurring the costs incident to dissolu-(2) They procured another corporation, of which several of them were officers, a corporation substantially without assets and entirely without business, to purchase their stock at more than three times its value. (3) The money which paid for their stock was procured from the Insurance Company, which had been under their control, and of which several of them were officers, by a device which defrauded at least some of the stockholders of the company. (4) They have the cash of one of the corporations, and upon the other have been imposed obligations which it cannot pay. If, with all the parties before the court, and with the pleadings within the control of the court, and with the facts accessible to the court, the technicalities of the law will not permit a determination of whether the conspiracy existed, as charged, and will not provide a remedy by which, in that event, the property taken may be restored to the persons defrauded, the courts should confess incapacity and give way to a more efficient agency for compelling right.

What has been said must not be taken as the expression of opinion by this court upon the merits of the charge against the natural defendants of a fraudulent conspiracy. The evidence offered by each of these defendants in his behalf has not, for the purposes of this opinion, been considered. It may be that a trial court, even if it found the existence of the conspiracy, would be warranted in holding that some of the defendants were not parties to it. The effort has been to show that, if the allegations of the petition are true, relief could have been, and should have been, extended, and to show that the evidence introduced by the plaintiff was sufficient to sustain these allegations. The memorandum opinion of the trial judge indicates that the

case was disposed of on a conception of the jurisdiction and authority of a court of equity in cases of the kind under consideration that we believe too narrow. The evidence strongly suggests a conspiracy involving breach of trust, requiring rescission and cancellation of contracts and adjustment of rights between defrauded corporations, and the determination and protection of the rights of defrauded stockholders as against the other stockholders and officers of the corporations. No proceeding at law could furnish adequate relief.

The judgment is reversed, and the cause is remanded for further

proceedings not inconsistent herewith.

Reversed.

WALKER, Circuit Judge (dissenting). The object of this suit by the receiver of the American Mortgage & Loan Company (which will be called the Mortgage Company) is to recover the amount of loss alleged to have been sustained by that company as a result of its purchase of 4.647 shares of the stock of the Southern States Fire Insurance Company (which will be called the Insurance Company) and pledging that stock as security for money borrowed to pay the price of the stock bought, which was alleged to be greatly excessive. The stock in question belonged to the seven individual defendants, each of them owning part of it, three of them being directors of the purchasing company. Together they controlled the affairs of the corporation, the stock of which was sold. The evidence was to the effect that the Mortgage Company, in buying the stock, acted through representatives who had no personal interest in the stock bought, and who, so far as appears from the evidence, were not subjected to any improper influence exerted in behalf of any seller of the stock. A finding that the purchase of the stock was to any extent the result of a breach of a fiduciary obligation owing by a seller to the purchasing company would be pure surmise or conjecture, unsupported by evidence. The evidence makes it perfectly plain that the purchase of the stock by the Mortgage Company was a step in the execution of a scheme of its own to acquire a controlling interest in the stock of the Insurance Company.

There was an absence of evidence indicating that any one interested as a seller of stock was in any way responsible for the Mortgage Company's adoption and prosecution of the scheme to get control of the Insurance Company. The money of the Insurance Company which was used in paying debts made by the Mortgage Company in its purchase of stock was obtained after the latter had, by the election of a board of directors chosen by it, come into control of the affairs of the former. It was not made to appear that it was on the initiative of any one other than itself, acting by representatives having no personal interest in the Insurance Company stock bought, that the Mortgage Company became the debtor of the Insurance Company, a corporation then under the debtor's control, and pledged shares of the stock of that corporation as collateral to secure the indebtedness incurred. Nor was it made to appear that the individual defendants, or any of them, had anything whatever to do with planning or carrying out the transactions by which that result was accomplished. Though the individual defendants co-operated with the Mortgage Company in furthering the latter's scheme of acquiring a controlling interest in the stock of the Insurance Company, this would not make them liable to the Mortgage Company for the losses the latter sustained in carrying out a venture of its own; the Mortgage Company acting throughout on its own judgment and with full knowledge of the facts. It was not even alleged that the Mortgage Company was induced or influenced to make any purchase of Insurance Company stock by any fraudulent misrepresentation in regard to it.

Acting by its own chosen representatives, who, so far as appears from any evidence adduced, had no adverse personal interest and were subjected to no improper influence in behalf of any seller, the Mortgage Company bought Insurance Company stock and in doing so made debts, secured by all its available assets, and was swamped as a result of the assets turning out to be worth less than the debts they secured. The effort is to make the defendants responsible for losses resulting to the Mortgage Company from the failure of a business venture of its The receiver of the Mortgage Company does not represent strangers to it who may have been prejudicially affected by the transactions in question. As receiver he is not entitled to charge the defendants with the consequences of the voluntary and uninfluenced conduct of the Mortgage Company itself. In the opinion of the writer what the record discloses is wholly insufficient to warrant a reversal of the decree dismissing the bill. It cannot properly be said of the evidence that it clearly proved the material averments of the bill. Furthermore, if there was a conspiracy to effect a sale of the Insurance Company stock owned by the group of stockholders of that company which controlled it, and to use that company's money in paying the price at which that stock was sold, the evidence which showed the existence of such conspiracy also showed that the Mortgage Company, acting by representatives having no personal interest in such stock, and who, so far as appeared, were subjected to no improper influence in behalf of any seller, but influenced by a desire to acquire control of the Insurance Company, made itself a party to that conspiracy, and, after it was in control of the Insurance Company through a board of directors of its choice, got from the Insurance Company the money required to pay the debts made in the purchase of the stock by borrowing it from the Insurance Company on the Mortgage Company's notes secured by the Insurance Company stock as collateral. The evidence indicated that Manasco and those associated with him in maintaining control of the Insurance Company were enabled to get more for their combined holdings of Insurance Company stock than the same amount of such stock held by others would bring in the market, because the acquisition of their stock and the securing of their co-operation enabled the purchaser to get in control of the Insurance Company. This was the result of the sale and of the co-operation of the sellers in putting the buyer in control of the Insurance Company, though the sellers had less than a majority of the Insurance Company stock.

The situation, then, is that the receiver of the assets of one conspirator is suing the other conspirators for losses sustained by the former in

carrying out the conspiracy. The receiver has no better right to maintain the suit than the Mortgage Company would have had if the receiver had not been appointed. One wrongdoer cannot maintain a suit against others who co-operated with him in the wrongful conduct complained of. Whatever loss the Mortgage Company sustained was a result of its own voluntary action in entering upon and carrying out a scheme to get control of the Insurance Company and in thereby incurring an indebtedness greater in amount than the value which the assets it pledged turned out to possess. The pledging of the Insurance Company stock for money borrowed from that company by the Mortgage Company was the act of the latter when it was in no way controlled by the individual defendants, or any of them.

LAKE DRUMMOND CANAL & WATER CO. v. JOHN L. ROPER LUMBER. CO. et al.

MARSHALL TOWING CO., Inc., v. SAME.

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

Nos. 1576, 1577.

1. Admiralty =118-Review-Findings of Lower Court.

Where the lower court finds the facts, and there is sufficient legal evidence to sustain its findings, its conclusion is entitled to great weight, and should not be reversed, unless manifestly contrary to the evidence.

2. Canals == 29-Duty to Keep Open Lock Gates.

In conducting locks 40 feet wide for the passage of a barge 30 feet wide, it was the duty of a canal company to keep the gates fully opened, thrown back into the recesses provided for them, thus leaving the sides of the locks perfectly even, and failure to do so was negligence.

3. Towage \$\infty\$11(8)—Dangerous Character of Locks—Knowledge of Tug Captain.

A tug captain, approaching the gates of a canal company's locks, should have known that any obstruction or snag sticking out upon the sides of the locks would necessarily result in injury to towed vessels going through such a narrow passage, only about 40 feet in width, to accommodate their 30 feet of breadth, and should have stopped when he saw the opened canal gate was jutting out of its recess, so as to obstruct passage.

4. Towage \$\inside 15(1)-Libel for Injury to Barge-Findings.

On libel against canal company and towing company for injury to barge, towed through canal company's locks by towing company's tug, court's finding that both towing company and canal company were at fault implied finding that persons in charge of tug were invited to enter locks when gates were not completely opened, a dangerous condition, which both they and the canal company could have seen.

Appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Libel by the John L. Roper Lumber Company against the Marshall Towing Company, Incorporated, wherein the libelee filed petition alleging fault for the accident against the Lake Drummond Canal & Water Company, which denied liability. From a decree awarding libelant costs and damages, and dividing the damages equally between

the Marshall Towing Company, Incorporated, and the Lake Drummond Canal & Water Company, the latter appeal. Affirmed.

Braden Vandeventer, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for Lake Drummond Canal & Water Co.

James G. Martin, of Norfolk, Va., for John L. Roper Lumber Co. H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for Marshall Towing Co., Inc.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The above-entitled appeals are substantially one case. These appeals are from a decree entered in the District Court of the United States for the Eastern District of Virginia, in which the libelant was awarded the sum of \$1,766.94 with interest, as costs and damages sustained by it on account of an injury to a barge under charter to it and while in its possession. The injury to the lighter or barge was caused while it was being towed into one of the locks of the canal of the Lake Drummond Canal & Water Company, in consequence of a collision or contract of the forward port side of the barge with the abutment wall of the canal at the entrance of one of its locks. The court below held both the Marshall Towing Company, Incorporated, and the Lake Drummond Canal & Water Company at fault, and divided the damages equally between the Marshall Towing Company, Incorporated, owner of the tug, and the Lake Drummond Canal & Water Company, owner of the canal, both of whom appealed.

The original libel was filed by the John L. Roper Lumber Company, charterers and bailee of the barge or lighter, against the Marshall Towing Company, Incorporated, as owner of the tug, for the damage which the former proved was sustained by the barge, and which it, the John L. Roper Lumber Company, was forced to pay to the owners of the barge, the Colonna Marine Railway Company. To this libel the Marshall Towing Company, Incorporated, filed its answer, and also filed a petition under the fifty-ninth admiralty rule, alleging the fault for the accident against the Lake Drummond Canal & Water Company. To both libel and petition the Lake Drummond Canal &

Water Company filed its answer denying liability.

No contention is made by either appellants that the John L. Roper Lumber Company was not entitled to recover, the sole question involved herein being whether the Marshall Towing Company is liable for half damages, or whether the Canal Company should have been held solely liable—the Towing Company contending that the collision and the resulting damages was solely due to the fault and negligence of the Canal Company in failing to have and keep its premises in good order and condition, so that its locks would open properly for the entrance and exit of vessels, and for the negligence of its officers, servants, and agents in inviting the tug and her tow to enter the locks at a time when the gates thereof were not properly open for entrance; further, that the Lake Drummond Canal & Water Company was solely

at fault in failing to give warning to the petitioner's tug of the condition of the lock in time to enable it to stop and thus avoid her tow coming in contact with the gate. The Lake Drummond Canal & Water Company insisted that the court below erred in holding "that because the gate of the canal lock was out of alignment a few inches that this was negligence on the part of this respondent, and that it was partially the approximate cause of the injury, or that it in any way proximately contributed to the injury"; also that the court erred in holding that the tug was not solely at fault in entering the lock at the time it did. There are other contentions on the part of the respondents, but these, we think, are sufficient to raise the pertinent issues involved in this controversy.

- [1] The court below, after considering all the testimony, as we have stated, held both appellants were liable. It is the universal rule that where the lower court finds the facts, and there is sufficient legal evidence to sustain its findings, its conclusion is entitled to great weight, and should not be reversed, unless it is manifestly contrary to the evidence.
- [2, 3] It appears from the evidence that the tug, acting for and on behalf of the Towing Company, was engaged in towing the barge through the locks of the Canal Company, and that the locks afforded a space of 40 feet through which vessels could pass when the gates were wide open, and that the gates were so constructed that, when properly opened, they fitted into the sides of the locks in sockets prepared for that purpose, so that the sides of the locks would be smooth, and so constructed that passing vessels touching the sides would pass along the same without sustaining an injury. It also appears from the evidence that the barge was 30 feet wide, plus "three chafing strakes on each side, 30 feet over all." Those in charge of the Canal Company's locks must have known, or with ordinary care could have known, that any snag sticking out from the sides of the locks would necessarily result in injury to vessels going through a narrow passage of this character. While this is true as to the agents of the Canal Company, the tug captain should have known this also. In conducting these locks it was the duty of the Canal Company to keep the gates fully opened—that is, the gates should at all times be open, so as to enter the recesses provided for them, and thus leave the sides of the locks perfectly even. We think that the court below properly held that it was negligence on the part of the Canal Company in its failure to keep these spaces sufficiently open, so as to permit the barges or other vessels passing through to do so without coming in contact with the gates.

It is strenuously insisted by counsel for the Towing Company that the agents of the Canal Company invited the tug and barge to enter the locks just before the accident occurred. Witness Ailsworth, captain of the tug, in referring to this point, said: "He waived me to come ahead after I blew to him." Also, the witness Melson testified that "he waived me to come in." Edward Rogers, the engineer of the tug, in testifying as to this phase of the question said: "Some one hollered, 'All right, come on in.'"

[4] Those who were attending the lock testified positively that these statements were not true, so it will be seen that there is a direct conflict of testimony as to this point. These witnesses were examined in open court, and the trial judge was thus afforded an opportunity to observe their conduct and demeanor while upon the witness stand, thereby being in a position to judge as to the truth of the matter, and found that both appellants were at fault, and in doing so he must have reached the conclusion that those in charge of the tug were invited to enter the lock at that time; also in this connection it should be remembered, as we have stated, that the captain of the tug saw or could have seen that the gate had not fully entered the recess prepared for it, but that it was jutting out, so as to obstruct the passage intended for vessels entering the lock. With this projection staring him in the face, the captain of the tug did not take the precaution to stop his engines until after the barge had come in violent contact with the gate. There is also testimony as to the force of the wind at that time; the tug insisting that there was no unusual wind, and the canal people that there was at least a half gale blowing.

The court below had all this testimony, and after deliberate consideration of the facts and circumstances entered its decree. In view of what we have said, it necessarily follows that we are not inclined

to disturb the decree of the court below.

Affirmed.

## McGHEE v. SWIFT & CO.

(Circuit Court of Appeals, Fourth Circuit. July 2, 1918.)

No. 1613.

1. LIBEL AND SLANDER 54-DEFENSES-TRUTH.

Where defendant arranged with plaintiff to advertise its products in newspapers, and, discovering that the account had been assigned, refused to honor a check given plaintiff in payment, held, that a communication to a newspaper which had carried the advertisement, detailing the circumstances, furnished no basis for recovery; the statements reflecting on plaintiff's business integrity being true.

2. Libel and Slander \$\sim 45(2)\$—Privileged Communications.

Where defendant arranged with plaintiff to advertise its products in newspapers, and, discovering that the account had been assigned, refused to honor a check given plaintiff in payment, held, that a communication to a newspaper which carried the advertisement relating the circumstances, was privileged.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action by J. Rutledge McGhee against Swift & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

E. J. Best, of Columbia, S. C., for plaintiff in error.

D. W. Robinson, of Columbia, S. C., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In the court below the defendant corporation, Swift & Co., had judgment on a directed verdict, and plaintiff comes here on assignments of error. The action is for libel, and the

material facts, practically undisputed, appear to be these:

On December 19, 1916, the plaintiff, under the name of Western Carolina Publishing Company, J. Rutledge McGhee, president, contracted with defendant to place "\$750 or more" of advertising matter in various newspapers of North Carolina and South Carolina. On or about February 10, 1917, defendant received notice from the People's National Bank of Rock Hill, S. C., that this contract had been assigned to it as collateral security for certain indebtedness of McGhee. Under date of March 20th, McGhee wrote a letter to defendant, in which he states, among other things:

"In regard to the bank at Rock Hill, I beg to say that I have adjusted this matter, and there will be no necessity for you figuring in our transaction in any way whatever."

On the 11th of April he presented and requested payment of a bill for \$872.64, for advertising in some 42 newspapers, a list of which he furnished, stating that he desired to settle with the papers, that he had drawn a great many of his own checks and already mailed some of them, and exhibiting a bundle of checks and addressed envelopes. Three days later, a check for the amount was sent him from defendant's Atlanta office. On the 17th of April this check was deposited by him in the Bank of Johnston, S. C., to the credit of J. Rutledge Mc-Ghee Advertising Agency, and in that name he checked out \$708.70 the same day, \$57 on the 19th, and \$100 on the 23d, or a total of \$865.70. None of these checks was drawn in favor of or paid to any of the newspapers in question; and plaintiff admits, as may here be stated, that up to some two months after defendant wrote the letter on which the suit is brought he had not paid a single newspaper or reduced his debt to the Rock Hill Bank. On April 18th defendant was advised by this bank that McGhee's indebtedness to it, secured by assignment of the advertising contract, remained unpaid. Thereupon defendant at once took steps to stop payment of the check it had mailed him on the 14th, and wired him to return the same. He replied next

"Check cashed and money disbursed, therefore cannot return; will expect it to be paid."

Shortly afterwards the Bank of Johnston notified defendant that it had accepted the check in good faith and allowed the proceeds to be drawn out without notice that payment had been stopped. Later it brought suit, and defendant then paid the check on advice of counsel. Under date of May 3d, McGhee sent the following circular letter to all the newspapers with which he had placed advertisements under his contract with defendant:

"Check for the account of Swift advertising, which was carried by you and for which you rendered bill, has been held up. The account was passed for payment and check was duly made out to you by us, when in the meantime Swift & Co. stopped payment on the check then issued to us. We are writ-

ing to ask you to bear with us a little longer until we can get the matter straightened out with Swift & Co."

A few days afterwards, May 15th, he gave the Rock Hill Bank a sight draft on defendant for the \$872.64, payment of which was refused.

[1, 2] In the meantime and at subsequent dates the defendant received letters inclosing bills from most of the newspapers which had carried the advertisements, including three published by McGhee himself. Amongst others, the Pee Dee Advocate, of Bennettsville, S. C., wrote to defendant and sent its bill, first on the 13th of April, again on the 28th of that month, and the third time about the 1st of June. In reply to that paper the defendant on June 5th wrote the letter in suit, which reads as follows:

"We have to acknowledge receipt of yours of the 28th inst., concerning your claim against J. Rutledge McGhee's Advertising Agency for \$9.60, for advertising our fertilizers placed in your paper by Mr. McGhee's Agency. In reply thereto we beg to say that we entered into a contract with Mr. Mc-Ghee by which we agreed to pay him \$872.64, for carrying certain advertisements for us in certain papers in North and South Carolina. In compliance with our agreement, we mailed Mr. McGhee a check for this amount on the 14th day of April, 1917, with the expectation that he would apply the same to the payment of various bills, to various newspapers, for this advertising. Prior to issuing this check we received notice from a Rock Hill Bank that Mr. McGhee has assigned his advertising contract with us to that bank, to secure a loan; when our check was issued to Mr. McGhee, we had temporarily overlooked this fact, but, having it called to our attention, we promptly stopped payment of check, under threat from the Rock Hill Bank that it would hold us responsible for amount thereof. Since we stopped payment of check we have received information from the Bank of Johnston, Johnston, S. C., that they received this check from McGhee as a cash deposit, and that he has already checked out, apparently on his own private account, the full amount thereof. Having refused to pay the check, we are now being threatened by suit at the hands of the Johnston Bank, as well as the Rock Hill Bank, and we have been advised by our counsel not to pay either of these banks until required to do so by law. From the foregoing you can readily see-that Mr. McGhee's conduct in using the proceeds of this check for his own private ends, rather than in payment for advertising, as he should have done, has complicated the situation very much, and has made it impossible for us to do anything in the premises until our legal rights and liabilities shall have been settled. If you have any leverage by which you can put pressure on Mr. McGhee to pay the amount due you, we trust you will proceed to do so, as you do not know us, and we do not know you, in this transaction. We believe that, if you will get sharply after McGhee, he will make arrangements to pay you, and other newspapers similarly situated, the amount he justly owes you for this advertising. Kindly let us hear from you with reference to this matter at your convenience, and oblige."

At the trial, in November, 1917, no attempt was made by testimony or otherwise to show that the letter sued on was written with any malicious intent or purpose, and plaintiff admitted on the witness stand all the facts above recited. The mere statement of these facts seems sufficient, under familiar principles of law, to answer the plaintiff's contentions. Even if it be conceded that the letter, or any part of it, was libelous per se, because of reflections upon the business integrity of McGhee, we are nevertheless of opinion that a verdict for defendant was properly directed on the ground, which the evidence puts beyond

serious doubt, that the communication was both privileged and truthful. Indeed, the case is so clearly within the accepted definition of qualified privilege that we deem it quite unnecessary to argue the proposition or to cite authorities. It is enough to say that the circumstances fully justified defendant in writing the letter, and that it contains no statement or imputation to plaintiff's discredit which is not confirmed by his own confession.

Affirmed.

## BONFOEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

No. 5047.

1. CRIMINAL LAW \$\infty\$814(1)-Instructions.

Where, under the evidence, there might be a conviction on some of the counts, if not on others, requested charge that, to convict in this cause, certain matter must be proved, is bad, as requiring conviction or acquittal on all the counts.

2. Post Office 49-Using Mails to Defraud-Persons to be Defraud-

ED-KNOWLEDGE AND INTENT.

For conviction under Penal Code, § 215 (Comp. St. 1916, § 10385), of using the mails to defraud, defendants, when forming the scheme, need not have known the person named in the indictment as defrauded or intended to be defrauded, but are presumed as matter of law to have intended to defraud all who should deal with them pursuant to the scheme.

3. Post Office \$\iff 48(8)\to Using Mails to Defraud-Variance-"Mortgage"

AND TRUST DEED.

Variance between indictment for using mails to defraud, using the word "mortgage," and proof of "trust deed," is not substantial. Defendants in their advertising called the trust deeds mortgages, and the word "mortgage," when used in a descriptive sense, has no inherent difference in meaning from the words "trust deed."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series. Mortgage.]

4. CRIMINAL LAW \$\infty\$1167(2)—HARMLESS ERROR-VARIANCE.

Variance between counts and proof could not have prejudiced defendants, convicted only on counts as to which there was no variance.

In Error to the District Court of the United States for the Western District of Oklahoma.

B. H. Bonfoey and another were convicted under Penal Code, § 215 (Comp. St. 1916, § 10385), and bring error. Affirmed.

C. B. Stuart, A. C. Cruce, and M. K. Cruce, all of Oklahoma City,

Okl., for plaintiffs in error.

John A. Fain, U. S. Atty., of Lawton, Okl. (Lal D. Threlkeld, Asst. U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. Plaintiffs in error, hereafter called defendants, were convicted of a violation of section 215, Penal Code (Act

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March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]). The indictment charged that the defendants devised a scheme to defraud certain persons named and other persons, to the grand jury unknown, as borrowers, and certain persons named and other persons, to the grand jury unknown, as investors. At the trial it did not appear that at the time the scheme was devised the defendants knew the persons whom it was alleged they intended to defraud, and therefore it is claimed the defendants could not have intended to defraud these persons. To carry out this contention, counsel for defendants asked the trial court to charge the jury as follows:

"In order to convict the defendants in this cause, the government is required to prove beyond a reasonable doubt that the defendants formed a scheme or artifice to defraud each and every one of the investors or borrowers named in the bill of indictment."

[1, 2] This request was refused. There were nine counts in the indictment, and the charge as requested would require a conviction or acquittal on all of the counts. For this reason alone, the charge was properly refused. If the charge quoted was requested on the theory that it would compel the jury to acquit as to those counts where the person named as the one defrauded or intended to be defrauded was not personally known to the defendants when they devised the scheme to defraud, it was erroneous, as the defendants were presumed as a matter of law to have intended to defraud all persons who should deal with them pursuant to the scheme to defraud, whether they were known to defendants at the time the scheme to defraud was devised or not. We therefore conclude there was no error in refusing the request.

[3] It is next claimed that there was a variance between the indictment and the evidence under some of the counts, in this: The indictment used the word "mortgage," and the evidence showed a "trust deed." This was not a substantial variance, for the defendants could not have been prejudiced. They were fully and fairly apprised of what they must meet by the allegations of the indictment. They had, in all their circulars advertising their business, called these trust deeds "mortgages." When the word "mortgage" is used in a descriptive sense, there is no inherent difference in the meaning of the word and the words "trust deed." Bartlett v. Teah (C. C.) 1 Fed. 768; Platt v. Union Pacific Ry. Co., 99 U. S. 48, 25 L. Ed. 424; McLane v. Placerville S. V. R. Co. et al., 66 Cal. 606, 6 Pac. 748; Theodore Shillaber v. John Robinson, 97 U. S. 68, 24 L. Ed. 967.

[4] Moreover, the defendants were convicted on counts where the alleged variance did not exist, and the deed of trust could not have prejudiced the jury on these counts.

The judgment below must therefore be affirmed; and it is so ordered.

## BOND v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

No. 5076.

1. Criminal Law \$\infty\$1088(1)\to Appeal\to Record\to Supervision by COURT.

The trial court should exercise supervision over the record certified, by excluding matters redundant and immaterial to the presentation of the question for review.

2. Criminal Law \$\infty\$1151\top-Appeal\top-Continuance\top-Discretion.

Granting or refusing a continuance rests in the sound discretion of the trial court, whose action will not be disturbed, except in a case of clear abuse of that discretion.

3. CRIMINAL LAW 593—CONTINUANCE—ABSENCE OF ATTORNEY.

That attorneys employed by defendant, who expected to be present and try his case, were unable to be present, does not alone make refusal of continuance error; defendant having counsel present to defend him.

In Error to the District Court of the United States for the West-

ern District of Oklahoma; John H. Cotteral, Judge.
Ben Bond was convicted of conspiring for transportation and delivery of intoxicants, in violation of Penal Code, § 238, and brings error. Affirmed.

Joe M. Adams and W. L. Chapman, both of Shawnee, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. [1] In this case, a record of 429 printed pages has been presented to this court for the purpose of presenting an alleged error of the trial court in refusing to grant a continuance. The question could have been presented on a record of a dozen pages. We think the trial court ought to exercise some supervision over the record certified here, by excluding redundant and immaterial matters.

[2] It is well settled that the granting or refusing of a continuance rests in the sound discretion of the trial court, and that its action will not be disturbed by this court, except in a case of clear abuse of that discretion. Warren v. U. S., 250 Fed. 89, — C. C. A. —; Isaacs v. U. S., 159 U. S. 487–489, 16 Sup. Ct. 51, 40 L. Ed. 229.

[3] The offense charged against Bond was that of conspiring with employes of an express company to transport and deliver intoxicating liquor in violation of section 238, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [Comp. St. 1916, § 10408]). The affidavit in support of a continuance discloses that a firm of attorneys had been employed by the defendant, who expected to be present and try his case, and that they were unable to be present. It appears, however, that defendant did have counsel present in court to defend him, and

we cannot conclude, from an examination of the affidavit, that the trial court erred in refusing a continuance, saying nothing about an abuse of its discretion.

The judgment below should be affirmed; and it is so ordered.

ECLIPSE MACH. Co. et al. v. HARLEY-DAVIDSON MOTOR Co. et al. (Circuit Court of Appeals, Third Circuit. May 25, 1918. Rehearing Denied July 20, 1918.)

No. 2344.

1. Patents 328—Validity and Infringement—Motorcycle Clutch.

Ellett patents, reissue No. 13,554 (original No. 982,042), No. 1.018,890, and No. 1,071,992, each for a clutch for motorcycles, cover combinations, the fundamental elements of which were old in separate use, but disclose patentable invention in the combinations. The reissue patent held not infringed, and both the others infringed.

2. PATENTS 36-INVENTION-CHANGE OF POSITION OF MECHANISM.

A change of mechanism from one position to another, whereby a problem is solved and new and useful results are obtained, is an indication of invention.

3. PATENTS 5-75-VALIDITY-PRIOR PUBLIC USE.

Use of an invention relating to mechanism of a motorcycle, which was necessarily public, but which was not commercial, but solely for the purpose of experimentation, and testing its efficiency, is not such a public use as will invalidate a patent applied for more than two years thereafter.

4. WORDS AND PHRASES-"MOTORCYCLE."

A "motorcycle" is a bicycle propelled by a gasoline engine located in the frame between the wheels.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Motorcycle.]

5. Words and Phrases-"Clutch."

A "clutch" is a device introduced in the transmission, some place between the mechanism in which power is created and the mechanism to which it is applied, and serves to make and break the connection between the two.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Eclipse Machine Company and another against the Harley-Davidson Motor Company and another. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 244 Fed. 463.

Archibald Cox and Robert W. Byerly, both of New York City, and C. L. Sturtevant, of Washington, D. C., for appellants.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa. (W. S. Hodges, of Washington, D. C., of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree dismissing a bill charging infringement of three closely related patents for motorcycle clutches. They are re-issue No. 13,554 (original No.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

982,042 of January 17, 1911); No. 1,018,890 of February 27, 1912; and No. 1,071,992 of September 2, 1913, issued to Frederick S. Ellett, and are conveniently referred to throughout the record as the re-issue, second patent, and third patent. Of the several claims in issue the District Court found claims 1, 4 and 5 of the re-issue, and claims 1, 8, 11 and 12 of the second patent not infringed; and claim 1 of the third patent invalid because the date of invention was more than two years prior to the application for the patent. R. S. § 4886 (Comp. St. 1916, § 9430). The complainants appealed.

The suit is between the patentee and his manufacturing licensee and

an alleged manufacturing infringer and its selling agent.

[1] The inventions of the three patents relate to clutches for motorcycles, each containing in variations of combination some of the same elements.

[4, 5] A motorcycle is a bicycle propelled by a gasoline engine located in the frame between the two wheels. The power of the engine is transmitted to the rear or traction wheel by some sort of transmission or connection. A clutch is a device introduced in the transmission some place between the mechanism in which power is created and the mechanism to which it is applied and serves to make and break the connection between the two.

In the art before Ellett, the transmission consisted mainly of a belt or one or more chains connecting the engine shaft to the rear wheel so that when one moved the other moved and when one stopped the other stopped. These direct connections, being fixed in the sense of not being detachable, produced obvious difficulties in riding and created dangers to the rider. They gave to the frame of the motorcycle—and to the body of the rider—the shock or jerk of each explosion of the engine. This caused discomfort and eventually fatigue. They made the start a dangerous and sometimes an adventurous feat, as the speed of the motorcycle (when raised at a standing start or after a pedal start) responded exactly and abruptly to the speed of the engine. The stop involved the difficulty of braking the engine long enough and hard enough to overcome the momentum of the engine as well as the momentum of the vehicle.

Direct transmission of power from engine to traction wheel made riding over sandy, muddy, rutty, and hilly roads difficult and dangerous. This was due to the fact that in meeting the varied problems of road conditions, quick changes, both in lowering and raising speed, are necessary. In direct transmission there was no way to slow down the motorcycle without slowing down the engine. In thus lowering—and also in raising—the speed of the motorcycle by brake and engine control alone, the drag of the road on the traction wheel became at times greater than the power of the engine, causing the motor to stall, thereby stopping the movement of the vehicle and interrupting the pleasure of the rider. To avoid stalling, the natural inclination of the rider was to overcome road problems by maintaining speed even at the risk of falls and injury.

To meet these problems the art resorted to several expedients. These were compensating sprockets and belt tighteners or idlers which relieved somewhat the rigidity of the direct connection. There were

also invented several clutches having for their object the connection and disconnection of the power transmission. These, however, were

not practically and commercially successful.

Finally. Ellett, a young machinist employed by the complainant company in its business of manufacturing coaster brakes and other bicycle appliances, invented the clutches of the three patents in suit. His inventive conception lay in placing in the hands of the rider a control over the motorcycle different from and in addition to single engine control by making a break in the transmission, whereby power can be applied or withdrawn, not abruptly at the caprice of the engine as in direct transmission, but by degrees at the will of the rider. result operatively is an increase in the endurance of the motorcycle and a decrease of explosive shocks to the motorcycle and to its rider, a reduction of the likelihood of stalling, and, in meeting varied road conditions, the removal of the operation of the motorcycle from the arbitrary mechanical control of the motor to the instinctive control of the rider. The result commercially, it is claimed and not denied, is that every motorcycle now sold in this country (including those of the defendant) has a clutch embodying the fundamental combination of Ellett's invention as disclosed in his second and third patents. The motorcycle output for 1914 was 68,000, of which the defendant sold 16,000. The clutches on all these motorcycles, except those made by the defendant, were either purchased by their makers from the complainant company or were manufactured under license. The defendant, admitting that its clutch contains the elements of the Ellett clutch. asserts its right to manufacture and sell it without tribute to Ellett on the ground that his patents are invalid in view of the prior art, or, if valid, their claims, when properly construed, do not cover the defendant's construction.

Each claim of the three patents in suit is a combination claim containing the same functional elements, possessing essentially the same characteristics, but differing in some structural details and in one important functional operation. The invention, therefore, may be considered first as a whole, and its differences, as appearing in the several patents, may be discussed later.

Ellett's inventive combination consists fundamentally of three elements, for no one of which he claims invention. Clutches, friction clutches, friction disc clutches were old in many arts, and friction disc motor clutches were not entirely new in the motorcycle art. Invention, if any, is to be found in the combination of elements comprising the

unitary structure. These are:

(1) One rotary member mounted upon another rotary member;

(2) Multiple flat friction discs alternately attached to each rotary member; and

(3) Screw cam (nut and screw) which (a) is nonrotating and (b) is connected with the friction discs in a manner to make or break the transmission of power by accurately controlling the amount or degree of connection or slippage of the rotating discs.

The chief characteristics of the invention are that the two parts, carrying alternate layers of discs, which by frictional contact and the release thereof cause the transmission or withdrawal of power from

motor to wheel, are both rotary parts, and that one is mounted upon the other in distinction from the customary mounting side by side on the same shaft. The mounting of one rotary member upon the other (each carrying its own friction discs) instead of mounting them side by side, met an absolutely essential requirement of the motorcycle builder in saving practically one-half in the length of the shaft, in reducing the over-all width of the machine, and in keeping the clutch practically within the vertical plane of the motorcycle. This is a problem peculiar to a motorcycle and of course is not present at all in an automobile with its abundance of space.

[2] Aschange of mechanism from one position to another, whereby a problem is solved and new and useful results are obtained, is an indication of invention. Mead-Morrison Mfg. Co. v. Exeter Mach. Co.,

225 Fed. 489, 140 C. C. A. 531.

The next element of the invention is multiple friction discs as distinguished from cone discs. The peculiarity of the multiple disc type is that all the discs are free to move laterally so that a given weight -say 10 pounds-applied to the pile of discs produces a pressure of 10 pounds on each of the entire series of surfaces in contact. By merely multiplying the number of discs, the same 10 pounds can be made to give a gripping force of 20, 30, 40, 50 and 100 pounds, and so on, according to the number of discs, the applied pressure of 10 pounds remaining the same. In a motorcycle where the parts are light and the space is limited there is an advantage in multiplying the number of thin discs over increasing the initial pressure. The gripping pressure of friction discs does not affect the ease of engaging and disengaging the discs. This is an advantage over the cone clutch, to disengage which it is necessary to apply force sufficient to overcome the friction caused by the wedging pressure of one gripping surface on the other. The grip of multiple discs is released simply by releasing the applied force.

While Ellett cannot claim the invention of friction discs, he is to be credited with selecting discs of the type that all motorcycle makers

now use to the exclusion of all other types.

The remaining element is the screw or screw-cam, which serves to actuate the discs. Simple as it is—being nothing more than a screw turned with nice calculation as to its function—its importance to the art is recognized by every motorcycle manufacturer using a clutch. There seems to be no substitute for it. Lightly as the defendant speaks of it, it nevertheless clings to it. It is found to be an actuating device of sufficient stability to prevent variations of pressure on the discs, and, consequently, undesirable variations of the speed, caused by the jar and shock incident to motorcycle riding. It is also sufficiently accurate to permit just the range of disc slippage required to give the rider the exact power he desires.

Fine gradations of pressure and slippage to produce correspondingly fine gradations of movement, extending to less than 1/16 of an inch on the discs, cannot, of course, be made by the joggling hand of the rider and can only be made by a disc actuator that has precision of pressure. Other actuators, such as face cams, forks, levers, apparently, will not do. The pitch of the screw can be fixed with extreme

accuracy and its actuation of the discs initially or after wear can be nicely calculated. If a screw is the only thing that will produce this result, there is merit akin to invention in finding that thing, simple as it is.

The operative utility of a clutch combining these three correlated elements, briefly stated, is found in the ability of the rider to drive the engine at one speed and the traction wheel at another, and to move the engine without moving the wheel at all, and, conversely, to move the wheel without moving the engine. Such control over the power and traction of a motorcycle by which its power and traction mechanism can be operated independently or interdependently at will, makes the rider a part of the vehicle in the sense that in learning what it can do, he soon learns to ride it under varied road conditions with the same involuntary exercise of will or instinct that a person employs in walking and running. If Ellett was the first to make this possible or practicable (and such he seems to be), he has a claim to invention, even though in doing it he combined means separately found in the art.

In view of the importance of this case to the motorcycle art and of the very serious consequences of a decision adverse to the defendant, one of the largest producers of motorcycles in the world, we have given the immense record in this case and the extended art cited against the patents full and careful consideration at the cost of no little labor. We do not think it necessary to the decision to review in this opinion the testimony and the prior art or to set forth the mechanical details of the inventions in suit. It will suffice to state their fundamental elements and differences with a brevity consistent with

a proper understanding of their functions.

In approaching a separate consideration of the three patents it is to be noted that in the clutch of each patent there are the same three elements—superimposed rotary members, multiple friction discs alternately attached to each rotary member, and screw cam actuating means. In all, the function of the rotary members is the same; there is a variation in the function of the screw cam with a reflected variation in

the function of the friction discs.

In the clutch of the Ellett re-issue, the screw actuator operates (by connecting mechanism) directly on the rotary members, causes a compression of their attached friction discs and makes a connection whereby power is transmitted from motor to wheel. A release of the actuator separates the discs and breaks the connection and transmission. Gradations of contact and power transmission are made by the hand of the rider on the actuator lever. The result operatively is that the change of power is imperfect except when made by an expert rider, and the result mechanically is the breaking of ball-bearings when pressure is inexpertly applied.

For these reasons this clutch was not commercially successful. About 500 were made when their manufacture was discontinued.

At about the time of the invention of the clutch of the re-issue (March, April or May, 1908), Ellett invented the clutches of the second and third patents. As they were mechanically more complex than the first and more costly to manufacture, he laid them aside in his employer's model room while the clutch of the re-issue was being tried out. Upon its failure, the clutches of the second and third patents were taken out and patented three or four years after they had been invented, tested, and found satisfactory.

The clutch of the second patent has the same three fundamental elements as the clutch of the re-issue. The function of the rotary members is the same, the function of the multiple discs is somewhat different, but the function of the screw actuator, while still that of an actuator, is reversed. This reversal is not a reversal of mechanism resulting in the same function, but it is a reversal of mechanism which produces a different function. Instead of moving the actuator by hand to make the disc contact and power transmission, as in the clutch of the re-issue, there is provided in the clutch of the second patent a plurality of springs which normally hold the discs in a gripping engagement or constant contact, whereby complete transmission of power is effected and maintained. The actuator in the clutch of the second patent is used not to make but to break contact of the discs. and when moved by hand it acts in opposition to the springs and operates to break the transmission. This organization obviates the consequences of inexpert transmission of power and of breakage incident to the clutch of the re-issue and makes the improved clutch as easily operated by inexpert as by expert riders. This change established the success of the invention.

The clutch of the third patent differs essentially from that of the second only in the position of the springs, which are mounted in the end of one rotary member so as to make the springs accessible and easily adjustable. Typical claims of the re-issue, second, and third patents are quoted in the margin.<sup>1</sup>

<sup>1</sup> Claim 1 of re-issue, No. 13,554:

"The combination with a rotary shaft, of a hub fastened upon one end thereof, a concentric wheel mounted for free movement upon said hub, one or more friction disks connected to the hub positioned in a chamber provided therefor between the hub and wheel and adapted to engage a friction member or members on the wheel, a fixed nut mounted concentrically at the outward end of the hub, a screw passing through said nut, means for imparting a turning movement to said screw, and means rotating with the hub and actuated by the screw whereby the inward movement of the screw will be imparted to the friction disk or disks."

Claim 1 of No. 1,018,890 (second patent):

"The combination with a rotary member, of a concentric wheel mounted for free rotation on said rotary member, a friction disk carried by said wheel on the interior thereof, a plurality of friction disks carried by said rotary member and engaging said first mentioned disk, a plurality of springs for normally holding said disks in gripping engagement, and means independent of the rotations of said wheel and said rotary member for actuating the springs to release the clutch members and comprising a fixed cam member, a revoluble cam member and a thrust bearing."

Claim 1 of No. 1,071,992 (third patent):

"In a clutch for motorcycles, the combination of a stationary member, a rotary member mounted on said stationary member, a wheel rotatably mounted on said rotary member, a plurality of friction disks adapted to form a driving connection between said rotary member and said wheel, a plate arranged on the outer end of said rotary member, an axially movable disk carried by said rotary member, a plurality of springs arranged between said axially movable disk and said plate and adapted to normally press said friction disks into gripping engagement, and means independent of the rotation of said rotary member and said wheel adapted to move said axially movable disk so as to release said friction disks."

After Ellett's first patent had been issued and the application for the second had been filed, and after the complainant licensee had put upon the market the multiple spring clutch of the second and third patents, the defendant Harley-Davidson Motor Company, in the summer of 1911, manufactured for its 1912 motorcycle model a clutch which it itself admits contains the elements of the Ellett clutches, and which the learned trial judge found bears "more than a substantial likeness" to the clutch of Ellett's third patent.

Being charged with infringement, the defendant presents several grounds of defense, all of which we have very carefully considered,

and but two of which require discussion in this opinion.

The first defense is, that under a proper interpretation, the claims of the Ellett patents, considered with reference to their character and scope, are invalid because anticipated by the prior art and by prior uses; or, if valid, they are not sufficiently broad in view of the prior art to cover the organization of the alleged infringing device. We shall postpone the consideration of the last proposition and dispose of the first two by holding the claims of the three patents here in issue valid as showing patentable invention. As against the defense that the re-issue is invalid because of "new matter" or that rights of the defendant intervened during the patentee's delay in applying for it, we hold the re-issue valid and controlling upon the defendant. Whether Harley improperly acquired knowledge of the Ellett clutch and incorporated it in the alleged infringing clutch manufactured by the defendant—an issue raised by the plaintiff and joined by the defendant—is not necessary to decide in view of our conclusion upon another phase presently to be stated. Certain it is that the circumstances show that at the time the defendant was developing and testing its clutch. Harley was not ignorant of the Ellett invention.

The defendant charges further that the second and third patents, even though disclosing patentable invention, were invalidly issued because of public use more than two years prior to the filing of the applications. With this contention, so far as it is applied to the third patent, the trial court agreed. We are constrained to disagree with the learned trial judge in holding the third patent invalidly issued, not upon the law applicable to the question, but upon his finding of fact. He stated in his opinion that "the invention had been perfected and the device put to use not only before the Harley filing date but so long before his own application" that the statutory time given Ellett in which to apply for a patent had passed, and that, consequently,

he prima facie had lost his right to a patent.

In so ruling the learned trial judge applied to the facts the unquestioned law, that:

"Abandonment to the public, or such dedication to be inferred from public commercial use, is inconsistent with the claim of an exclusive proprietary right and is sufficient ground for the denial of a grant for a patent. When more than two years elapse after the invention is made, the inventor must assume the burden of excusing the delay and overcoming the presumption of dedication from commercial use."

[3] It is upon the evidence excusing the delay and overcoming the presumption of dedication, the burden of which the patentee assumed,

that we differ with the learned trial judge in our conclusions. We think that Ellett has sustained the burden, which the law imposed upon him, by showing very satisfactorily, indeed, very certainly, that there was not a commercial use of the invention and there was not a public use of it more than two years prior to the filing of applications for patents, and that such use as there was, though in public, was purely experimental and was necessary to test out his invention by long rides and by different riders. Elizabeth v. Paving Co., 97 U. S. 126, 24 L. Ed. 1000; Beedle v. Bennet, 122 U. S. 71, 76, 77, 7 Sup. Ct. 1090, 30 L. Ed. 1074; Harmon v. Struthers (C. C.) 57 Fed. 642. These tests, when made, demonstrated that the device was satisfactory and complete. It was not patented at that time because the inventor neither had money nor could he borrow money with which to procure patents, and for the additional reason that he could induce no one to manufacture the clutch because of its complexity and cost at a time when clutches were not generally known or demanded by motorcycle riders. It was after the clutch of the re-issue had been tried and had failed, and before the defendant came upon the market with the Harley clutch that Ellett succeeded in enlisting the interest of his employer and in obtaining the manufacture of the clutch and its offer to the trade. He then promptly applied for and obtained the second and third patents. There was a delay of from three to four years between the invention of the clutches of the second and third patents and the filing of applications for patents. Without repeating the large amount of testimony upon this issue, it will be sufficient to state that we are of opinion that Ellett did not by any affirmative act or public use of his invention abandon it or dedicate it to the public, and that any presumption arising from his delay in patenting his invention has been met and overcome by evidence in quantity and character sufficient to satisfy the law in this regard.

We hold that the second and third patents were not invalidly is-

sued upon the ground assigned.

The remaining issue is infringement. This involves an interpretation of the claims of each patent to determine whether in view of the prior art they are broad enough to cover the organization of the al-

leged infringing device.

The plaintiffs maintain that the claims of the re-issue (of the first patent) are for a pioneer invention consisting of three fundamental elements, and as these elements are found in the defendant's device, it infringes. On first view this would seem to be true. It would certainly be true if the defendant employs the three fundamental elements of the re-issue (which it admits using) to perform the functions and to produce the results they perform and produce in the clutch of the patent. If the defendant's device does this and does more by infringing the improved mechanism of the second and third patents, it would still infringe the re-issue. But if the three fundamental elements of the re-issue are present in the defendant's device, yet are there employed in a way different from that taught by the re-issue, and are caused to function in a way not suggested by its disclosures, and to produce results wholly different from those intended by the invention, then the invention of the re-issue is not of that primary and fundamental type which would hold the defendant to infringement.

It should be remembered that the claims of the re-issue are combination claims containing elements with clearly disclosed functions, the essential characteristic of which, as we have stated repeatedly, is the pressure of the screw cam on the rotary members to make contact and the release of the pressure to break contact. In the organization of the defendant's clutch, contact (with power transmission) is obtained (and maintained) by spring pressure on the discs, not by screw pressure manually applied as in the clutch of the re-issue, and contact in the defendant's clutch is broken by pressure of the screw cam or its equivalent, not by the release of pressure of the screw cam as in the clutch of the re-issue. This difference in operation reflects the difference in mechanism. It is not a mere reversal either of mechanism or function, but it is a positive difference, as the functions of two of the three elements in the defendant's clutch are not suggested by the disclosures of the re-issue. A very good evidence of this is, that when Ellett conceived a new function for his three elements in co-action with springs (similar to the organization of the defendant's clutch subsequently made) he was awarded a patent for it on the theory not that it was an improvement upon the clutch of the re-issue but that it was a conception of something novel and something different from the clutch of the re-issue, and therefore involved invention.

Moreover, if in the defendant's clutch the spring pressure means were omitted, the three elements of the re-issue would remain but they would not co-act in the manner disclosed by the re-issue or in any other manner. In other words, the clutch would not work. Similarly, it would not infringe. Therefore, while the defendant has taken the three elements of the re-issue combination claims (each being old), and has used them, it has not used them in the way in which they were used in the combination device of the re-issue. And it is only in the combination that invention is found. What the defendant did was to take the three old elements (either from Ellett or from the art, it makes no difference which), and give one—the screw cam—an entirely new function, cause another—the friction discs—to operate in an entirely different way, and employ the remaining element (the superimposed rotary members) in the way disclosed by the invention. This so utterly breaks up the combination that in our view the defendant's clutch does not infringe the combination claims of the re-issue.

But in avoiding infringement of the re-issue the defendant has fallen into infringement of the second and third patents. This is due to the fact that it has taken the same three elements found in all the patents and has used them or their equivalents, not differently, but in the way claimed by the second and third patents.

The Harley clutch appears by the exhibits to be mounted on the rear wheel of the motorcycle, although manifestly it is sometimes mounted on a counter-shaft between the motor-shaft and the rear wheel. The reissued patent shows the Ellett clutch mounted on the motor-shaft; the third patent on a counter-shaft. This difference in the positioning of clutches, the defendant maintains, requires a substantial difference in their organization. It maintains, further, that the claims of the patents relate only to a clutch on the motor-shaft or

on a counter-shaft, while its clutch is on neither, being mounted on the hub of the traction wheel. It therefore seeks to limit the claims of the patents to a clutch on the motor-shaft and on a counter-shaft. Without repeating the discussion upon the claims of the patents, we are satisfied that they are sufficiently broad to cover clutches regulating the transmission of power located on the traction wheel as well as on the motor-shaft or on a counter-shaft. The clutch of the patents is so arranged functionally that it makes no difference where it is placed, that is, whether on the motor-shaft, on a counter-shaft, or on the traction wheel, for the reason that it makes no difference to which rotary member of the clutch power is first applied. The co-acting functions of the two are identical whichever is the power-giving and the power-taking member in the passage of power from motor to wheel. If the power is given to the inner rotary member directly from the motorshaft, it is transmitted by compression of the friction discs to the outer member, and thence carried to the traction wheel. Or, if the clutch be placed upon the traction wheel, it is transmitted from the motor-shaft by chain to the outer rotary member of the clutch, and then carried through the compressed discs to the inner member where it is conveyed to the hub of the traction wheel. Or, if placed on a countershaft, the power coming from the motor-shaft is first carried to the rotary member with which it is connected by chain and then similarly conveyed through the discs by friction pressure to the other member, whichever it may be, and is thence carried by chain to the traction wheel. Therefore, in principle, the friction clutch of the invention operates equally well wherever placed. We are of opinion that infringement is not avoided by placing the clutch on the wheel instead of on a counter-shaft or on the motor-shaft.

The organization of the defendant's clutch embraces the superimposed rotary members of the patents, the multiple friction discs of the patents, means for making contact by spring pressure and for breaking contact by exerting force in opposition to the spring pressure, not literally by the screw cam of the patents, but by another mechanism, which the defendant admits and we hold to be its equivalent.

As we view the organization of the defendant's clutch, it comprises all the elements of the claims of the second and third patents in suit arranged by a different positioning of the clutch on a motorcycle and by an inversion of parts to perform the same functions and produce the same results. While there are many differences between the infringing clutch and the clutches of the two patents in structural details, we see no difference in their fundamental elements or in the functions they perform. Therefore, we find infringement of the claims of the second and third patents in suit and direct that the decree below be reversed and that another decree be entered in accordance with this opinion.

## NATIONAL CIRCLE, DAUGHTERS OF ISABELLA V. NATIONAL ORDER OF DAUGHTERS OF ISABELLA.

(District Court, N. D. New York. August 1, 1918.)

No. 191.

1. Corporations \$\infty 49(2)\top Names\top Mutual Societies.

In suit by plaintiff, a Connecticut corporation, to enjoin defendant, a New York corporation, incorporated prior to plaintiff, from using the name "Daughters of Isabella" in and as a part of its name, and from carrying on its corporate business anywhere and everywhere, held relief would be denied, there being no evidence of fraud, etc., on the part of defendant, which prior to plaintiff had established subordinate branches and used the name in all states outside of Connecticut, where it had been enjoined from using the same.

2. Corporations \$\infty 49(2)\$—Names—Mutual Societies.

In suit by plaintiff, a Connecticut corporation, to enjoin defendant, a New York corporation incorporated prior to plaintiff, from using the name "Daughters of Isabella," etc., held, that the superior right of plaintiff, if it ever existed, to use said name outside of Connecticut, had, as against defendant, been lost by nonuser, abandonment, and laches.

3. EQUITY \$\infty 71(1)-Laches and Acquiescence-Lapse of Time.

Mere lapse of time not being of the essence of laches or acquiescence, the surrounding facts and circumstances are to be considered as well as the rights and interests of all concerned.

4. Injunction \$\infty 4-\text{Nature of Remedy.}

Injunctions are granted to prevent, not to redress, injuries.

In Equity. Suit by the National Circle, Daughters of Isabella, against the National Order of the Daughters of Isabella. Bill dismissed.

See, also, 232 Fed. 907.

This is a suit in equity brought by the plaintiff, National Circle, Daughters of Isabella, a corporation of the state of Connecticut, to enjoin the defendant, the National Order of the Daughters of Isabella, a New York state corporation, from using the name "Daughters of Isabella" in and as part of its corporate name, or in carrying on its corporate business and activities anywhere and everywhere. The plaintiff claims a prior and exclusive right to the sole use of this name or these words "Daughters of Isabella." This is denied by the defendant, which is the prior corporation in date of incorporation, and prior to plaintiff in establishing subordinate branches and using the name in all the states where used outside of the state of Connecticut.

Borden H. Mills, of Albany, N. Y. (Charles F. Roberts, of New Haven, Conn., of counsel), for plaintiff.

P. H. Fitzgerald, of Utica, N. Y. (E. L. Smith, of Utica, N. Y., and Bernard E. Lynch, of New Haven, Conn., of counsel), for defendant.

RAY, District Judge (after stating the facts as above). In or about the month of May, 1897, a voluntary unincorporated association of ladies, exclusively of the Catholic faith, was organized at New Haven, Conn., under the name "The Ladies' Auxiliary of Russell Council, No.

65, Knights of Columbus." In fact, while a separate organization, it was auxiliary to the body known as "Knights of Columbus." It used a ritual, songs, odes, and installation exercises which were in the main. if not entirely, prepared by one Daniel E. Colwell, who was then national secretary of the Knights of Columbus. This ritual, etc., was founded on the historical incident of the sale by Queen Isabella of Spain of her jewels to furnish the means to equip the expedition of Columbus which resulted in the discovery of America. After a time allusion was made to said Queen of Spain in such ritual. At some time, not many months after the organization of such voluntary unincorporated association, some of the members thereof, both in public and private, and in speaking of the association between themselves and to others, referred thereto as "Daughters of Isabella," and thus such persons applied that name thereto and to the members thereof. Just how or when the name originated does not further appear. In or about 1898, at a meeting of the association, a committee was appointed to consider the subject of incorporating under the name of "Daughters of Isabella." Nothing of any account was done by them, however, until 1904. In 1901, about, some of the members of this association. "The Ladies' Auxiliary of Russell Council, No. 65, Knights of Columbus," procured and began to wear publicly a society pin on the face of which was displayed the figure of a bell with the letters "I" and "S" on either side thereof.

On the 12th day of February, 1904, at a meeting of that association the members of such association present voted to incorporate under and pursuant to the laws of the state of Connecticut under the name "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus," and March 7, 1904, certain members of the said association were incorporated under that name in the state of Connecticut, and thereafter there were received into membership therein all of the members of said unincorporated association who desired to join. This Connecticut corporation, "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus," has never dissolved or wound up its affairs or ceased to exist, but is to-day an existing corporation of the state of Connecticut; but it is claimed by the plaintiff that such corporation has become a part and parcel of the plaintiff here, "The National Circle, Daughters of Isabella," as one of its courts, and that it is now one of its subsidiary circles. The National Circle, Daughters of Isabella, the plaintiff herein, was thereafter and at the January, 1907, session of the General Assembly of the state of Connecticut, by act approved July 25, 1907 (Sp. Acts 1907, p. 402), duly incorporated by a special act of said General Assembly under the corporate name "The National Circle, Daughters of Isabella." This was done on the application of the incorporators named in the articles of incorporation so granted March 7, 1904, to the said "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus." To the plaintiff corporation by such special act was granted power to establish branches. There is no claim or pretense that the plaintiff corporation of July, 1907, absorbed or superseded or took the place of the former corporation of March 7, 1904, but that the earlier corporation became affiliated with and a part of the

later corporation, this plaintiff, as one of its subordinate branches or circles. The plaintiff's attorney so stated in the beginning of the trial. In the meantime and on the 24th day of June, 1903, and about nine months before the organization or incorporation of the first Connecticut corporation, and four years before the incorporation of the second Connecticut corporation before described, certain ladies and gentlemen of the city of Utica, Oneida county, in the state of New York, and that vicinity, eight in number, all of the Catholic faith, organized and duly incorporated, under and pursuant to the corporation laws of the state of New York, the defendant corporation by and under the name "Daughters of Isabella," and on that day its articles of incorporation were duly filed and it became a body corporate of the state of New York under its laws. Subsequently and on the 7th day of August, 1905, the name of this corporation was duly changed to "The National Order of the Daughters of Isabella." It commenced its corporate activities at once on its incorporation in 1903, and established subordinate branches or courts in different places in the state of New York, and also in several other states of the United States. These courts, with the dates, respectively, when established and where located, appear in table "A" annexed. In so establishing courts and extending its activities the defendant, by its agents or officers, went into the state of Connecticut about April 10, 1904, and established a court at Naugatuck, and March 12, 1905, March 14, 1905, May 5, 1905, May 21, 1905, June 4, 1905, January 7, 1906, March 4, 1906, January 20, 1907, May 3, 1908, and April 4, 1909, organized and established courts at other places in the state of Connecticut.

The articles of incorporation of this New York corporation do not expressly—that is, in terms—state any purpose of the corporation to establish courts or subordinate branches anywhere, and the plaintiff claims that all of its acts in so doing were ultra vires, null and void, and in violation of the plaintiff's rights. Such articles of incorporation do state, however, "the territory within which its operations are to be principally conducted is the United States of America and the Dominion of Canada." These subordinate courts or branches of the defendant corporation are not parties to this suit. It is evident that because of its activities or popularity, or for other legitimate reasons, the defendant corporation was prosperous, and through these courts extended its affiliated membership into several states of the United States before the plaintiff established circles there. The plaintiff corporation has established circles in the states named in table "B," annexed hereto, only and on the dates given therein. The membership of these courts and circles, respectively, is given in "A" and "B." I find no substantial evidence of fraud or deceit or of misrepresentation to any one made by defendant or its authorized officers or agents in establishing these courts. They seem to have been established because of the superior or greater activities of the defendant corporation. is evident from "A" and "B" that the defendant was the first to establish itself, through its courts, in the following states of the United States, viz. Pennsylvania, Georgia, Wisconsin, New York, Iowa, Kansas, New Jersey, South Carolina, Florida, Illinois, Mississippi, Virginia, Oklahoma, Louisiana, Missouri, Nebraska, Wyoming, Rhode Island, Texas, Oregon, South Dakota, California, Massachusetts, Idaho, New Hampshire, North Dakota, Vermont, Indiana, Minnesota, Washington, Montana, Maryland, and perhaps other states before the bringing of this action.

The pertinent clauses of the articles of incorporation of the New

York corporation read as follows:

- "1. That the name of said corporation shall be the Daughters of Isabella.
- "2. The particular objects for which said corporation is to be formed are:
  "A. For the purpose of promoting the social and intellectual standing of its members,

"B. For literary purposes.

- "C. For the purpose of rendering such aid and assistance among its members as shall be desirable and proper, and by such lawful means as to them shall seem best.
- "3. The territory within which its operations are to be principally conducted is the United States of America and the Dominion of Canada.
- "4. The principal office of said corporation is to be located in the city of Utica, Oneida county, New York,

"5. That the number of its directors shall be six."

The pertinent clauses or sections of the Connecticut corporation, plaintiff here, read as follows:

"Sec. 2. The objects and purposes of said corporation shall be to render pecuniary aid and assistance to sick and distressed members and to the beneficiaries of members, whether such sickness be temporary or incurable, and to render pecuniary aid toward defraying the funeral expenses of members, and to promote social and intellectual intercourse among its members. \* \* \* \*"

"Sec. 4. Said corporation shall have power to locate and establish state and district circles, local or subordinate circles, or other branches or divisions thereof under the name of Daughters of Isabella, composed of members of the order in any town or city in this state, or in any other state of the United States, or in any other country, and said state, district, or local circles, or other branches or divisions, when so established, shall be governed and managed by such laws, by-laws, rules, and regulations as said corporation shall determine; and said corporation may enforce such laws, by-laws, rules, and regulations against any such state, district, or local circle or circles, or other branches or divisions in any court of this state, or of any other state of the United States; and said corporation may grant charters to such state, district, or local circles, or other branches or divisions, and may authorize such state, district, or local circles to make, subject to the approval of the National Circle or some authorized officer thereof, such local by-laws as the needs of any state, district, or local or subordinate circle, or other branch or division may seem to require. \* \* \*"

"Sec. 6. Said corporation shall be governed, managed, and controlled by the constitution, by-laws, rules, and regulations adopted by the voluntary association known as the National Body of the Daughters of Isabella formed pursuant to the amendment to the articles of incorporation of the Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus, approved by the secretary of the state, November 5, 1904, and now in force, until the same are legally changed, altered, amended, or repealed.

"Sec. 7. All funds and other property now belonging to the said voluntary association known as the National Body of the Daughters of Isabella are by this resolution made the funds and property of the corporation herein created,

and subject to its constitution, by-laws, rules and regulations."

October 21, 1907, on complaint of "The Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus," and "The National Circle, Daughters of Isabella," the said two corporations

so organized and incorporated in the state of Connecticut, an action in which said two corporations were parties plaintiff was commenced and thereafter prosecuted in the superior court of the state of Connecticut against "The National Order of the Daughters of Isabella," the New York corporation, Annie E. Smith as state regent of the state court of the said order in the state of Connecticut, and also the several courts of the said "The National Order of the Daughters of Isabella," naming them as courts organized and doing business in the state of Connecticut. This complaint alleged the said voluntary association; the said name thereof; the idea on which based; the adoption and use of odes; the adoption and use of said pin in 1900; the use of the name "Daughters of Isabella"; and says the complaint, "and said name 'Daughters of Isabella' became the name by which the members of said organization were known among themselves and by many persons unconnected with said organization." The complaint also alleged the incorporation of March 7, 1904, in the state of Connecticut; the use of the same constitution, etc., as that of the voluntary unincorporated association; the amendment to the articles of incorporation and the formation of four subordinate branches in said state; also the said incorporation by special act at the January session of the Connecticut Legislature, approved July 25, 1907, and the affiliation of the subordinate branches therewith; also the organization and incorporation of said New York corporation; an application by it to the secretary of state of Connecticut to do business in the state of Connecticut and the denial of same, and the application by one Neary for a special charter creating him and others a corporation in Connecticut under the name of "The National Order of Daughters of Isabella" and the refusal of the Legislature to grant same; also the said change of name of the New York corporation, and that thereafter, with knowledge of the aforesaid facts, the said Neary and others unknown organized "subordinate branches or courts of the said New York corporation, 'The National Order of the Daughters of Isabella," within the territory of the state of Connecticut at places named. The said complaint also alleged that said defendant "The National Order of the Daughters of Isabella" had designated said courts and claimed the right so to do as "Daughters of Isabella," and that the members thereof were known among themselves by that name. The complaint then alleged confusion, etc., in name; that many persons joined the one body under the belief they were joining the other in the state of Connecticut, and that said New York corporation was seeking to organize other courts "within said state," to the irreparable injury of plaintiffs, and also alleged false representations "within the state of Connecticut." The complaint demanded damages, and an injunction restraining the New York corporation "from establishing any further branches within the state of Connecticut under said name or title Daughters of Isabella," and also restraining the said branches of the New York corporation "now in existence within the state of Connecticut from continuing to use said name or title."

Although said New York corporation had established a large number of courts in several of the states of the United States other than

the state of Connecticut, and was engaged in so doing, no complaint was made thereof, and no relief was demanded or claimed restraining the New York corporation, or the other defendants, from establishing courts, or using the name "Daughters of Isabella," anywhere outside of Connecticut or in other states than Connecticut. In other words, under the allegations of the complaint and the issues framed by the answers, the right of the New York corporation to use the name "Daughters of Isabella," and to establish its courts in states outside the state of Connecticut, or states other than the state of Connecticut, was not challenged or in issue. A substituted complaint was filed, but this did not broaden the issue, and the injunction demanded was only to reach to the state of Connecticut. This action was brought to trial, after demurrers had been filed and heard, in March, 1910, and the following judgment rendered March 7, 1910, viz.:

"Whereupon it is adjudged that the defendant, the National Order of the Daughters of Isabella, and its servants and agents, be, and it is hereby, enjoined, under a penalty of one thousand dollars, from establishing any further branches within the state of Connecticut under said name or title 'Daughters of Isabella,' and that all subordinate branches of said National Order of the Daughters of Isabella now in existence within the state of Connecticut be. and the same are hereby, forever prohibited and enjoined, under a similar penalty of one thousand dollars, from using said name or title, and that the plaintiffs recover of the defendants twenty-five dollars damages, and the costs --- cents." --- dollars and --

The following findings of fact in that Connecticut case are pertinent:

"(1) That the plaintiff was organized as a voluntary benefit association by women of the Catholic faith, in May, 1897, under the name of 'The Ladies' Auxiliary of Russell Council, No. 65, Knights of Columbus.'

"(2) That from the time of its formation the members of this association made much use of the name of Isabella, a queen of Spain, in their ceremonies, ritual, and songs, and were in the habit of calling each other 'Daughters of Isabella.'

"(3) That early in 1898 the association by vote appointed a committee to consider the matter of incorporation under the name 'Daughters of Isabella,' but no further action was taken at that time.

"(4) That as early as 1901 the association adopted and its members began to wear publicly a society pin on the face of which were displayed letters and symbols indicating 'Daughters of Isabella, and by that name the association and its members then were commonly known and called among themselves and informally by the outside public.

"(5) That said association originated and was the first to use said name in this state as a name for a society and its members, and it and its succestsors have continued to use said name constantly until the present time.

"(6) That on February 12, 1904, this association voted to be incorporated under the laws of this state under the name 'Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus,' and on the 7th of March, 1904, said association was so incorporated, and it has continued to be known as the 'Daughters of Isabella,' and the members thereof to be known among themselves and to the public generally by that name.

"(7) That these articles of incorporation contained no provision for the es-

tablishment of branches of the corporation.

"(8) That before March 7, 1904, no other persons, or society, or corporation, had adopted and were using the name 'Daughters of Isabella' in this state, and no other organization was known by that name to the plaintiffs, or to the public generally in this state.

"(9) That said corporation was duly organized by the members of the original voluntary association, who became members of said corporation; and it adopted the same constitution, used the same ceremonies, ritual, songs, society

pin, and insignia, and continued to carry out the plans and purposes of the original voluntary association, and to use and be commonly known by the name 'Daughters of Isabella.'

"(10) That said corporation upon its organization became and thereafter continued to be the successor in title and all other respects to all the rights and privileges of said original voluntary association, including the rights to use the name 'Daughters of Isabella.'

"(11) That said corporation made an amendment to its articles of incorporation, which was filed with the secretary of state November 5, 1904, and by which it was authorized and empowered to establish branches under the name 'Daughters of Isabella,' and to give to such branches and their members the right to use said name.

"(12) That under authority of said amendment the plaintiff corporation formed four subordinate branches with a membership of about fifteen hundred, and all of the members have been always known among themselves

and to the public as 'Daughters of Isabella.'

"(13) That at the January session of the General Assembly of Connecticut, in 1907, all of the incorporators named in the articles of incorporation granted to the plaintiff on March 7, 1904, all of whom were members of said corporation organized thereunder, for and in behalf of the plaintiff and all of its subordinate branches at that time in existence, made application for and were granted by a special act a charter by which said incorporators and those associated with them were created a body, politic and corporate, under the name and title of 'The National Circle, Daughters of Isabella,' with authority to establish branches in Connecticuit and elsewhere. \* \* \* "

"(24) That of the fourteen courts or branches of the defendant New York corporation all except three were organized and established in Connecticut since the filing of the articles of incorporation of said corporation with the

secretary of this state. \* \* \*

"(27) That in December, 1906, the defendant New York corporation established a state court within this state, known as the 'State Court of the National Order, Daughters of Isabella,' of which the defendant Annie E. Smith is the regent and chief executive officer. The state court was composed of the subordinate courts or branches in the state.

"(28) That said state court, said Annie E. Smith as its regent and chief executive officer, and the defendant William J. Neary as the agent and so-called territorial regent of said defendant New York corporation, have carried on within this state an active campaign for the organization therein of subordinate courts or branches of said New York corporation under the name and title 'Daughters of Isabella,' and have organized and established the subordinate branches or courts which are named as defendants in this action, having together a membership of about fifteen hundred. Some of these courts were originally branches of the plaintiff corporation, which they have persuaded to leave and to join the New York corporation.

"(29) That said defendant New York corporation and each of its subordinate courts or branches in this state, through their agents and territorial regent and other officers, by speeches, advertisements, arguments, the circulation of literature, and the holding of public meetings and other means, have been attempting and threatening, and still are attempting and threatening, to organize other subordinate courts or branches of said New York corporation within this state, under said name and title 'Daughters of Isa-

bella.'

"(30) That all of the defendants, by their acts within this state, have invaded the rights acquired by the plaintiffs; they have seriously and irreparably injured the plaintiffs' property in their name, which is essential to their corporate existence; they have occasioned loss and damage to the plaintiffs by confusing their identity; they have reduced the membership of the plaintiffs by persuading some of their subordinate branches to leave them and join the New York corporation, and have hindered the plaintiffs' growth in numbers and in new branches, and thus they have diminished materially the plaintiffs' means and opportunities for carrying on the business and objects for which they were organized; they have considerably reduced the

plaintiffs' pecuniary income, thereby decreasing their power to enjoy the advantages they designed to secure by their association and incorporation; and their continued use of this name will have the natural and necessary tendency completely to destroy the plaintiffs' corporate life. \* \* \*"

"Second. The following conclusions have been reached:

"(1) That, having proved the facts alleged in the complaint, the plaintiffs were entitled to the relief asked for.

"(2) That the plaintiffs have acquired the exclusive right to use the name

'Daughters of Isabella' within this state.

- "(3) That when the plaintiffs had acquired such a right the defendant foreign corporation should be restrained from using that name in this state, or one so similar as to confuse, mislead, or deceive the public, to the injury of the plaintiffs.
- "(4) That the defendant corporation's name is so similar to the plaintiffs' name as to confuse, mislead, and deceive the public, to the injury of the plaintiffs.
- "(5) That the plaintiffs' exclusive right to its name is one that carries with it the presumption of injury by interference, for which there is no adequate remedy at law, and which, therefore, a court of equity will restrain."

On appeal no error was found, and the judgment of the superior court was affirmed.

It is seen that this judgment of the Connecticut courts only assumes to find and adjudge that the plaintiffs, and its or their predecessor, the unincorporated association, was the first to use the name "Daughters of Isabella" in the state of Connecticut, and only assumes or purports to adjudge the rights of the parties in that state. It is not general in its findings or adjudication. It settled, and settles forever, the rights of the parties in that state and no other. Reynolds v. Stockton, 140 U. S. 254, 264, 265, 266, 11 Sup. Ct. 773, 35 L. Ed. 464; Radford v. Myers, 231 U. S. 725, 733, 34 Sup. Ct. 249, 58 L. Ed. 454; Vicksburg v. Henson, 231 U. S. 259, 269, 34 Sup. Ct. 95, 58 L. Ed. 209. It is confined in the issues framed, in the findings and in the terms of the decree itself, to the rights and acts of the parties in the state of Connecticut. The cause of action in that case is not identical with the one alleged in the instant case. The finding is explicit, referring to the unincorporated association: "(5) That said association originated and was the first to use said name in this state [Connecticut] as a name for a society and its members," etc.; and, among the conclusions, "(2) That the plaintiffs have acquired the exclusive right to use the name 'Daughters of Isabella' within this state [Connecticut]."

From the rendition of that judgment, in March, 1910, down to the commencement of this action, about January or February, 1916, the defendant, at large expenditure of money, effort, and time, has been engaged in forming and establishing courts, and using the name "Daughters of Isabella" as applied thereto, in a large number of the states of the United States, and was the first so to do. The defendant corporation was so engaged in establishing courts in New York and several other states prior to the commencement of that action in the superior court of the state of Connecticut, and has been so engaged ever since. No legal action was taken to challenge or restrain such use of the name Daughters of Isabella in either of the states outside of Connecticut, or the establishment of such courts, which now have a

membership of some 25,000, until the commencement of this action, in the year 1916.

The acts and rights of the parties in the state of Connecticut and not elsewhere were pleaded, put in issue, tried, and adjudicated in and as to the state of Connecticut alone.

In Radford v. Myers, 231 U. S. 726, 733, 34 Sup. Ct. 249, 252 (58 L. Ed. 454), the court said:

"Judgments become estoppels because they affect matters upon which the parties have been heard, or have had an opportunity to be heard, but are not conclusive upon matters not in question or immaterial. Reynolds v. Stockton, 140 U. S. 254, 268, 269 [11 Sup. Ct. 773, 35 L. Ed. 464]."

In Reynolds v. Stockton, supra, the court, in speaking of section 1, art. 4, of the federal Constitution (the full faith and credit clause), said:

"It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state. \* \*

"We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And, without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by This idea underlies all litigation. Its emphatic language is the pleadings. that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition, so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state.

"The inquiry is, had the court jurisdiction to the extent claimed? "Jurisdiction" may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. \* \* Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

In Vicksburg v. Henson, supra, 231 U. S. at page 269, 34 Sup. Ct. 99, 58 L. Ed. 209, the court said:

"It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. Graham v. Railroad Company, 3 Wall. 704, 710 [18 L. Ed. 247]; Reynolds v. Stockton, 140 U. S. 254 [11 Sup. Ct. 773, 35 L. Ed. 464]; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 507 [27 Sup. Ct. 762, 51 L. Ed. 1155]; Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 223 [32 Sup. Ct. 442, 56 L. Ed. 738]. In Barnes v. Chicago, M. & St. P. Ry. Co., 122 U. S. 1, this court, speaking by Mr. Chief Justice Walte, said (page 14 [7 Sup. Ct. 1043, 1050 (30 L. Ed. 1128)]): 'Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. Railroad Co., 3 Wall. 704 [18 L. Ed. 247].'"

[1] And independent of this, the plaintiff here is not entitled to the injunction or relief demanded. Hanover Star Milling Co. v. Metcalf, and Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713. Those cases were decided in one opinion, and concerned the use of a trade-mark or name "Tea Rose" as applied to flour. The gist of the decision as applicable here is that:

"The common law of trade-marks is but a part of the broader law of unfair competition. While common-law trade-marks and the right to their exclusive use may be classed among property rights, the right grows out of use and not mere adoption. Where two parties independently employ the same trade-mark or name, not in general use and susceptible of adoption, upon goods of the same class but in separate and remote markets, the question of prior appropriation is legally insignificant in the absence of intent on the part of the later adopter to take the benefit of the reputation, or to forestall extension of the trade, of the earlier adopter. While property in a trade-mark is not limited, so far as its use has extended, by territorial bounds, the earlier adopter may not monopolize markets that his trade has never reached and where the mark signifies not his goods but those of another. So far as controversy over a trade-mark concerns intrastate distribution as distinguished from interstate trade, the subject is not within the sovereign power of the United States.

"Trade-mark rights, like others that rest in user, may be lost by abandonment, nonuser, laches, or acquiescence. Where a later adopter, in good faith and without notice of its use in other territory by an earlier adopter, expends money and effort in building up a trade in a territory which the earlier adopter has left unoccupied for a long period—in this case more than forty years—and into which his trade would not naturally expand, the earlier adopter is estopped to assert trade-mark infringement in that territory."

The defendant corporation in the instant case was the first to use the name "Daughters of Isabella" in connection with and as a part of its corporate name in every state of the United States where used, except the state of Connecticut, and there was no intent or purpose on its part to take the benefit of the reputation of the unincorporated Connecticut voluntary association, or to forestall the extension of the business of that association. The defendant was the first to incorporate (June 24, 1903), and at that time the unincorporated association had made no effort to extend its activities or the use of the name, so far as it had used the name, outside the state of Connecticut. March 7, 1904, about nine months thereafter, it did incorporate as "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus." That corporation still exists and retains that name. It was not until July 25, 1907, that the plaintiff here incorporated or came into existence. This was about four years after the incorporation of the defendant. During all that four years the defendant was active in extending its activities and membership into some 15 of the various states of the United States, viz. Pennsylvania, Georgia, Wisconsin, New York, Iowa, Kansas, New Jersey, South Carolina, Florida, Illinois, Mississippi, Virginia, Louisiana, Oklahoma, and Missouri. Since that time the incorporation of the plaintiff (July 25, 1907), and prior to the commencement of this action, the defendant has extended its activities and membership into the states of Nebraska, Indiana, Massachusetts, Wyoming, Rhode Island, Texas, Oregon, South Dakota, California, Ohio, Idaho, New Hampshire, North Dakota, Vermont, Minnesota, Washington, and Montana, and also into the District of Columbia, and has also been increasing the number of its courts and its membership in most or all of the other states named.

May 2, 1909, the defendant established its first court in Massachusetts, and January 21, 1912, or 1913, the plaintiff established its first circle in that state. November 12, 1911, the plaintiff established its first circle in the state of Illinois (Calumet Circle, No. 22, at Chicago, Ill.); but July 5, 1905, the defendant had entered that state and established a court at Chicago, No. 41; and February 10, 1907, another court at Chicago, No. 62; and April 26, 1908, another court, No. 84, at Rock Island, Ill.; and August 31, 1908, still another at Chicago, No. 89; and July 27, 1909, still another at Chicago, No. 112; and the same year, July 11, another at Blue Island, Ill.; and October 24, 1909, still another at Chicago, No. 120; and in 1910 two more in Chicago, Nos. 124 and 125. September 22, 1910, Catherine Keleher, Ann Keleher, Catherine Laske, Helen Boyer, and Agnes Wisla filed with the secretary of state of the state of Illinois articles of incorporation, stating, "The name of such corporation is Daughters of Isabella, Illinois Circle"; the object for which it is formed is:

"The object for which it is formed is to render pecuniary aid and assistance to sick and distressed members, and to the beneficiaries of members, whether such sickness be temporary or incurable; to render pecuniary aid

towards defraying the funeral expenses of members, the funds for paying all benefits to be raised by purely voluntary and charitable contributions; to promote social and intellectual intercourse among its members; and for literary purposes."

It was to be managed by a board of five directors.

October 3, 1911, a certificate of amendment to such last-named corporation was filed, which stated that it was signed by all the directors and members of said corporation, "Daughters of Isabella, Illinois Circle," and was signed by Agnes Wisla, Helen M. Boyer, Ann Keleher, Catherine Keleher, and Catherine Laske, showing a membership of five persons. This amendment enlarged the object and purposes of the corporation, granted power to locate and establish district, local, or subordinate circles "under the name Daughters of Isabella," in the state of Illinois "or elsewhere," to adopt by-laws, etc., to purchase and hold all kinds of property, and elect and appoint all proper officers. Neither the original nor the amended certificate of incorporation makes any reference to either the New York corporation or the Connecticut corporations.

February 26, 1912, Victoria Warnesson, Rhona Flynn, Belle V. Casey, Jule Warnesson, and Lilah McManus filed articles of incorporation in the office of the secretary of state of the state of Illinois under the name "Ladies of Isabella," the corporation to be governed by a board of five directors, and giving as its object:

"Whe object for which it is formed is for the purpose of promoting the social and intellectual standing of its members, who at all times must be members in good standing of the Roman Catholic Church; for literary purposes; for the purpose of rendering such aid and assistance among its members, their designated heirs and relatives, as shall be desirable and proper, and by such lawful means as shall be deemed best by them."

September 25, 1911, the five directors of the first-named Illinois corporation, "Daughters of Isabella, Illinois Circle," and who constituted its entire membership, resigned as directors thereof, and on the same day such members thereof, said Catherine Laske, Ann Keleher, Catherine Keleher, Agnes Wisla, and Helen M. Boyer, proceeded to elect Mary E. Booth, Mary E. Boland, Catherine J. Colwell, Agnes M. Finnigan, and Agnes J. Kay, all of New Haven, state of Connecticut, and all being members of said Connecticut corporation, "National Circle, Daughters of Isabella," directors of such Illinois corporation. Thereupon the meeting was adjourned. This is the only business this Illinois corporation ever did, unless it be that the following may be called doing business, viz.: After being elected directors of the Illinois corporation, and on the 2d day of November, 1911, said Agnes M. Finnigan, Anna E. Kay, Catherine J. Colwell, and Mary E. Booth, as "Board of Directors of the Daughters of Isabella, Illinois Circuit," petitioned the National Circle, Daughters of Isabella, and its board of directors, said Connecticut corporation, therein reciting the incorporation of the Illinois corporation, the election of Mary E. Booth as president and Catherine J. Colwell as secretary thereof, and that at a meeting of the directors thereof it had been voted, November 2, 1911, as follows:

"That the president be, and hereby is, appointed a committee of one to prepare, or cause to be prepared, a petition or application to the National Circle,

Daughters of Isabella, and to the board of direction thereof, setting forth the history of the incorporation and organization of the Daughters of Isabella, Illinois Circle, and the facts with reference to the present control of said corporation, and to request, in our name and by our authority, that a contract of affiliation be arranged between the National Circle, Daughters of Isabella, as organized under the laws of the state of Connecticut, and the Daughters of Isabella, Illinois Circle, as aforesaid, whereby said latter corporation may secure the right to use the ritual, passwords, and other secret work of the National Circle, Daughters of Isabella, to have representation in the National Circle, and whereby any lodges or circles organized under the charter of the Daughters of Isabella, Illinois Circle, may be governed and controlled, in so far as the same can be lawfully done, by the officers, and under the constitution, laws, rules, and regulations, of the said National Circle, Daughters of Isabella, so as, in effect, to make the two organizations one body, and, so far as practicable, under one management, and to still maintain the corporate existence of both organizations. And we hereby further direct our president and secretary to prepare, or cause to be prepared, such a contract, and, after the same has been duly approved by a vote of both parties thereto in such manner as may be necessary, to sign and execute the same in our behalf, and, subject to the supervision of this board, to carry the provisions thereof into full force and effect as soon as practicable."

And that a contract pursuant thereto had been prepared and was submitted for the consideration of the board, and which also recited and stated that "The National Circle, Daughters of Isabella," had never qualified to do business in the state of Illinois, and had no right to establish branches in said state, and "consequently has no right to establish branches in that state (Illinois), or to use the name Daughters of Isabella therein; and inasmuch as the said Illinois corporation now controls the exclusive right to the use of said name, and the right to establish branches or circles in said state of Illinois," and that as it might not be possible for said Connecticut corporation to secure the right to do business in some of the Western states without the payment of prohibitive fees, and "inasmuch as the charter granted by the state of Illinois can be filed in such states at nominal expense," etc., and "as furthermore the Illinois Circle now has an application for the institution of a large circle in the city of Chicago," etc., the petitioners asked earnest consideration of the petition, etc. This petition was executed at New Haven, Conn., November 2, 1911, by Agnes M. Finnigan, Anna E. Kay, Catherine J. Colwell, and Mary E. Booth, as "Board of Directors of the Daughters of Isabella, Illinois Circle."

Thereupon, on the same day, at New Haven, in the state of Connecticut, the said National Circle, Daughters of Isabella, passed a resolution to execute the proposed contract; and on the same day, November 2, 1911, at New Haven, Conn., the proposed contract was executed by signing "The National Circle, Daughters of Isabella, by Mary E. Booth. Daughters of Isabella, Illinois Circle, by Mary E. Booth. Attest: Margaret E. Stammers, Secretary The National Circle, Daughters of Isabella. Attest: Catherine J. Colwell, Secretary Daughters of Isabella, Illinois Circle." That contract so signed by the persons named, all residing in the state of Connecticut and all officers in the National Circle, Daughters of Isabella, this plaintiff, but elected in the manner aforesaid controlling officers of the said Illinois corporation, surrenders the control and management of the Illinois corporation to

the Connecticut corporation, this plaintiff, makes it subordinate thereto, and in effect purports to amalgamate it therewith. If of any force
or effect whatever, it constitutes a surrender of its corporate rights and
powers to the said Connecticut corporation and a consent to be governed and ruled by its constitution and by-laws. It does not, in terms
or by implication, purport or attempt to transfer to the Connecticut
corporations, or either of them, the right of the Illinois corporation to
the name "Daughters of Isabella," or its right granted by the Illinois
charter to use such name in the state of Illinois. Clearly the agreement
had no such effect.

November 12, 1911, nine days thereafter, Calumet Circle, No. 22, was instituted at Chicago, Ill., according to the sworn list furnished by Josephine C. Curran, National Secretary of National Circle, Daughters of Isabella, this plaintiff. This was the first attempt of the plaintiff corporation to organize and do business in the state of Illinois.

At this time the defendant, as we have seen, had some nine courts duly organized and doing business in the city of Chicago and other points in the state of Illinois, the earliest of which was established in 1905. Clearly the defendant corporation was first to enter and do business in the state of Illinois and use the name "Daughters of Isabella" therein. It was not molested or interfered with in so doing from 1905 down to November, 1911, when plaintiff sought to establish its first circle in that state. I am unable to see that this plaintiff has gained any right or rights in the state of Illinois to use the name Daughters of Isabella as against the defendant corporation by or through the incorporation of the said "Daughters of Isabella, Illinois Circle," and the attempt to place it under the control of the plaintiff. the Connecticut corporation, and confer rights in the manner pointed The Illinois corporation is not a party to this suit. After the agreement between the said named persons residing in Connecticut who were officers of the plaintiff and who had caused themselves to be elected officers in the Illinois corporation, and themselves as officers of and representing the said Illinois corporation, the plaintiff corporation attempted to organize and conduct circles in Illinois, but not as "Daughters of Isabella, Illinois Circle." The Connecticut corporation, this plaintiff, was not granted any right by the state of Illinois to do business in the state of Illinois. I do not think the agreement referred to conferred any right on the plaintiff against the defendant corporation. If the plaintiff had the right to enter the state of Illinois and establish circles and do business there, such right was not superior to the right of defendant corporation long established in that state under the name National Order of the Daughters of Isabella. The state of Illinois has done nothing to exclude either party from the state or interfere with their using their corporate names in such state. After November 12, 1911, there was some conflict between certain of the members of the two organizations, this plaintiff and this defendant, in the city of Chicago, state of Illinois. It seems to me unnecessary to go into the details of those conflicts. The ladies concerned were and are most estimable ladies of the Catholic faith, and in

most matters seem to have acted in good faith in matters more or less involved in this most unfortunate litigation. The members of the courts established by the defendant claimed the right to use the name, and, under the leadership of the officers of the complainant corporation, the members of the circle established in 1911 claimed the exclusive right to the name in Illinois and elsewhere. The courts of Illinois were not invoked nor have they been at any time since.

It seems that the Connecticut corporation claims the sole and exclusive right to use the name "Daughters of Isabella" not only in Illinois, but everywhere, while the defendant, the New York corporation, by virtue of its prior incorporation and its first occupancy, etc., of all territory outside of Connecticut, and its first use of the name in all territory outside of Connecticut, claims the right to continue the use of that name everywhere outside of Connecticut. Except in Connecticut, the Legislature of no state has been appealed to nor have the laws of any state been invoked. When the defendant the "National Order of the Daughters of Isabella" entered the various states of the United States where it has gone, except Connecticut, the plaintiff corporation, "National Circle, Daughters of Isabella," had no circles, business, or business reputation in such states. It had made no attempt to enter such states and establish circles. This is true also of the first Connecticut corporation and of the unincorporated Connecticut voluntary association. There was no attempt by defendant to circumvent or injure the plaintiff. There was nothing to indicate that the plaintiff or the first Connecticut corporation was seeking or would seek to enter or use the name in those states or intended so to do. So far as appears, the defendant corporation or its incorporators were the first to think of a national body of Daughters of Isabella. It was not seeking or attempting to take the benefit of the reputation of the Connecticut voluntary association outside of Connecticut, for it had none, and it was not seeking to forestall the extension by it of the use of the name Daughters of Isabella in other states, for the Connecticut association was making no attempts or efforts to extend itself or its activities into other states.

The name Daughters of Isabella was not in general use by the Connecticut voluntary association, or by any one, until the defendant, in 1903, organized and incorporated and extended itself into the various states named. Clearly, it seems to me, in 1907, when the plaintiff was incorporated in Connecticut, the first Connecticut corporation, Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus, had no exclusive right to the use of the name Daughters of Isabella outside the state of Connecticut which it could confer on or transmit to the plaintiff corporation when it came into being, especially as against this defendant.

It seems to me that the principles enumerated in Hanover Star Milling Co. v. Metcalf and Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, and above cited and quoted, are controlling here. And it seems to me that it would work a gross injustice to now enjoin the defendant from using its

corporate name or from establishing courts under its corporate name anywhere outside of the state of Connecticut.

[2] I think the superior right to use the name Daughters of Isabella outside of Connecticut, as against the defendant, if it ever existed in the plaintiff, has been lost by nonuser, abandonment, and by laches. The plaintiff since its incorporation, except in Connecticut, has allowed the defendant corporation to go on with its work establishing courts in the numerous states named. The rights of thousands of members of the various orders of the defendant corporation are involved. Mere time is not of the essence of laches or acquiescence.

[3] The surrounding facts and circumstances are to be considered

as well as the rights and interests of all concerned.

[4] Injunctions are granted to prevent, not to redress, injuries. During all these years the plaintiff corporation has known what the defendant corporation was doing outside the state of Connecticut and has made no legal protest. The decree of the superior court of the state of Connecticut prohibits this defendant from entering that state and there establishing courts. If that decree has been or should be violated by the defendant, a party to that action, such act or acts will constitute a contempt. After the decree of the said Superior Court of Connecticut and its affirmance, the defendant ceased to do business in that state. A corporation was then formed and incorporated in Connecticut under the name "Daughters of Castile." The courts of Connecticut have not interfered therewith or with its activities. That corporation has duly organized bodies in that state, and these of choice have become affiliated with the New York corporation, and use the name "Daughters of Castile," with the added words, "in full affiliation with the National Order, Daughters of Isabella."

I know of no law, and am not informed of any, which will prevent these members of the "Daughters of Castile" from affiliating with the New York corporation. If the National Order, Daughters of Isabella, this defendant, is promoting, aiding, and abetting the Daughters of Castile to use the name Daughters of Isabella in the manner stated, and thereby is violating the injunction of the Connecticut court, it seems to me resort should be had to that court, which has ample power in the premises to enforce its own orders and decrees, but I do not see, on the evidence, that such decree is being violated. Those bodies, "Daughters of Castile," exist in and carry on their activities in the state of Connecticut and are within the reach and power of its courts. If the "Daughters of Castile" desire to affiliate with the National Order of the Daughters of Isabella, I know of no rules of law or equity that will or should prevent them from so doing. The evidence does not establish that this defendant has courts in Connecticut masquerading under the name "Daughters of Castile" in full affiliation with the "National Order of the Daughters of Isabella," and hence is using the name "Daughters of Isabella" in that state.

On the whole case, which is complex and voluminous, I am satisfied the plaintiff is not entitled to the relief prayed for, and the bill of complete will be dismissed with scate

plaint will be dismissed, with costs.

## COURTS OF THE NATIONAL ORDER OF THE DAUGHTERS OF ISABELLA.

Court		Instituted. Members	
1.	Utica, N. Y	April 25, 1903	374
2.	Meadville, Pa		95
3.	Augusta, Ga	Feb. 7, 1904	77
4.	Cuba, Wis		69
5.	New York City	Feb. 22, 1904	
6.	Carroll, Iowa		159
7.	New York City		66
8.	Naugatuck, Conn		49
9.	New York City	May 2: 1904	78
10.	Savannah, Ga	Sept 1 1904	170
11.	Wichita, Kan	Nov. 7 1904	36
12.	Freeland, Pa	Nov 12 1004	90
13.	No Court organized under this number.		
14.			10
	Emmetsburg, Iowa	Nov. 0, 1804	46
15.	New York City	Nov. 20, 1904	160
16.	Gloversville, N. Y	Nov. 20, 1904	87
17.	New York City		70
18.	Jersey City, N. J.		155
19.	Charleston, S. C		68
20.	Jersey City, N. J		295
21.	Atlanta, Ga		
22.	Brooklyn, N. Y	Jan. 29, 1905	
23.	St. Augustine, Fla	Feb. 5, 1905	91
24.	Ansonia, Conn	Feb. 12, 1905	75
25.	New York City	Feb. 12, 1905	156
26.	Pottsville, Pa	March 6, 1905	58
27.	New Britain, Conn	March 12, 1995,	93
28.	Waterbury, Conn		
29.	New York City	March 26. 1905	140
30.	Hoosick Falls, N. Y	April 30, 1905	174
31.	De Witt, Iowa		
32.	New York City	April 27 : 1905	255
33.	Winstead, Conn	May 5, 1905	-00
34.	New York City	April 26 1905	150
35.	Corry, Pa	May 7 1905	75
36.	New York City	June 11 1905	72
37.	Derby, Conn	May 21 1935	50
38.	Brooklyn, N. Y	Sout 10 1005	187
39.	Jamaica, N. Y	Ima 4 .1005	
	New Haven, Conn	Tune 4, 1005	59
41.	Chiange III	June 4, 1909	151
41. 42.	Chicago, Ill	July 0, 1005	45
	Ottumwa, Iowa		45
<b>43.</b>			59
44.	Greenwich, Conn		137
45.	New York City		335
46.	Brooklyn, N. Y	Dec. 7, 1909	177
47.	Meridian, Miss	ren. 11, 1906	
	Hartford, Conn	Jan. 7, 1900	
49.	Waterloo, Iowa		155
	Trenton, N. J.		
	Bridgeport, Conn		77
52.	Jacksonville, Fla		103
53.		May 6, 1906	
<b>54</b> .	Alexandria, Va	June 10, 1906	39
<b>55.</b> •	Shamokin Pa	June 24, 1906	124
<b>56.</b>	Macon, Ga	July 8, 1906	44

Court		Instituted.	Membership.
<b>57.</b>	Brooklyn, N. Y	.July 8, 1906	64
58.	Elizabeth, N. J	. Sept. 3, 1906	188
59.	West Hoboken, N. J	.Nov., 1906	133
60.	Baton Rouge, La	. Jan. 28, 1907	71
61.	Belleville, N. J.	. Dec. 2, 1906	
62.	Chicago, Ill	.Feb. 10, 1907	
63.	Meriden, Conn	Jan. 20, 1907	
64.	Enid, Okl.		
65.	Ossining, N. Y	March 13, 1907	122
66.	Kane, Pa		
67.	Harrison, N. J.	April 12, 1907	48
68.	Brooklyn, N. Y		
69.	Poughkeepsie, N. Y	May 12, 1907.	215
70.	Nevada, Mo	May 26, 1907	
71.	Mechanicsville, N. Y	May 26, 1907	94
$7\hat{2}$ .	Newark, N. J.	June 2 1907	106
73.	Leavenworth, Kan	Tune 17 1907	69
74.	Warren, Pa		
75.	Long Island City, N. Y.		
76.	Hoboken, N. J.		
77.	McCook, Neb.	Nov 96 1007	0±
78.	Pensacola, Fla	Nov. 96 1007	00
79.	Brooklyn, N. Y.	Nov. 20, 1001	
80.	Brooklyn, N. Y.	Tah 'e' 1000	
81.	Oklahoma City, Okl	Manch '90 1008	
82.	Stamford, Conn	May 9 1000	70
83.	Loogootee, Ind.	Anni 96 1000	$\begin{array}{cccccccccccccccccccccccccccccccccccc$
84.	Rock Island, Ill.	. April 20, 1806 "April 98-1009	48
85.	Richmond Hill, N. Y	.April 20, 1803	44
86.	Hempstead, N. Y.	. May 6, 1906 "May 91 1000	44
87.	New Brighton, N. Y	Tuno 91 1000	49
88.	Kansas City, Kan.	. July 19 1000	183
89.	Chicago, Ill.	Ana 21 1000	09
90.	Alliance, Neb.	Sout 91 1000	
91.	New Rochelle, N. Y	Oot 19 1009	
92.	Jamestown, N. Y.	'Nov' 8 1000	150
93.	Yonkers, N. Y.	Oct 95 1000	001
94.	Iowa City, Iowa	Nov 07 1000	92
95.	St. Marys, Pa	Nov. 21, 1800 Nov. 98, 1008	145
96.	Falls City, Neb.	Nov 98 1600	145
97.	New York City.	Tun 94 1000	
98.	New York City.	Sout 10 1000	57
99.	Troy, N. Y.	Fab 7 1000	199
100.	Chateaugay, N. Y.	April 18 1000	
101.	Mt. Vernon, N. Y.		
102.	North Troy, N. Y.	March 25 1000	
103.	Stoneham, Mass	May 9 1900	68
104.	Sheridan, Wyo	April 18 1000	
105.	Norwalk, Conn.	April 4 1000	115
106.	South Norwalk, Conn	May 0 1000	
107.	Cohoes, N. Y	May 9, 1909	48
108.	Tarrytown, N. Y.	July 11 1909	52
109.	Rockaway, N. Y.	June 27 1909	
110.	Newport, R. I	June 3 1909	125
111.	Renovo, Pa	June 90, 1909	49
112,	Chicago, Ill.	June 27 1909	±0
113.	Blue Island, Ill	July 11 1909	108
114.	Port Jarvis N V	July 18 1909	174
115.	Port Jervis, N. Y	Nov 28 1909	106
116.	Shawnee, Okl	Sept 19, 1909	64
117.	Covington, La.	Sept. 26, 1909	25
118.	Eugene, Or.		
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MATIONAL CIRCLE, D. OF 1. V. MATIONAL ONDER OF D. OF 1.				
Cour	t No.	Instituted. Membership.	•	
119.	Opelousas. La	. Oct. 24, 1909 37	7	
120.	Chicago, Ill	. Oct. 24, 1909 58	3.	
121.	Stapleton, N. Y	. Dec. 5, 1909	7	
122.	Malone, N. Y	. Nov. 21, 1909 83	3	
123.	Middletown, Conn			
124.	Chicago, Ill			
125.	Chicago, Ill		-	
126.	Huron, S. D	June 26, 1910 65		
127.	Corona, N. Y			
128.	Schenectady, N. Y	June 26, 1910 99		
129. 130.	Philadelphia, Pa	. July 31, 1910		
130. 131.	Whitestone, N. Y	Nov. 27, 1910 58		
132.	Philadelphia, Pa	Dec 18 1910	?	
133.	San Francisco, Cal	April 30, 1911 245	Ś	
134.	Hartford, Wis	Feb. 26, 1911 55		
135.	Chicago, Ill			
136.	Chicago Heights, Ill			
137.	Elmira, N. Y	. April 23, 1911 167	7	
138.	Cambridge, Mass			
139.	Corning, N. Y		ł	
140.	Milford, Conn	April 23, 1911 71	L	
141.	Arlington, Mass	. April 30, 1911 152		
142.	Janesville, Wis			
143.	Chicago, Ill			
144.	Chicago, Ill		-	
$145. \\ 146.$	Chicago, Ill		,	
147.	Chicago, Ill	May 14, 1911 97		
148.	Springfield, Ill			
149.		July 16, 1911 33		
150.	Winchester, Mass			
151.		Oct. 15, 1911 55		
152.	Mason City, Iowa			
153.	Chicago, Ill		٠.,	
154.	New Orleans, La	. Nov. 19, 1911 122	2	
155.	Philadelphia, Pa	. Dec. 3, 1911 49		
156.		. Nov. 19, 1911 100		
157.	Eagle Grove, Iowa			
158.	Lewiston, Idaho			
159. 160.	Oakland, Cal	. Feb. 4, 1912		
160. 161.	Flushing, N. Y.			
162.		. Feb. 18, 1912		
163,	Woonsocket, S. D			
164.	Kingston, N. Y			
165.		.Feb. 11, 1912		
166.	Newton, Mass	.Feb. 18, 1912 199	)	
167.	Concord, N. H		7	
168.	Franklin, La		)	
169.	Lincoln, Ill			
170.	Minot, N. D			
171.	Lexington, Mass			
172. 173.	Sacramento, Cal	. May 5, 1912 78		
174.	Bedford, Ind			
175.	Shenandoah, Pa	. April 28, 1912 88		
176.	Malden, Mass	. May 12, 1912		
177.	Houma, La	. June 23, 1912 35		
178.	Jeanerette, La	. July 7, 1912 36		
179.	Le Mars, Iowa	. July 28, 1912 125		
180.	St. Joseph, Mo	. Oct. 6, 1912 56	j	
	252 F.—53			

Cour	t. No.	Instituted.	Membership.
181.	Santa Rosa, Cal		
182.	Beaumont, Tex		
183.	No. Cambridge, Mass		
184.	Marshall, Tex		
185.	Brewster, N. Y	Dec. 1, 1912	
186.	Jersey City Heights, N. J	Dec. 15, 1912	73
187.	Somerville, Mass		
188.	Glens Falls, N. Y		
189.	Sheldon, Iowa	. Jan. 25, 1913	72
190.	Rock Rapids, Iowa	. Feb. 1, 1913	
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# PARK v. DIRECT NAVIGATION CO., Inc.

(District Court, S. D. Texas, Galveston Division. July 18, 1918.)

#### No. 71.

1. Salvage 531-Assistance Against Fire-Efficient Aid-Amount.

Where captain and crew of tug promptly went to aid of oil-burning tug on fire, when her captain whistled for help, incurring no danger, and passing lines of hose to burning tug, which its crew used to extinguish fire, so that tug suffered no damage, harbor being supplied with fire-fighting vessels, award of 3 per cent. of value of salvaged tug, or \$1,000, will be made to owner, master, and crew of other.

2. SALVAGE \$\infty 38-Apportionment.

Award of salvage for assisting another tug to extinguish fire on board, service involving no danger, and its meritorious character consisting in prompt response to call for help, will be apportioned two-thirds to owner and one-third to master and crew of salving tug.

In Admiralty. Libel in personam by W. G. Park against the Direct Navigation Company, Incorporated. Decree for an award of salvage, and its apportionment ordered.

Terry, Cavin & Mills, of Galveston, Tex., for libelant. W. T. Armstrong, of Galveston, Tex., for respondent.

HUTCHESON, District Judge. This is a libel in personam, brought by W. G. Park, owner of the tug R. C. Veit, on behalf of himself and the captain and crew, for salvage services rendered the tug Louise, the property of the respondent, the Direct Navigation Company, under the following circumstances:

About noon on the 27th day of March, 1914, the tug Louise, an oil-burning tug, having taken oil into her tank at Southern Pacific Pier A, cast loose to go on her way to Lynchburg. Before she had gotten out of the slip into the channel, the engineer discovered an oil fire in her bilges, and immediate efforts were taken by the engineer and crew, by the use of steam and hose, to extinguish the fire before it could spread and cause the blowing up of her oil tanks, which were located directly over and a little forward of the bilges. Shortly after the boat had entered the channel, the water glass on the boiler having been broken for the benefit of the escaping steam, the engine shut down. All openings into the boat which led to the hold and the engine and fire rooms being closed and the boat drifting, the captain of the tug Louise blew two short blasts of his whistle for assistance. The crew of the Veit, which was lying at the Southern Pacific dock, Pier B, and which had been passed by the Louise on her way down the channel, had noticed

black smoke issuing from around her stack and from around the umbrella over her stack, and, anticipating trouble, had gotten herself ready to go to her assistance, should she call. Within a very brief space of time after the call, not more than five minutes, the Veit lay alongside the Louise, and in response to the call of Capt. Norman of the Louise. "For goodness sake, give us some water! we are burning up," the Veit took hold of the Louise with a single line, and, lying to at her stem, caused two lines of hose to be passed over to the Louise, and commenced pumping water through them. While there was no panic on board the Louise when the Veit arrived, there was a lively appreciation of the fact that the situation might become dangerous, as evidenced by the fact that the lifeboat of the Louise had been lowered, the clothes of some of the men had been brought on deck, and preparations had been made to leave the Louise, should it become necessary to do so. In a short while after the Veit arrived and commenced pumping water. the fire was extinguished, through the joint action of the steam and water hose of the Louise and the water hose and assistance given by the Veit. No member of the crew of the Veit went aboard the Louise, but all of the work of putting out the fire was done by her own crew. After the fire was extinguished, with no damage, except some marks upon and discolorations of the woodwork, and dirt and filth in the bilges and in the fire and engine rooms from the discharge of the water therein, the Veit, at the request of the Louise, towed the Louise back into the slip, moored her to the dock, furnished her with steam to pump out her hold, and stood by until the condition caused by the fire had been remedied. In all, the services of the Veit consumed about three hours.

All of this took place in the harbor of Galveston a short distance from the docks, in calling distance of the municipal fireboat; many tugs, amply supplied with fire-fighting apparatus, were present, capable of furnishing assistance; yet no tug came to the assistance of the Louise in response to her call, except the R. C. Veit. So that, while it is quite true that the services performed were performed at a place and under circumstances attended with no appreciable danger to the crew of the Veit, and where, had the Veit not arrived, it is morally certain other assistance would have arrived in time to prevent the destruction of the Louise by fire, the fact remains that the Veit did, with great promptness and resourcefulness, repair to the scene of the trouble, and either alone or with the assistance of the fire apparatus of the Louise herself, and her crew, did extinguish the fire without any loss to the owners.

[1] That the facts present a case for salvage is clear. It is, however, equally clear that the salvage is one of a low order, distinguished by no element which lends a meritorious character to salvage service, except the one element of great promptness and efficiency in the matter of the succor given. Much testimony was presented by the respondent to prove that the fire was negligible, that the risk was nil, that the peril was a mere bagatelle, and, if the theory which this evidence is designed to establish, that the services could not be of a meritorious character, because neither the salved not the salvaging vessel were in

great peril, were a correct one, it would be a defense to this case, efficient and complete. But salvage cases are directly subject to the influence of the maxim that "foresight and not hindsight must be the test by which to judge the value of the services," and that it will not do to say, because the issue was met with absolute success, and peril and loss avoided, that there shall be no award.

In this class of cases the court endeavors, in passing upon the award, to give the matter that direction which the circumstances existing at the time the service was rendered should give it, and not that suggested by later events, so that, while it is true that the loss was slight, and therefore, looking backward, it might be thought the service was slight, there must be borne in mind that the proof is clear and positive that the captain and crew of the Louise were apprehensive that the fire might increase in fierceness, that this would cause the tanks to explode, and that under that apprehension the captain blew for help, because, and only because, of the existence of the fire. While it is the opinion of the court, in the light of the evidence, that, even had the Veit not arrived. the damage would perhaps have been slight, and that the pumps and steam of the Louise might unaided have extinguished the fire, it is equally the view of the court that neither the master of the Louise nor the master of the Veit believed so at the time, and that they both acted upon the belief that, unless the Veit gave succor, great damage might ensue.

In addition to the claim that the service was not a salvage service, the respondent asserts that by reason of a contract between the libelant and the Southern Pacific Company, by the terms of which the libelant was obligated to furnish fire protection and other services to the property of the Southern Pacific Company, the services were contractual, and not voluntary; and he makes the further contention that, if the contract did not deprive libelants of the right to recovery, it creates a situation in which the Southern Pacific Company was entitled to share in any award that may be made. That his contention is unsound is shown both by the terms of the contract, which limits the period in which the services must be rendered by the tug Veit to the time between the hours of 6 p. m. and 6 a. m., while this occurrence was at noon, and not between the hours named, and by the further fact that there is no evidence that the Louise was the property of the Southern Pacific Company, or came within the description of the subject-matter of the contract, even had the services been performed within the period stipulated therein. The court therefore discards this defense as wholly untenable, either in bar or diminution of the libelant's claim. The court finds that the services were voluntary, were efficient, and were rendered solely by the tug Veit in the interest of her owner, and the master and crew in the interest of themselves, and no other.

It will serve no useful purpose to catalogue the fundamental considerations stated and restated in the hornbooks which underlie an award. It will be sufficient to point out that here was no bold and daring exploit of the kind which furnishes admiralty with its dramatic cases of salvage award, and that, were this a case decided under the influence alone of the ancient rule of risk and peril at sea, little, if any,

salvage award could be made. The more modern decisions of courts of admiralty, however, show recognition of a marked change, not in principles, but in the application of the principles of salvage to the conditions of modern seafaring, and while in the inception of salvage the element of risk and peril was the dominating element in recovery, now the element having the largest influence seems to be that of the ability to render instant and effective service, and the beneficial character of the service rendered. In short, while in ancient days the more difficult the enterprise, whether through defective equipment or through the vis major of the sea, the greater the salvage return, now the more the enterprise is made easy, through highly developed and efficient equipment, such as steam apparatus and equipment, the larger the recovery, because, the fundamental principle of salvage being voluntary and effective service, the modern law of admiralty looks with favor upon efficient salvage equipment, which makes certain, speedy, and effective service.

This view of the law is excellently stated by Judge Toulmin in The Pleasure Bay (D. C.) 226 Fed. 55, in which case, after quoting from The Blackwall, 10 Wall. 1, 19 L. Ed. 870, as follows:

"Steam vessels are considered as entitled to a liberal reward, not only because the service is usually rendered by a costly instrumentality, but because the service is in general rendered with greater promptitude and is of a more effectual character."

—he says, "In case of fire, the first moments are the most important," and further applying the principle to the facts of that case:

"The services rendered by the Linnet were prompt, meritorious, and efficient. They were effective in relieving the steamer from danger, which was not only reasonably to be apprehended, but was, in my opinion, from the evidence, actually present. There was no particular danger to the Linnet or crew involved; but assistance rendered at a time most needed is an important element."

Of course, the question of peril and arduous labor and great adventure is still a very high factor in a salvage award, and had the services in this case been rendered by the well-equipped Veit in a case where no other equally well equipped vessel could be obtained, and under circumstances of great danger to itself and crew, the award, under the influence of these conditions, would have been much larger. Because of the fact that the services rendered were in a harbor equipped with other fire protection, notwithstanding the fact that the Veit unquestionably assisted the Louise, and the further fact that the salvaged vessel suffered no loss, the libelant must be content in this case with a small award. See The Indian, 159 Fed. 20, 86 C. C. A. 210, and Guffey Petroleum Co. v. Borison, 211 Fed. 595, 128 C. C. A. 194, both decisions of the Circuit Court of Appeals for the Fifth Circuit.

[2] Giving to the principles thus announced their proper influence in this case, there should be an award to the libelant of \$1,000, approximately 3 per cent. of the value of the Louise, which the undisputed testimony fixed at \$30,000; said sum being apportioned \$666.67, or two-thirds, to the owner, and one-third, or \$333.33, to the master and crew, to be distributed to them in proportion to their wages; and a decree for such sum and such apportionment is hereby ordered.

#### UNITED STATES v. HUTCHINGS et al.

(District Court, W. D. Oklahoma. March 4, 1918.)

No. 839.

1. NAVIGABLE WATERS &=1(6)—ARKANSAS RIVER—INDIAN RESERVATIONS.

The Arkansas river at a point between Osage and Pawnee counties, Okl., is not navigable, and the Osage Tribe acquired title to the bed as far as the middle of the main channel of the stream at the date of Act June 5, 1872.

2. WATERS AND WATER COURSES &=89—INDIAN LANDS—SURVEY.

Where the original government survey commenced in 1871 and finished in 1872 plainly indicated an island in the Arkansas river which bounded the Osage Reservation, the fact that the island was not meandered or surveyed did not affect the claim of the tribe thereto; indeed, title would not have been affected had the island been wholly ignored.

3. Indians \$\iiii 13\text{—Indian Lands-Allotment-Illegality.}

Where an island belonging to the Osage Tribe was claimed by others, suit by the United States for the benefit of the tribe and allottee cannot be defeated on the ground of the illegality of the allotment.

4. Waters and Water Courses €=>89—Indian Reservations-Meander Lines of River.

Where an Indian reservation was by act of Congress bounded by the main channel of a river, the meander lines of the river are not to be deemed the traverse lines bounding the reservation.

5. Waters and Water Courses &= 89—Indian Reservations—Boundary—"Main Channel"—"Channel."

Under Act June 5, 1872, describing the Osage Reservation as bounded by the main channel of the Arkansas river, the "main channel" does not simply mean the main branch of the river, for the "channel" of a river is less comprehensive and means primarily its bed, and hence the reservation extended to the main channel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Channel; Main Channel.]

6. WATERS AND WATER COURSES 52-BOUNDARIES-ISLAND.

The division line between opposite riparian owners on a nonnavigable stream would be the middle of the stream, and, if that line falls upon an island, a division of the island is required.

7. WATERS AND WATER COURSES 59-INDIAN LANDS-RESERVATION.

An island between Osage and Pawnee counties, Okl., held to belong to the Osage Indian Tribe under Act June 5, 1872, which described reservation as extending to main channel of Arkansas river, which at that time was on the side of the island furthest from the reservation.

In Equity. Suit by the United States against G. W. Hutchings and others. Decree for complainant.

Francis J. Kearful, Asst. Atty. Gen., John A. Fain, U. S. Atty., of Lawton, Okl., and Isaac D. Taylor, of Oklahoma City, Okl., for the United States.

S. P. Freeling, Atty. Gen. of Oklahoma, Ledbetter, Stuart & Bell and Burwell, Crockett & Johnson, all of Oklahoma City, Okl., and Dillard & Blake, Rice & Lyons, and A. J. Biddison, all of Tulsa, Okl., for defendants.

COTTERAL, District Judge. This suit involves the title to an island, located in the Arkansas river between Osage and Pawnee coun-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ties, in this state, described by the government survey of 1908 as lot 7, in section 25, township 21 north, range 8 east, and lot 11, in section 30, same township, range 9 east, and extending across the range line

dividing those sections.

The bill was filed by the United States, for itself and as trustee for the Osage Tribe of Indians, and Larry Nolegs, one of its members, against the commissioners of the state land office, the Attorney General and an assistant, and certain individuals and companies, and charges that the tribe acquired title to the island, as a part of its reservation, by deed of the Cherokee Nation to the United States in trust for the tribe on June 14, 1883, and by an act of Congress, approved June 5, 1872 (Act June 5, 1872, c. 310, 17 Stat. 228); that in June, 1909, the island was duly allotted to Nolegs as a part of his surplus lands, pursuant to the Act of June 28, 1906 (34 Stat. 539, c. 3572), whereby the underlying minerals were reserved to the tribe and are subject to lease and have been leased under federal supervision for its benefit; and that the defendants have no right, title, or interest in or to the island. A decree is prayed for an injunction against acts of the defendants threatening interference with the possession of the island by the United States and the allottee, and removal of the oil and other minerals therefrom, and for other proper relief.

The defendants deny that the island ever became a part of the reservation, or that the tribe acquired any title to it, or that it has been leased for the tribe. The state officers consent in their answer to the suit as against the state, and allege that the Arkansas river is a navigable stream, and that as a result title to the island inured to the state on its admission in 1907, and that it was rightfully leased for the production of oil and gas by the commissioners of the state land office to the Jim Crow Oil Company, according to state law. That company adopts the same averments in its answer. The answer of defendant Thomas, and his lessees, Guffey and the Producers' Oil Company, denies that the land involved is an island, as shown by omission from the government survey of 1871 and 1872, and makes claim to the premises upon homestead patents for portions of sections 25 and 26. on the south shore of the river, opened to settlement and entry as public lands on September 16, 1893. Act March 3, 1893, c. 209, 27 Stat. 640; Proclamation Aug. 19, 1893, 28 Stat. 1222. The death of Thomas having occurred pending the suit, a revivor was ordered against his personal representative. The defendant Edminston and his lessee, the Milliken Oil Company, also deny the existence of the island, and claim title under a like homestead patent to a grantor for lands in section 30, on the south shore of the river. That company, after a retransfer of interest to Edminston, withdrew from the suit.

The defendants were restrained by temporary orders from interfering with the possession of the plaintiff and the allottee. The receivership in the case No. 75, entitled "United States v. Brewer-Elliott Oil Company and Others," extends to the oil production in sections 25 and 30, except upon the island. On stipulation, it was ordered that the equipment of the Producers' Oil Company might be removed or sold, and the proceeds of any oil in its tanks deposited with the

clerk of this court. Another order also enjoined the defendant Edminston from interfering with the operation of a lease.

[1] In the case No. 75, tried jointly with this, questions were decided of vital importance to this controversy, and for convenience the opinion and findings in that case are adopted without formal repetition. The title of the Osage Indians to the bed of the Arkansas river was considered, and it was determined that the river at the location of the island is not and has not been navigable, and that in consequence the Osage Tribe acquired title to the bed as far as the middle of the main channel of the stream, at the date of the Act of June 5, 1872.

As no claim is made on behalf of the state and its lessee to the island except on the ground of the navigability of the river, they have no title to or interest in the island. This leaves the controversy as between the government, representing the tribe and allottee, and the adjacent landowners and their lessees on the extreme south shore of the river.

The title of the tribe is rested on the two grounds: That the island was conveyed by the Cherokee deed of June 14, 1883; and that it was included within the limits of the reservation confirmed by the Act of June 5, 1872, whereby it was bounded by the main channel of the river, then located on the south side of the island.

[2] The assertion that the island had no existence at the date of the original government survey, commenced in 1871 and finished in 1872, is wholly untenable, as it was indicated in the river by the plat and field notes, and its substantial formation is clearly established by the evidence. The island was not meandered or surveyed into lots, but the omission is unimportant, as the engineers generally did not survey islands in the Arkansas river; and the title would not be affected if the island had been entirely ignored. Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Moss v. Ramey, 239 U. S. 538, 36 Sup. Ct. 183, 60 L. Ed. 425. The definite official survey of the island occurred in 1908.

[3] The allotment is said to be illegal; but, if the tribe acquired title to the island, it concerns only the government and the Indians, and, as no other objection to its validity appears, it should be sustained.

Referring to the deed of 1883, it is certain that the island was included in the description by express recital in the note indorsed on the annexed plat. The authority for including the islands, if not located on the Osage side of the main channel, is sought to be sustained because they constituted lands of the Osage west of the river, for which appropriation was made in favor of the Osages by the Act of March 3, 1883 (22 Stat. 624, c. 143). But there is no showing that they ever claimed such lands; and, furthermore, it seems more than doubtful that islands fall within a description of lands west of the river. In view of the uncertainty existing under the present record as to the force of the deed with respect to the islands, and as title by the deed is not essential to the result and may be presented more fully in other litigation, the question will be left open in this case.

[4] The further basis of title presents a question of fact as to the location of the main channel of the river; that is, which of the two

channels shown to exist on the opposite sides of the island was the main channel when the Osage Tribe acquired title, on June 5, 1872.

A contention advanced by counsel for mineral claimants of the island is that, as the reservation was composed of specified descriptions and acreage, the north meander lines of the river constitute traverse lines limiting the extent of the reservation, and they cite Producers' Oil Co. v. Hanzen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330, as authority. But, as that case shows, a meander line is not a boundary, and there is no fact or circumstance in this case tending to establish such limitation.

[5, 6] It was further contended by the same counsel that the act of June 5, 1872, in bounding the reservation by the "main channel" meant simply the "main branch" of the river in the sense of the main Arkansas river. But the terms are not equivalent, as a "channel" of a river is less comprehensive and means primarily its bed, while a "branch" of a river may have two or more separate channels. The act clearly indicates a legislative intention to designate the main or principal channel as a boundary at places where this river had more than one channel, as, for example, where it divided about an island. In such case, the main channel and not the entire channel between the extreme shores was fixed, therefore, as the true boundary. Otherwise, the plain language of the act would not be given effect.

If the boundary had been described merely as the Arkansas river, the division line between the riparian owners would be the middle of the stream; and, if that line had fallen upon the island, a division of the island would be required accordingly. Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857. But such was not the case, and the location of the main channel on June 5, 1872, must be found in order to determine whether the island was within or without the reservation.

[7] As showing the conditions found by the engineers in 1871-72, the official plat returned to the General Land Office of township 25 north, range 8 east, shows an "isle" at the east line of the section, also the range line, near the north margin of the river, and an arrow, below and slightly to the left, in the middle of the river, pointing downstream. In the field notes is a call on that line from a location below north to the right bank of the river, another north to a half mile corner in the river, and another farther north to the island, shown to be at its north shore; and the width of the island is given.

H. J. Behning, county surveyor of Osage county, who was familiar with the river at that locality, made during his term (1907-1913) a survey, and had prepared maps of the island, river, and adjacent lands with the aid of the previous surveys. He showed by his measurements that at the date of the survey of 1871-72 the south channel was about 75 feet wider than the north channel, and further, by the changing conditions in the channels, including erosions at the north shore of the island and accretions at its south shore, that afterward the north channel had become wider than the south channel. And his opinion was added that the north channel was the minor one at the date of the original survey. There was corroboration in the testi-

mony of two employés on the reservation, who hunted on the island in 1882 and then waded the north channel, finding 15 or 20 steps of shallow water and conditions of willow growth and drift. One of them stated that the south channel was the wider and deeper, contained more water, and was too deep to cross. The other witness gave his estimate that there was more water in the south chanel, but without recalling observation of it at the time.

A traveler who camped near the island at a time of high water in December, 1882, or January, 1883, stated that the island appeared then to split the river in the middle, and on fording below the island found the swifter and deeper water at the north shore; but he did not take particular notice of the north channel, or the width of either. A farmer and stockman who settled at Cleveland early in 1883, and was familiar with the river from that date, described the north channel as being wider, carrying about all the water at low stages, and the south channel as increasing in depth and width from a big rise in 1885, and containing much water when the river was up, but no running water for a considerable part of the year. The testimony of the other witnesses dates from the fall of 1893 and forward, and it confirms the fact that from that year the main channel has been on the north side of the island. In addition, the evidence covers in detail the conditions which have obtained in the river.

The later and present state of the channels does not control, but should have due wieght in connection with the other evidence in arriving at the comparative prominence of the channels in 1872. It is substantially proved that the south channel was the wider and contained the chief flow of water in that year. The fact appears to be consistent with a subsequent change in the extent of the channels in view of the showing of erosion at the north shore of the island and accretion at its south shore, and the characteristics of the two channels. While the proof is not to a certainty desirable, upon the entire evidence a finding is required and will be made that, at the date of the grant of the Osage Reservation to the tribe in 1872, the main channel of this river was on the south side of the island, and in consequence the island then was located within and was a part of that reservation.

A decree will therefore be entered to the effect that the Osage Tribe acquired title to the island in controversy as a part of its reservation; that it was lawfully allotted as surplus land to Larry Nolegs; that the underlying oil, gas, and other minerals are reserved to the tribe and subject to lease and disposal only as provided by the laws of the United States; and that the title of the tribe and allottee and the plaintiff as their trustee to said island and minerals be duly quieted. And further that the defendants and their lessees, grantees, agents, representatives, and successors in interest have no title to or interest in said island or minerals; and that they be perpetually enjoined from asserting the same or interfering with the possession of the island and production of minerals thereon by the plaintiff and said tribe and allottee; and that the costs of this suit be taxed to the defendants.

referee.

#### In re PETERSEN.

### (District Court, D. Nevada. June 26, 1917.)

- 1. Bankruptcy \$\iff 228\$—Decision of Referee—Setting Aside by Counsel.

  If it is purpose of counsel by agreement to set aside decision of referee in bankruptcy, they should do so by some direct and unequivocal action, not by attempting to review order without consulting referee, or securing any records from his office.
- 2. Bankbuptcy ← 228—Determination of Referee—Review,

  If counsel wish District Court to review determination of referee in bankruptcy, record to be examined should be made up and submitted, under the Bankruptcy Act and the General Orders in bankruptcy, and until this is done the court cannot review the proceedings before the
- 3. Bankruptcy \$\sim 228\$—Order of Referee—Review—General Orders.

  A party to an order made by the referee on the merits cannot have a review of it, unless he pursues the mode prescribed in General Order in Bankruptcy No. 27.
- 4. Bankbuptey € 228—Order of Referee—Review.

  The Bankbuptey Act contemplates that the record on review of an order of the referee shall be made up by him and also by him certified to the District Court.
- 5. Bankruptcy &=3421/2—Order of Referee—Review—Summary of Evidence.

On review of order of referee in bankruptcy sustaining objections to claim on note, secured by chattel mortgage and presented by bankrupt's wife, if existence of fraud as to creditors on part of bankrupt is still in issue, there should be a detailed summary of the evidence, not a mere statement of conclusions, in relation to the alleged fraud.

6. Bankbuptcy &= 228—Obder of Referee—Review—Agreement as to Evidence.

On review of order of referee in bankruptcy, agreement as to what conclusions should be drawn from evidence does not afford District Court sufficient data to enable it to determine whether there has been misstatement of evidence, particularly when referee's summary of evidence is not submitted.

In Bankruptcy. In the matter of Emil Petersen, bankrupt. On review of order sustaining objections to claim on note. Matter recommitted to referee.

See, also, 252 Fed. 849.

George Springmeyer, of Reno, Nev., for petitioner. James D. Finch, of Reno, Nev., for trustee.

FARRINGTON, District Judge. In this case Emma Petersen presented as a preferred claim against the bankrupt a note for the sum of \$3,000, secured by a chattel mortgage. The trustee objected to the claim, that it did not sufficiently describe the property, and that it was given to hinder, delay, and defraud the creditors of the bankrupt. The claimant asks the court to review the order of the referee in bankruptcy sustaining these objections.

An agreed statement of facts and a brief on behalf of the claimant were filed in this court. Accompanying these documents was a stipulation in the following words:

"It is hereby stipulated and agreed, by and between the petitioner and trustee, acting by and through their respective attorneys, as follows: That the trustee waives filing a brief and submits the matter on the showing made before the referee, that oral argument before the court is waived by both parties, and that this matter may stand submitted upon petitioner's brief and the agreed statement of facts herein: Provided, that the court does not require further authorities or oral argument."

Save these three documents, nothing has been filed which the court may consider on review.

Section 39 of the Bankruptcy Act declares that the-

"referees shall \* \* \* (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges. \* \* \* (9) Upon application of any party in interest, preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them when a stenographer is not in attendance." Act July 1, 1898, c. 541, 30 Stat. 555 (Comp. St. 1916, § 9623).

The twenty-seventh order in bankruptcy reads thus:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The referee has not certified the question presented by the petition for review, or the summary of the evidence, or his findings or order thereon; in fact, he has transmitted no records of the hearing before himself or pertaining to a review in this court, although it appears from the agreed statement of facts that a petition for review was filed. Except the assertion in the agreed statement that the order is based on a misstatement of facts, there is nothing to indicate that the referee was requested by either party to make up the records embodying the evidence, or the substance thereof, as agreed on by the parties. The agreed statement, though it purports to have been made by James D. Finch, attorney for the trustee, and George Springmeyer, attorney for the claimant, Emma Petersen, is signed by Mr. Finch only. The statement recites facts showing that the bankrupt actually owed the claimant, then his wife, some \$3,000, secured by a chattel mortgage duly recorded. It asserts that the mortgagor and the mortgagee "both testified that the mortgage was given bona fide, and there was no evidence to the contrary, and that both parties endeavored to comply with all the requirements of law"; that the mortgage was upon all work stock, driving horses, harness, and blacksmith tools then owned by the mortgagor, also on all book accounts and bills owing the mortgagor, two buggies, one spring wagon, and farming implements, all of which were specifically pointed out and designated at the time the mortgage was executed. The mortgage did not include range horses, eight wagons, a safe, two hay presses, grain, wood, and hay owned by the bankrupt. Some of the work horses died, and were not replaced. In the course of his business as a freighter, the mortgagor took his horses from one county to another, but his headquarters were in Ormsby county, Nev.

"The mortgagee did not receive any payments on the mortgage; she knew, and did not object to the mortgagor giving a second mortgage, and making small payments on it."

The statement concludes as follows: The trustee objected to the original claim—

"as a secured claim, because the mortgage did not contain an adequate, proper, or full description of the location of the property attempted to be mortgaged therein." "Thereupon the referee disallowed the claim as a secured claim, but allowed it as an unsecured claim, upon the ground of insufficiency in the description of the mortgaged property, and upon the ground of constructive fraud. The mortgagee, claimant under claim No. 15, filed a petition to review the referee's decision, upon the grounds that the decision is against the law and the evidence, and is based upon a misstatement of the evidence adduced at the hearing."

- [1, 2] What purports to be a copy of the referee's decision and order appears in the petitioner's brief. The inclusion of this order in the brief constitutes its only authentication. There is no copy of the mortgage, or of the referee's summary of the evidence, if he made one. In the brief it is stated that the mortgagee objected to the referee's statement of the evidence, and, in order to avoid the necessity of having the evidence taken again, the attorneys had entered into an agreed statement of the evidence. It is not easy to avoid the suspicion that counsel have attempted to procure a review of an order without consulting the referee, or securing any records from his office. If it is their purpose by agreement to set aside the decision of the referee, they should do so by some direct and unequivocal action. If they wish this court to review the determination of the referee, the record to be examined should be made up and submitted in the manner provided in the Bankruptcy Act, and in the General Orders in Bankruptcy. Until the statutory practice is substantially complied with, the court cannot review the proceedings before the referee.
- [3] A party to an order made by a referee after a hearing on the merits, cannot have a review of it unless he pursues the mode prescribed in General Order 27. Collier on Bankruptcy, p. 604. This method seems to be exclusive. Collier on Bankruptcy, p. 604; Hegner v. American T. & S. Bank (C. C. A. 7th Cir.) 187 Fed. 599, 109 C. C. A. 429, 26 Am. Bankr. Rep. 571; In re Home Discount Co. (D. C. Ala.) 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Greek Mfg. Co. (D. C. Pa.) 164 Fed. 211, 21 Am. Bankr. Rep. 111; In re Clark Coal & Coke Co. (D. C. Pa.) 173 Fed. 658, 23 Am. Bankr. Rep. 273.
- [4] To reverse an alleged order of that official, on a record no part of which emanated from his office, would be manifestly unfair. The Bankruptcy Act contemplates that the record on review shall be made up by the referee, and by him certified to this court. Collier on Bankruptcy, p. 604.

[5] In the brief counsel declares there is not one scintilla of evidence that the mortgage was given to hinder, delay, or defraud cred-

itors, and none to show any actual fraud. The review here is asked on the ground that the order is based on a misstatement of the evidence, but the incorrect statement is not before me. If the existence of fraud is still an issue in the case, there should be a detailed summary of the evidence, not a mere statement of legal conclusions in relation to the alleged fraud. In the absence of a copy of the referee's summary, its contents can be gathered only inferentially from the brief and the copy of the decision. From the latter the following quotations are taken:

"With mortgagee's knowledge and consent he [the mortgagor] continued to use and treat the mortgaged animals and other property as his own, taking them where he would, losing some horses by death in distant work. He also, with her knowledge and consent, collected bills and accounts, applied the money collected to his own use, and never accounted to mortgagee, or paid her anything. Likewise, without objection from the mortgagee, who knew of the transaction, he incumbered most of the mortgaged property with another mortgage, directly violating the written terms of the first mortgage. Mortgagee testified that she took the mortgage to protect herself, and (under cross-examination) also to enable her husband to keep on in business."

"The description of all the property except the bills and accounts is clearly

insufficient."

"The testimony of mortgagee also showed that, though the mortgage was given to secure a bona fide debt for funds actually advanced by her or in her behalf, yet that she had in mind, not merely the securing of her own debt, but the protection of her husband against the claims of others, to whom he was also in debt, that he might continue his business."

If the decision of the referee is correctly copied, he must certainly have heard some testimony which he believed sustained the objections to the mortgage. Whether this evidence will support a finding that the mortgage was executed to hinder, delay, or defraud creditors, is the question. Possibly this is where the difference between the referee and the attorney for the mortgagee lies.

[6] An agreement as to what conclusions should be drawn from the evidence does not afford sufficient data to enable me to determine whether there has been a misstatement of the evidence, particularly when the referee's summary of the evidence is not submitted. On the record presented, this court can neither uphold nor reverse the decision of the referee. The whole matter must therefore be recommitted to that officer, for such further proceedings as the litigants are entitled to demand under the law.

#### In re PETERSEN.

### (District Court, D. Nevada. August 25, 1917.)

1. CHATTEL MORTGAGES \$\infty 47\to Description of Property.

As against creditors and others who may acquire adverse rights, mortgage of specified number of articles or animals out of large number is void for uncertainty, when particular articles are not separated or designated, so they can be distinguished from others of same kind; but it is enough if description, supplemented by suggested inquiries, enables parties to identify property.

2. CHATTEL MORTGAGES \$\infty 47-Description of Property-Situs.

The situs of the property covered by chattel mortgage is usually regarded as an important fact in its identification, which must be accomplished by the description, to validate the mortgage against creditors and others who may acquire adverse rights.

3. CHATTEL MORTGAGES \$\infty 49(1)\$—Description of Property.

A mortgage of property described as one span of colts, three years old, one gray and one bay, is defective: but if it further states the colts are in the mortgagor's possession on his farm, in a certain township, county, and state, the description is sufficient.

4. CHATTEL MORTGAGES \$\simeq 47\to Description of Property-Sufficiency.

Chattel mortgage covering "seventeen head of work stock," etc., and books and accounts due mortgagor in business conducted under his name, insufficiently described property to be valid against creditors; neither location of property nor residence of mortgagor or mortgagee being given.

5. BANKRUPTCY \$\instructure{172}\to Validity\to Law Controlling.

The validity of a chattel mortgage against creditors represented by a trustee in bankruptcy must be determined by the law of the state in which the mortgage was made and where the property was situated.

6. BANKRUPTCY €==180—CHATTEL MORTGAGE—STATUTE.

Under Rev. Laws Nev. § 1083, as to fraudulent conveyances, chattel mortgage given by debtor to wife 12 years after indebtedness to her was contracted, no payments having been made, and intended to protect debtor's property from his creditors, was void as to his trustee in bankruptcy.

In Bankruptcy. In the matter of Emil Petersen, bankrupt. On petition for review of an order of the referee refusing to allow a preferred claim. Order affirmed.

See, also, 252 Fed. 846.

George Springmeyer, of Reno, Nev., for petitioner. James D. Finch, of Reno, Nev., for trustee.

FARRINGTON, District Judge. The referee in bankruptcy, having refused to allow as preferred the claim of Emma Petersen, she has filed a petition for review. The questions certified by the referee are: First, whether the mortgage contains a proper description; and, second, whether fraud is shown.

The description of the property, as it appears in the chattel mortgage, is as follows:

"Seventeen (17) head of work stock, seventeen (17) harnesses therefor, six (6) driving horses, two (2) buggies, one (1) spring wagon, one (1) lot of binding chains and stretchers, one (1) lot of blacksmith tools, one (1) lot of plows, harrows, scrapers and other farming implements, and all and singular the book accounts and bills due or unpaid said mortgagor in his business carried on and conducted under the name of Emil Petersen."

In the summary of the evidence, the referee says the mortgage did not include all of the mortgagor's horses, wagons, machinery, etc., nor any stock of hay, grain, or wood, but covered all book accounts and bills owing to him.

"Beside the mortgaged 'work stock,' which included mules, draft, saddle and driving horses, bankrupt had, at the time the mortgage was given, other saddle and driving horses, beside range horses—the range horses being in another county than that in which his hay yard business was conducted, which was in said Ormsby county. The bankrupt at the same time owned

eight or more wagons, two hay presses, three bob sleds, a safe, and other articles of property not included in the mortgage."

[1] It is a well-established rule that the mortgage of a specified number of articles or animals out of a large number is void for uncertainty, when the particular articles intended to be conveyed are not separated or designated, so they can be distinguished from others of the same kind. As against creditors and others who may acquire adverse rights, the mortgage is not effective unless it affords some means of identifying the property. It must give some marks or characteristics by the aid of which the thing mortgaged can be singled out. It is enough if the description, supplemented by inquiries which the instrument itself suggests, will enable a third party to identify the property. The description must contain enough to direct the mind of the searcher to facts from which he may ascertain the property with reasonable certainty. As was said in Ehrke v. Tucker, 99 Kan. 52, 160 Pac. 985:

"The suggestion which indicates the line of inquiry must come from the mortgage itself, and cannot rest alone in the minds of the mortgagor and mortgagee." Northwest Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307; Jaffrey v. Brown (C. C.) 29 Fed. 476; Street v. Sederburg, 41 Colo. 128, 92 Pac. 29; Westinghouse Co. v. McGrath, 131 Iowa, 226, 108 N. W. 449, 117 Am. St. Rep. 421–424; Dierling v. Pettit, 140 Mo. App. 88, 119 S. W. 525; Chandler v. West, 37 Mo. App. 631–635; Barrett v. Fisch, 76 Iowa, 553, 41 N. W. 310, 14 Am. St. Rep. 238, 239; Jones on Chattel Mortgages, §§ 54, 56; 6 Cyc. 1025.

The fact that the parties to the mortgage are able to identify the property, or to state what stock was intended to be covered thereby, is not what is required. The description in the mortgage must direct the attention to some source of information beyond the words of the parties themselves. It must furnish the data by which the mortgaged chattels may be identified. Barrett v. Fisch, 76 Iowa, 553, 41 N. W. 310, 14 Am. St. Rep. 238, 239. If the oral testimony of the parties were sufficient, as the mortgagee here claims, few descriptions would or could be fatally defective, and the purpose of requiring chattel mortgages to be recorded in order to give notice to the public would be defeated.

- [2] The situs of the property is usually regarded as an important fact in its identification. Neither the location of the property nor the residence of the mortgagor or mortgagee is given in the mortgage, though the affidavit, the certificate of acknowledgment and the promissory note set out in the mortgage were made at Carson City, Nev. The Nevada Act declares that the mortgage shall not be valid—
- "for any purpose against any other person than the parties thereto unless \* \* \* it shall be recorded in \* \* \* the county where the property is situated, and also in the county where the mortgagor resides." Rev. Laws Nev. § 1080.
- [3] A mortgage of property described as one span of colts, three years old, one gray and one bay, is defective; but if the further statement that the colts were in the mortgagor's possession on his farm in a certain township, county, and state, were added, the description

would be sufficient. Jones on Chattel Mortgages, §§ 54a, 55; Northwestern Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307. In Moebus v. Collins, 85 N. J. Law, 430, 89 Atl. 986, a New Jersey case, the court held:

Whether "a description of the mortgaged property as 'fourteen cows' is sufficient depends on the situation at the time the chattel mortgage was given. If the mortgagor then owned only 14 cows, title would pass under the mortgage. If he owned more, title would not pass as against a bona fide purchaser for value."

In Simon Casady & Co. v. German Savings Bank, 159 Iowa, 149, 140 N. W. 401, an Iowa case, the property covered by a chattel mortgage was described thus:

"Forty head of three-year-old steers, weight about 1,200 pounds, color reds and roans. Worth about \$60.00 per head. The same is now in my possession in sections 14 and 15, Lee township, Madison county, Iowa."

The mortgagor, at the time the mortgage was given, owned 140 head of cattle answering this description. The cattle were sold; the plaintiff mortgagee thereafter brought suit to establish an equitable lien to the funds arising from the sale of the cattle. Following a long line of Iowa cases, the court held the mortgage void for uncertainty in the

description, consequently its record gave no notice to any one.

In Burlington State Bank v. Marlin Nat. Bank (Tex. Civ. App.) 166 S. W. 499, the mortgage mentioned seven horses and mules, but did not describe them, except by color, height, and age; it did not state that the mortgage was the owner of the animals, nor where they were situated. The mortgage was held to be void. To the same effect, see Reynolds v. Tifton Guano Co., 20 Ga. App. 49, 92 S. E. 389; Stewart v. Jaques, 77 Ga. 365, 3 S. E. 283, 4 Am. St. Rep. 86; Milner Banking Co. v. Adair, 18 Ga. App. 575, 90 S. E. 170; Chandler v. West, 37 Mo. App. 631–635; Bozeman v. Fields, 44 Mo. App. 432.

[4] The description contained in the mortgage, under these authorities, appears to be insufficient as to the work stock, driving horses,

and blacksmith tools.

[5, 6] 2. It is contended that the referee in bankruptcy erred in holding the chattel mortgage void for fraud. The validity of the mortgage must be determined by the law of Nevada, the state in which the mortgage was made and where the property was situated. Etheridge v. Sperry, 139 U. S. 266, 277, 11 Sup. Ct. 565, 35 L. Ed. 171. In section 1083 of the Revised Laws of Nevada it is provided that:

"Every conveyance, or assignment, in writing or otherwise, of any estate or interests in lands, or in goods in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action \* \* \* made with the intent to hinder, delay, or defraud creditors or other persons of their lawful sults, damages, forfeitures, debts or demands, and every bond, or other evidence of debt given \* \* \* with the like intent, as against the persons hindered, delayed or defrauded, shall be void."

In order to render a conveyance void under the above statute it is not necessary that it should have been executed with an actual fraudulent intent; it is sufficient that the purpose was to hinder or delay creditors. The grantor may actually believe that delay will enable him

to pay his debts, and thus prove an advantage to his creditors, and yet the mortgage be void under the statutory language quoted. The statute does not permit the mortgagor to be the judge as to whether his action will benefit creditors or not. If his conveyance was intended to secure time by delaying or hindering creditors, it is void, even though he was convinced he was acting for their best interests. Bigelow on

Fraudulent Conveyances, p. 116.

The intent to delay, however, must be something more than a mere purpose to enable the mortgagee or grantee to collect his claim. The mere preferring one creditor to another is not a violation of the statute. In order to render such a conveyance void on the ground that it was intended to hinder or delay creditors, it must have been executed for that purpose—that is, to secure delay advantageous to the debtor and disadvantageous to his creditors; in other words, it must have been specially intended by the maker to have the effect of hindering and delaying his creditors in the collection of their claims, and protecting his property. Johnson Baillie Shoe Co. v. Bardsley (C. C. A. 8th Cir.) 237 Fed. 763, 150 C. C. A. 517, 38 Am. Bankr. Rep. 492–497; Coder v. Arts, 213 U. S. 223, 240, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1; Jones on Chattel Mortgages, § 338.

The indebtedness for which the Petersen mortgage was given was incurred prior to May 4, 1896. No payments having been made during an interval of more than 12 years, on April 9, 1909, when the bankrupt was in failing circumstances, he gave his wife a new note for \$3,000, covering all the previous indebtedness, and secured it with the chattel mortgage in question. The mortgage was recorded on the same day. In the summary of the evidence it is stated that the mortgage was given as security, and also "to protect her husband from creditors so that he might continue his hay yard, wood, and hauling busi-

ness."

Not only before, but after, the mortgage was given, Mrs. Petersen acted as bookkeeper for her husband; she was aware of his financial condition; after 12 years, during which no payments were made on the indebtedness by Petersen, the note and mortgage were made and recorded, and thereafter the mortgagor conducted his business apparently just as he had before. He collected his bills and applied the proceeds for his own business, for his own benefit, or in payment of indebtedness to parties other than his wife. She never demanded or received any accounting of the mortgaged property in use, nor any payments on the mortgage. Petersen, notwithstanding such action was expressly prohibited in the mortgage, gave a subsequent mortgage on the same property to Sarman, another creditor, on which he made payments. This he did with Mrs. Petersen's knowledge, and without objection from her.

The only reasonable inference to be drawn is that the protection of Petersen's property from his creditors was the important purpose to be accomplished by the mortgage, and that it was so intended by both

Mr. and Mrs. Petersen.

The order of the referee is affirmed.

## In re WELLESLEY et al.

#### In re CARTWRIGHT & PLUNKETT.

(District Court, N. D. California, First Division. December, 1917.)

- 1. Bankruptcy \$\sim 61\$—Acts of Bankruptcy—Admission of Insolvency.

  A debtor's written admission of inability to pay his debts, and willingness on that ground to be adjudged a bankrupt, is sufficient to support an adjudication, without regard to his solvency or insolvency.
- 2. Bankruptey \$\simes 62\$—Acts of Bankruptey—Partnership.

  A written admission by one of three partners on behalf of the firm of its inability to pay its debts and its willingness on that ground to be adjudged a bankrupt is not an act of the partnership, and is insufficient to support an adjudication egainst the opposition of the other partners.
- 3. BANKRUPTCY \$\infty 62\)—PARTNERSHIP—"ACT OF BANKRUPTCY"—CONCEALMENT OF PROPERTY.

The withdrawal from a bank by one partner of money of the firm, and his retention of the money and refusal to produce it, was a concealment of property by the partnership with intent to hinder, delay, and defraud creditors, which constituted an act of bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of Bankruptcy.]

4. BANKRUPTCY \$\sim 91(1)\$—Involuntary Proceedings—Defenses.

Where concealment of property with intent to defraud creditors is alleged as an act of bankruptcy, the burden rests on the alleged bankrupt to prove solvency as a defense.

In Bankruptcy. In the matter of Annie C. Wellesley, J. H. Plunkett, and Orpha Plunkett, copartners doing business as Cartwright & Plunkett, and Annie C. Wellesley and J. H. Plunkett individually, alleged bankrupts. Hearing on involuntary petition. Order of adjudication.

Milton J. Green and Vogelsang & Brown, all of San Francisco, Cal., for petitioning creditors.

Hugh K. McKevitt, of San Francisco, Cal., for bankrupts Plunkett. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, Cal., for bankrupt Wellesley.

FARRINGTON, District Judge. A petition has been filed by three creditors of Annie C. Wellesley, J. H. Plunkett, and Orpha Plunkett, as copartners doing business under the firm name of Cartwright & Plunkett, asking that the partnership, Annie C. Wellesley, and J. H. Plunkett be adjudged bankrupts. Two acts of bankruptcy are alleged: First, that the said Annie C. Wellesley, for herself and for said firm, admitted in writing the inability of the firm to pay its debts, and its willingness to be adjudged a bankrupt on that ground; second, that J. H. Plunkett concealed \$1,800 belonging to the firm, with intent to hinder, delay, and defraud its creditors. \$1,400 of that amount was so concealed June 18, and an additional \$400 September 5, 1917.

The Plunketts have filed an answer, denying that they, or either of them, or the firm, is insolvent, or has committed an act of bankruptcy, as alleged in the petition. The matter having been referred to Armand B. Kreft, referee in bankruptcy, he has found, and reported, after

taking the evidence, that both acts of bankruptcy were committed as alleged, and recommends that the firm, and also J. H. Plunkett and

Annie C. Wellesley, individually, be adjudged bankrupts.

The question is: Can the two alleged acts of bankruptcy, or either of them, be attributed to the firm? Section 3a, subdivisions 1 and 5, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1916, § 9587]), are as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be \* \* \* removed. any part of his property, with intent to hinder, delay, or defraud his creditors, or any of them; \* \* \* or (5) admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground."

Section 1, subdivision 19 (Comp. St. 1916, § 9585), provides that the term "persons," when used in the Bankruptcy Act, shall include part-

nerships.

Mrs. Wellesley, who owns a half interest in the firm, is the mother of Orpha Plunkett, and the latter is the wife of J. H. Plunkett. The testimony shows that on the day before the creditors' petition was filed Mrs. Wellesley admitted in writing that the partnership was unable to pay its debts and willing to be adjudged a bankrupt on that ground. The admission purports to have been made on behalf of the firm.

[1] It is well settled that the debtor's written admission of inability to pay his debts, and willingness on that ground to be adjudged a bankrupt, is sufficient to support an order of adjudication, without regard to his solvency or insolvency. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; In re American Guarantee & Security Co. (D. C. Cal.) 27 Am. Bankr. Rep. 640, 192

Fed. 405; Brandenburg on Bankruptcy, § 53.

[2] With one partner favoring and two opposing, it can hardly be said that the partnership is willing to be adjudged a bankrupt. Nevertheless, on the authority of Yungbluth v. Slipper (C. C. A. 9th Cir.) 26 Am. Bankr. Rep. 265, 185 Fed. 773, 108 C. C. A. 106, 223 U. S. 722, 32 Sup. Ct. 524, 56 L. Ed. 630, and In re Kersten (D. C. Wis.), 6 Am. Bankr. Rep. 517, 110 Fed. 929, it is contended that the admission by

Mrs. Wellesley is the act of the firm.

In the Yungbluth Case, one of the partners had assigned the partnership property for the benefit of the firm, the "total assets of the partners and of the firm, were insufficient to pay the partnership debts," and the jury found that the opposing partner himself was insolvent. Under the circumstances the assignment was held to be sufficient to support an adjudication against the firm, because "it was an act which affected the partnership business and disposed of the partnership" property. The court also said that, if the assignment had been made or assented to by both partners, it would not have been necessary to prove the insolvency of the partnership. The reasonable inference to be drawn is that insolvency must be shown affirmatively, when such an assignment of partnership property is not made by or with the consent of all the partners.

In the Kersten Case, the act of bankruptcy relied on was an admission in writing, signed by one of the two members of a firm of private

bankers, purporting to be made in behalf of both, that they were unable to pay their debts and willing to be adjudged bankrupt. The proceedings were had on a creditors' petition, and the only opposition was made by other creditors, not by a copartner. The court held that, in the absence of express authority, authority might be inferred from the fact that the partner not signing the admission failed to object or disaffirm, when opportunity so to do was presented.

In the case at bar the written admission does not dispose of property, or necessarily affect the partnership business. This is a general partnership. Unless otherwise expressly stipulated, the decision of a majority of its members binds it in the conduct of its business. Each member is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on the business of the firm in the ordinary manner. As such a partner, Mrs. Wellesley had no authority "to do any act which would make it impossible to carry on the ordinary business of the partnership," or to do any other act not within the scope of the partnership business. Civ. Code Cal. §§ 2424, 2428, 2429, 2430.

There is no evidence that Mrs. Wellesley had any prior authority to make the admission. Such an act, however, may be ratified, either expressly or impliedly, and thus become the act of the firm; for example, an unauthorized contract of purchase by one partner was held to have been indirectly ratified by the failure of the remaining partners to disavow the contract before delivery of the goods. Hatchett & Large v. Sunset Brick & Tile Co. (Tex. Civ. App.) 99 S. W. 174. The rule is thus stated in Rowley's Modern Law of Partnership, § 473:

"If one partner fails to repudiate an unauthorized act of the other within a reasonable time after he has acquired knowledge thereof, he will ordinarily be held to have ratified the same."

In the present case it is impossible to indulge any presumption of acquiescence on the part of the Plunketts. On the day following the execution of the admission, the creditors' petition was filed, and at once opposed by all the partners except Mrs. Wellesley. Hence I am unable to agree with the referee that the written admission, under the circumstances, was an act of the copartnership, and therefore sufficient in itself to support an adjudication.

[3] The record in this case shows that in June, 1907, the three partners, on their joint note, borrowed from the First National Bank of San Francisco \$2,400. This amount was placed to the credit of the firm, and later, June 18th, Plunkett drew from the account \$1,400, and in September an additional \$400. He admits that he has the money, but refuses to produce it, to tell where it is kept, or to pay it to the creditors of the firm. His proposal to the creditors was that he would purchase Mrs. Wellesley's half interest in the business; that he would pay therefor the \$1,800, which he had drawn from the bank, allow Mrs. Wellesley to retain \$700 of the partnership funds, which she then had in her hands, and that he would in addition give her a note for \$2,500, payable in one year. Clearly these facts are sufficient to establish a concealment of partnership funds, with intent to hinder, delay, and defraud creditors. The act was committed by a member of

the firm; it was a disposition of partnership property; it had the same effect on the property out of which the partnership debts were payable and on the partnership business as would have been accomplished had

all three partners actively and openly participated therein.

There is no evidence of any protest or of any objection to the act of J. H. Plunkett by other partners, unless the written admission of Mrs. Wellesley can be so construed. In borrowing the money the three partners united. Its concealment was a detriment to all creditors of the firm. J. H. Plunkett's scheme, if successful, would have enabled Mrs. Wellesley to withdraw from the business with \$2,500 of partnership money. In its effect upon the property and business of a firm, a written admission of inability to pay its debts and willingness to be adjudged bankrupt is very different from a concealment of its property with intent to defraud, particularly if the firm is in failing circum-

stances and the concealment has been actually effected.

[4] The Plunketts are earnestly opposing an adjudication. It is provided in section 3, subdivision (c), of the Bankruptcy Act, that it shall be a complete defense to any proceeding in bankruptcy, based on the debtor's concealment of his property with intent to defraud his creditors, to allege and prove that the party proceeded against was not insolvent at the time of filing the petition against him. Not only was it much to the advantage of the Plunketts in this contest to prove that fact, but, inasmuch as it is defensive matter, the burden was on them to do so. Collier on Bankruptcy (10th Ed.) p. 84; Brandenburg on Bankruptcy, § 42, p. 67; In re Crenshaw (D. C. Ala.) 19 Am. Bankr. Rep. 503, 156 Fed. 638; Louisiana Nat, Life Assurance Soc. v. Segen (D. C. Ala.) 28 Am. Bankr. Rep. 407, 196 Fed. 903. The complete failure of the Plunketts, who must have possessed accurate knowledge as to the firm and its affairs, to prove, or attempt to prove, its solvency, justifies the inference that solvency was incapable of proof, and that the assets of the company, together with those of the individual partners, were insufficient to pay its debts.

In Chemical National Bank v. Meyer (D. C. N. Y.) 1 Am. Bankr. Rep. 565, 92 Fed. 896, where the liquidating partner of an insolvent firm made a general assignment for the benefit of creditors, and the other partner made no attempt to prevent such assignment, it was held to be an act of bankruptcy upon which the firm could be adjudged bankrupt. The court further observed that, if Meyer did not have the authority to make an assignment, then the assignment was tantamount to an attempt to conceal or remove the property with intent to hinder, delay, or defraud the firm creditors. The conduct of the other partner amounted to a practical acquiescence, so that in either case an act of

bankruptcy had been committed with reference to the firm.

We have here, then, facts very similar to and quite as convincing as those which were deemed sufficient to warrant an adjudication against the partnership in the Yungbluth Case. It is unnecessary to discuss the participation of J. H. Plunkett and Mrs. Wellesley. Each has committed an act of bankruptcy.

Let an order of adjudication be entered herein against the firm, J. H.

Plunkett, and Annie C. Wellesley.

#### THE HESPEROS.

#### THE ARETHUSA.

(District Court, E. D. Virginia. May 11, 1918.)

1. Collision \$\infty 71(1)\$—Tow-Fault.

Where an outward bound steamer anchored on the eastern side of the channel of the Elizabeth river at Norfolk, Va., and a tug following with barges in tow proceeded to the west side of the channel, though a steamer was incoming, held that, as the tug and incoming steamer agreed on a starboard to starboard passage, the tug was not at fault, though the incoming vessel struck the anchored vessel and also injured the tow.

2. Collision \$\infty 71(3)\top-Anchored Vessel-Fault.

Though a vessel anchored to take on dynamite within harbor limits in violation of the harbor rules, yet, where the vessel had taken on no explosive before the collision occurred, the purpose for which it anchored does not place it at fault.

3. Collision \$\infty 71(3)\to Anchorage\to Fault.

An outbound vessel which anchored on the eastern side of the channel of the Elizabeth river at Norfolk, Va., without permission of the harbor master, etc., though it violated harbor rules and Act March 3, 1899, § 15 (Comp. St. 1916, § 9920), held not at fault for a collision with an inbound vessel, where the anchorage was in deep water, extending out beyond the channel to the eastward, and a sufficient channel for incoming vessels remained.

4. Collision \$\infty\$-\text{\$\text{Liability}\$-Vessel at Fault.}

A government steamer inbound through the channel of the Elizabeth river, at Norfolk, Va., held at fault for a collision with an outbound vessel anchored on the eastern bank of the channel; it appearing that the inbound vessel imprudently attempted to pass between the anchored vessel and a tug and her tow on the other side of the channel.

In Admiralty. Libel by the United States against the steamship Hesperos, with petition by G. Sandaa, master of the steamship Hesperos, against the E. I. Du Pont De Nemours Powder Company, and another, consolidated with libels by the New England Coal & Coke Company and by the Hesperos against the United States, as owner of the steamship Arethusa, together with a petition by the United States against the steamship Hesperos. Decree against the United States, as owner of the steamship Arethusa.

Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., for the United States. Hughes, Little & Seawell, of Norfolk, Va., for The Hesperos and petitioner G. Sandaa.

Edward E. Blodgett and Blodgett, Jones, Burnham & Bingham,

all of Boston, Mass., for New England Coal & Coke Co.

Hughes & Vandeventer, of Norfolk, Va., for Lambert's Point Tow-boat Co.

Edward R. Baird, Jr., of Norfolk, Va., for E. I. Du Pont De Nemours Powder Co.

WADDILL, District Judge. On the morning of the 18th day of October, 1915, between 7 and 8 o'clock, a collision took place between

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the United States ship Arethusa, inward bound, the Hesperos, anchored on the eastern side of the channel of the Elizabeth river, opposite Craney Island Light, Norfolk, Va., and the barges Emilie and Cassie, being two of a tow of three barges then proceeding down the river on the western side of the channel, under the following circumstances:

The Hesperos, a large ocean going steamship, 389 feet long, 54 feet beam, and 24.6 deep, having loaded part of her cargo at the piers of the Norfolk & Western Railway Company at Lambert's Point, was taken out from the pier by the tug Pocahontas, of the Lambert's Point Towboat Company, and proceeded down the river to a point just below Craney Island Light, for the purpose of loading a consignment of dynamite, which was then on a barge at anchor on the flats, to the eastward of the place at which the Hesperos came to anchor. Hesperos was followed down the channel by the tug Gwalia, towing three barges, lashed together, on a hawser of 25 to 30 fathoms. The tide was ebb, the weather good, and practically no wind. The tug and tow navigated to the western side of the channel, upon the Hesperos making its departure for the eastern side. The Hesperos was anchored over as close to the bank on the eastern side as she could get, and, with the ebb tide, her stern swung slowly to the westward, coming round to the tide; her engines being kept slow ahead, for the purpose of keeping her bow to the bank of the channel. After being anchored, the Arethusa, 330 feet long, 43 feet beam, and drawing 23 feet of water, was observed coming up the river below Boush Bluff, a mile or more away, about midchannel, and apparently at full speed. The Arethusa and the tug Gwalia exchanged passing signals of two blasts of their whistles, indicating a starboard to starboard passage. The Arethusa approached the Hesperos, with apparently no change of helm or speed, and the Hesperos sounded danger signals, which the Arethusa did not hear. The Arethusa, according to her master's testimony, maintained her course and speed, running, until a short time before the collision, at half speed of from five to six knots an hour, and immediately before, and at the time of the collision, had slowed down to slow speed of between three and four knots an hour, and, when within two ship lengths from the Hesperos, she put her wheel hard aport, with a view of going to starboard, but not in time to avoid coming into collision with the Hesperos, striking the stern of the latter ship on her port quarter, doing considerable damage to that ship, and seriously injuring herself, tearing away, among other things, the ship's bridge, steering gear, etc. The Arethusa then swung abruptly to starboard, ran some 600 to 800 feet over to the westward side of the channel, and into the easternmost of the three barges, the Emilie, sinking her, and driving with such force against the second barge, the Cassie, as to cause it considerable dam-

The original libel was filed by the United States against the Hesperos; the latter ship answered this libel, and also by petition under the Fifty-Ninth Admiralty Rule (29 Sup. Ct. xlvi) brought in the E. I. Du Pont De Nemours & Co., the charterers of the Hesperos, and

the Lambert's Point Towboat Company, owner of the tug Pocahontas, which anchored the Hesperos. The Lambert's Point Towboat Company and the E. I. Du Pont De Nemours & Co. filed their respective answers to this petition. The Hesperos also filed an independent libel against the United States, the owner of the steamship Arethusa, as did also the New England Coal & Coke Company, the owner of the barges in collision. The United States filed its answer to these two libels, and also by petition brought in the Hesperos in the New England Coal & Coke Company case, to which petition the Hesperos filed its answer, and by consent of parties the several cases were heard together. It is perhaps proper that the court should here state that the litigation was inaugurated pursuant to an act of Congress approved April 26, 1916 (chapter 87, 39 Stat. 1261), entitled "An act for the relief of New England Coal & Coke Company, owner of the American barges Emilie and Cassie, and Bruusgaard, Kiosterud Dampskibsaktieselskab, owner of the Norwegian steamship Hesperos," by which the United States magnanimously assented to the determination of the loss arising from the collision in question, by the owners of the Emilie and Cassie, and the owners of the steamship Hesperos, in litigation to be instituted by the United States, the owner of the Arethusa, in an admiralty suit in the proper District Court of the United States, and by the act jurisdiction was conferred upon said court to hear and determine the whole controversy, and enter judgment, and decree for damages sustained by reason of such collision, if any, either for or against the United States, upon the same principles and measures of liability, and with the same costs, as in like cases in admiralty between private parties.

The several libels, cross-libels, and petitions growing out of the collision between the four vessels, were, by consent, heard together, and present for determination the question upon whom the liability should fall for the disaster. The contention of the Hesperos that she should be absolved from liability, and that the Lambert's Point Towboat Company, whose tug took her out from the piers, and located her at the scene of the accident, or the E. I. Du Pont De Nemours & Co., the charterers of the Hesperos, and owners of the cargo, under whom the towboat company was acting, as claimed by her, should be held responsible, is not well taken, under the facts and circumstances of this case.

The elimination of these two companies leaves for ascertainment the liability, as between themselves, of the Gwalia and her tow, the Hesperos, and the Arethusa, which will be considered in the order named.

[1] First. Upon the testimony in this case, fault alone, if any, can be imputed against the Gwalia and her tow, for violating the narrow channel rule by navigating on the westward, instead of on the eastward, side of the channel.

The court's conclusion is that they were not negligent in this respect, under the circumstances of this case. In going down the channel, they first followed the Hesperos, a large ship, and upon her directing her course to the extreme eastward of the channel, with a

view of anchoring, the Gwalia and its tow directed their course to westward, to avoid possible risk from the maneuver of the down-going ship; and while thus navigating, and after the Hesperos had come to anchor, they gave to the Hesperos two blasts of the tug's whistle, indicating that they would pass the ship on their starboard. To this signal the Hesperos made no answer, and the Arethusa, the up-coming ship, in a short time responded with two blasts of the whistle, indicating that she understood that the two whistles meant a desire on the part of the tug and tow to inaugurate a starboard hand passage with her, to which the Arethusa replied with two blasts of her whistle. giving her assent to such passage. Thereupon the Gwalia replied with two blasts to the Arethusa, which she meant, and the Arethusa understood, as a confirmation of the understanding to pass starboard to starboard; and the tug and tow continued their movement to port, and navigated as far to the westward side of the channel as it was prudent to go, when the Arethusa, having suddenly collided with the Hesperos, on the eastward side of the channel, sheered to the westward, and ran into two of the barges in tow of the Gwalia, sinking one, and seriously damaging the other. Under these circumstances, it clearly appears that the tug and tow were free from fault, and should in no manner share the loss caused by the collision. The Hesperos, which had anchored on the eastern side of the channel, could certainly not complain of its course to the westward of the channel. and the up-coming steamer gave its full assent to the navigation proposed by the Gwalia.

[2] Second. This brings us to the consideration of the Hesperos'

conduct, and her liability for the consequences that followed.

This ship was at anchor at the time of the collision between herself and the Arethusa, as well as at the time the latter ship collided with the barges Emilie and Cassie. It is earnestly insisted by the United States, the owner of the Arethusa, that the Hesperos was solely at fault for the collision, in that she cast anchor in the channel, also undertook to load dynamite in the harbor, contrary to law and the harbor rules and regulations governing the taking on of explosives, and for coming to anchor, and that at least she was partly to blame for the collision, because of negligent navigation in connection with her anchorage, at a time when it was too late for the Arethusa to so change her course as to escape the consequences of her alleged unseamanlike conduct.

There is force in the government's contentions in these respects; but, so far as the loading of dynamite is concerned, it did not affect the collision, further than that the ship came to anchor at the place in question to take on dynamite, which was stored upon barges on the flats in that vicinity. The dynamite, however, was not taken on by the Hesperos, and the alleged violation of the local ordinance in that respect does not become material.

[3] The place of anchorage is one of more difficulty. The harbor rules unquestionably contemplate anchorage in the harbor only upon permission of a harbor master, and that the same shall not be in the channel; but obtaining permission of the harbor master

seems to have become obsolete, if ever enforced. The rule forbidding anchorage in the channel is as follows:

"5. Vessels entering the harbor and intending to come to anchor or dropping out of wharves or docks preparatory to departure, must anchor under direction of a harbor master, and are forbidden to anchor in the channel"

—and should be read in the light of the national legislation on that subject. Act March 3, 1899, c. 425, § 15, 30 Stat. L. 1152 (Comp. St. 1916, § 9920). These regulations, and the act of Congress were set forth and fully considered by this court in the Margaret I. Sanford-Strathleven Case (203 Fed. 331, 335, 336, 338, 339); and, while under the decision of this court the government's contention against anchoring in the channel has strong support, still the same was not approved by the Circuit Court of Appeals in that respect (213 Fed. 975, 130 C. C. A. 381), and in the view taken by that court, in that and other cases, the true rule is that Congress, by the act referred to. did not intend absolutely to forbid anchoring in narrow channels, except only at such places as would necessarily prevent the passage of other vessels, or obstruct them in passing, to such an extent as to make the effort to do so a dangerous maneuver; and that vessels anchoring at a point in a channel, where, notwithstanding such anchorage, other vessels navigating with the care the situation required, can safely pass, neither violates the statute, nor renders a vessel liable under the general rules applicable to navigation, although she may to a certain extent obstruct the channel.

Assuming this to be the law applicable to the Hesperos' anchorage. which this court must do, since the very act of Congress and harbor rules and regulations were in question in the Strathleven Case, and it is manifest either that the appellate court treated the inhibition in the local harbor regulation as to anchoring in the channel as substantially the same as that of the national act, or reached the conclusion that the harbor rules in that respect were superseded by the act of Congress on the subject, and placed its own construction upon the meaning and effect of the federal act, diametrically opposed to that of the lower court, still it cannot be said that the Hesperos was at fault in anchoring where she did. She cast her anchor where the deep water really extended beyond the cut channel to the eastward, for a short distance, with a clear deep water cut channel of 600 feet besides; and, while she had undoubtedly swung out under the influence of the ebb tide into and partly across the channel, there is nothing to indicate or suggest that she had taken certainly more than half of the channel, which left ample space for the passing of the up-coming steamer Arethusa, in the exercise of proper care and caution on its part. It is true that the Arethusa claimed that her course was obstructed to the westward by the down-coming tug and tow; but it was not so to such an extent that in broad daylight, calm weather, and slight ebb tide against her, she could not readily have so navigated as to have avoided coming into collision with the Hesperos.

[4] Third. Coming now to the case of the Arethusa, in addition to what has been said in connection with the navigation of the Hes-

peros and Gwalia, it seems to the court quite clear that the Arethusa is liable for bringing about the collision. She was proceeding under most favorable circumstances up the channel, with nothing seriously to obstruct or interfere with her navigation; and the burden was upon her, the free and unincumbered vessel, to keep clear of vessels at anchor, and approaching tugs and tows. She should have so navigated, both as respects her proper place in the channel, her speed, and in everything she did, or reasonably could have done, with that end in view. So far from doing this, she managed, without apparent justification, to come into collision with the Hesperos at anchor on the eastern side of the channel, running at such speed as to severely injure the Hesperos, tearing away most of her own running gear, navigating machinery and appliances, and sheered over to the western side of the channel, a distance of 500 or 600 feet, and ran into the tow, with such force as to sink the Emilie, and seriously cripple the Cassie, two of the barges in the tow, both heavily laden. This would not have happened had the Arethusa been navigating at the speed and with the care required of her under the circumstances. had seen the anchored ship a mile or more away, and, while it is true she did not at first observe the ship was at anchor, she at least should have discovered she was not approaching. She observed, when she was as much as a quarter of a mile away, that her stern was swinging out into the channel across her bow, and while the Arethusa's navigators claim that they did not see her anchor chain until she was some 300 feet of her, and that she, about that time, swung more rapidly out into the stream, still the court cannot but be impressed with the fact that her exact position would have been, if it was not actually, discovered in ample time to have avoided the collision, by the exercise of reasonable vigilance by the navigating officers of the Arethusa. It seems entirely clear, from the Arethusa's own account of the transaction, that her master thought he had sufficient room to pass between the stern of the Hesperos and the passing tug and tow, and he attempted to do so, when good seamanship, prudence, and the exercise of proper care and caution would have forbidden his so doing. He should have so navigated, at least, as to have been able to keep his ship under easy control at all times, to prevent the happening of just such an occurrence as took place; and certainly he should not have attempted to proceed at such rate of speed as the evidence, and the result of what happened, indicates he was making.

The government's proctor, Assistant District Attorney Hiram M. Smith, who actively conducted the litigation for the United States, ably and earnestly insisted that, assuming the navigation of the Arethus to have been imprudent, still that no harm would have resulted therefrom, and the disaster would not have occurred, but for the imprudent act on the part of the Hesperos in accelerating the movement of that ship into and across the channel, at a time when it was too late for the Arethusa to avoid the accident, and that this was the sole cause of the collision, or certainly contributed to it, for which the Hesperos should, at least in part, share the burden.

There is force, of course, in this contention. Still, having regard to the law and rules of navigation properly applicable, and due regard to what maritime skill, prudence, and forethought required of the Arethusa, it should not be adopted. The testimony as a whole, in the view taken by the court, does not sustain the position that a sudden acceleration of the movement of the Hesperos materially aided to bring about the accident. It is true the Hesperos was continuing to angle out into the stream, and it may be immediately preceding the accident she moved somewhat faster, but not perceptibly so, save as testified to by those on the Arethusa; still no such close shave as that should have been taken by the Arethusa. The obligation imposed upon her as an unincumbered ship was to avoid as well the risk of collision, as the collision; and she should have properly discharged her duty in this respect, going with the tide against her, in broad daytime, without wind or other conditions to obstruct her, she ought not to have so placed herself in respect to the Hesperos and the Gwalia as to have gotten into collision with them. She voluntarily assented to the proposal of the tug and tow to take her side of the channel, when she knew the Hesperos was on the other side, and knew that she would have to pass between the two; and she should at that time, or certainly later, instead of attempting to pass, have stopped and reversed her engines and sounded danger signals. It is true she did not hear the danger signal from the Hesperos, nor did those on the Gwalia, though doubtless such signals were given, but at a time when the other vessels were too far away to hear them. But that is immaterial here, since the Hesperos was seen in full view when a mile

Moreover, the Arethusa should have anticipated the danger arising from unusual or erratic occurrences in connection with the movement of the Hesperos, and not have so navigated as to have become entangled with her upon such conditions happening, either from her own undue speed, or from proceeding in too close proximity to the ship angling out in the channel. The Maryland (D. C.) 182 Fed. 831. The opinion of Mr. Justice Brown, speaking for the Supreme Court, in The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 75 (44 L. Ed. 126), is so appropriate that it deserves quotation again, though it has been so often repeated. He said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

The following decisions from this district: The Richmond, 114 Fed. 208, 213; The Georgetown, 135 Fed. 854, 858; and The Hawkhead, 248 Fed. 780—sustain the conclusions herein reached.

It follows, from what has been said, that the Arethusa is solely liable for the happening of the disaster in this case, and a decree so ascertaining will be entered on presentation.

#### In re KITZEROW.

(District Court, E. D. Wisconsin. April 6, 1918.)

CERTIORARI & 24—SELECTIVE SERVICE ACT—DEFERRED CLASSIFICATION—CERTIORARI TO DRAFT BOARDS,

Certiorari will not issue to review the action of local and district draft boards in making determination as to deferred classification under executive regulations promulgated under the Selective Service Act, for the act creates a system for executive enforcement, and proceedings of the draft boards, as to those within scope of the act, are not in the same category as those of quasi judicial tribunals.

At Law. Petition by George O. Kitzerow for writ of certiorari, to be directed to the Local Board, Division No. 10, of the City of Milwaukee, and District Board No. 1, for the Eastern District of Wisconsin. Application denied.

This is a petition for a writ of certiorari to be directed to local board, division No. 10, of the city of Milwaukee, and district board No. 1, for the Eastern district of Wisconsin, commanding them to certify to this court for its review and determination the case of the petitioner in respect of his disposition as a registrant for military service. The petitioner was required to give notice of application, and the matter has been heard upon the appearance of the petitioner by counsel and the respective boards by the United States attorney.

The petitioner is a natural-born citizen of the United States, of the age of 24 years, resident in Milwaukee, and, being subject to registration for military services, did, on June 5, 1917, register with the proper local registration board. The petition recites the creation of the local and district boards named as respondents, and, after reference to the authority contained in the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76) for the executive promulgation of rules and regulations, as well as the jurisdiction of the several boards authorized to be created, cites from the rules and regulations prescribed the following:

"Sec. 70. Reason for and Effect of Classification.—The military needs of the nation require that there be provided in every community a list of names of men who shall be ready to be called into service at any time. The economic needs of the nation, while deferring to the paramount military necessity, require that men whose removal would interfere with the civic, family, industrial, and agricultural institutions of the nation shall be taken in the order in which they best can be spared. For this reason the names of all men liable to selection shall be arranged in five classes, in the inverse order of their importance to the economic interests of the nation, which include the maintenance of necessary industry and agriculture and the support of dependents. The group of registrants within the jurisdiction of each local board is taken as the unit to the classified. Within each class the order of liability is determined by the drawing, which has hitherto assigned to every man an order of availability for military service relative to all men not permanently or temporarily exempted or discharged. The effect of classification in class 1 is to render every man so classified presently liable to military service in the order determined by the national drawing. The effect of classidication in class 2 is to grant a temporary discharge from draft, effective until class 1 in the jurisdiction of the same local board is exhausted. The effect of classification in class 3 is to grant a temporary discharge from draft, effective until classes 1 and 2 in the same local board are exhausted; and, similarly, class 4 becomes liable when classes 1, 2, and 3 are exhausted. The effect of classification in class 5 is to grant exemption or discharge from draft. The term 'deferred classification,' as used in these regulations, is equivalent to the term 'temporary discharge.'"

The petition further refers to the authority granted in section 4 of the act

of Congress for executive exclusion or discharge from the selective draft of all "those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable," and then quotes the following further executive regulation respecting classification in respect of dependency: "Section 4 of the Selective Service Law exempts no person from military service on the ground of dependency. It only authorizes the exclusion or discharge from draft of those in a status with respect to persons dependent upon them for support which renders their exclusion or dis-The present scheme is designed by the creation of sevcharge advisable.' eral classes arranged in the order of their availability for military service to defer the induction into the army of registrants upon whom other persons are mainly dependent for support until persons without actual dependents have been called. While an actual dependency must be established before any kind of discharge can be granted, there are certain conditions of dependency which it is advisable to recognize to a fuller extent than others. The present classification is designed to afford the maximum of protection to dependent relatives consistent with the military necessity of the nation. It is to be recognized that war must bring inconvenience and sacrifice to all. No person has a right to refuse to sacrifice luxuries; on the other hand, it is not the intent of the law to deprive the dependents whom the law and regulations are designed to protect of a reasonable adequate support. No definite degree can be given to the meaning of the term 'reasonable adequate support' as used in the classification rules and schedules. The adjustment of these relations must be left to local boards, who have abundantly shown that they will approach each case with sympathy and common sense, and while defending the interests of the nation from selfish and false claimants, on the one hand, will afford the decent protection here designed for meritorious claimants on the other."

Further reference is made to an executive regulation providing that "any registrant who has aged and infirm or invalid parents, \* \* dependent upon his labor for support, shall, under the classification rules, be placed in class 3 by the local boards"; that petitioner, obediently to the regulations respecting answer of the "questionnaire," with which we are all familiar, returned and filed his with the respondent local board, division No. 10, wherein, and upon concurring and supporting affidavits required by the rules and regulations, he made due claim for exemption or deferred classification, averring that he should be placed in division B of class 3, and that upon such answers and accompanying attidavits he was entitled to such classification, but that the respondent local board "upon consideration of the answers and affidavits contained in the questionnaire," erroneously classified the petitioner in class 1, division A, as being a single man without dependent relatives, and which classification by said local board is contrary to the proof submitted by him; and that subsequently he took an appeal to the respondent district board, which affirmed the ruling of the local board, whereupon an application was made for rehearing and re-examination of the case, all of which was denied.

The petitioner seeks through this proceeding to review the action of the respective boards, to the end either of obtaining an order directing a change of classification or a reconsideration of his case by the boards upon the proffered testimony.

Lenicheck, Bossel & Wickham, of Milwaukee, Wis., for petitioner. H. A. Sawyer, U. S. Atty., of Milwaukee, Wis., for the United States.

GEIGER, District Judge (after stating the facts as above). The question is: Should a writ of certiorari issue to draft boards upon facts such as are presented in the present petition? Counsel for the petitioner rests his case wholly upon utterances found in opinions of judges dealing with applications for writs of habeas corpus or for

writs of injunction, seeking to test or to restrain the action of district boards. Thus, in the Angelus Case (C. C. A. 2d Circuit) 246 Fed. 54, 158 C. C. A. 280, Rogers, Circuit Judge, said:

"We do not, however, agree with the statement of the District Judge, heretofore quoted, that there can be no interference of the courts in the action of these boards. We think a decision of the boards is final only where the board has proceeded in due form, and where the party involved is given a fair opportunity to be heard and to present his evidence. But, if an opportunity to be heard should be denied, there can be no doubt as to the right of the aggrieved party to come into the courts for the protection of his rights. And we do not believe that the District Judge meant to say that a decision must be regarded as final under such circumstances. The law courts have a general superintending control by certiorari over all inferior tribunals acting in a judicial or quasi judicial character; and jurisdiction is not entirely taken away by the words of the statute, which declares that the judgment of the inferior tribunal shall be final."

Manifestly, cases dealing with individuals who aver that by reason of the express provisions of the Selective Service Act they are not within, but are left without, the entire scope of the act, as prescribing and imposing liability to military service, are not pertinent. It may readily be conceded that, where the law imposes no obligation upon an individual, the courts must be open to his resistance of any effort to impose its obligations upon him. But the present case deals with an individual whose status is admittedly within the reach of the law. Indeed, he professes his willingness to submit to its obligations, but seeks for the time being to assert a right resting solely upon an executive regulation fixing and establishing conditions or considerations for classifications, and hence order and priority of call. With this as the case, should the courts exercise jurisdiction by certiorari to correct the misapplication of the executive regulations, and to enforce, as the petitioner's right, the regulations as they may be applicable to the facts presented by him in court?

Undoubtedly, Congress, by detailed enactment, or the Executive, with or without detailed regulation, could have imposed the service obligation upon all individuals within the scope of the law, without any attempt to establish order or priority based upon considerations pertaining to the individual or to the service or the needs of the nation. In other words, this power, existing as it did in Congress, might have been exercised and exerted by detailed provisions of the law, or might have been, as it was, delegated practically in its entirety to the Executive. It is my view that the character of the legislation is such that it never was intended, by conferring upon the Executive the full power and discretion to determine the matters which are now comprehended within the executive regulations, to reserve to the individual who is within the scope of the law, as a matter of legal right, subject to be enforced and vindicated in the courts, these very regulations which, in executive discretion, need not have been made at all, or, in like discretion, may be varied from day to day. The draft boards are purely executive agencies, and their error, committed against those who are within the draft law, is executive error in the enforcement of discretionary regulations; and I do not believe that it was or could be the congressional intent that these executive agencies, constituted, as observed, to carry out an unlimited discretion, were or are to be considered in the light of quasi judicial tribunals, discharging functions which pertain to everyday legal rights of a citizen. It would imperil the whole scheme, congressional and executive, in respect of the working of the Selective Service Law; and for these reasons I shall decline to take jurisdiction of the application for the issuance of the writ.

#### UNITED STATES v. MAYER.

(District Court, W. D. Kentucky, at Owensboro. May 6, 1918.)

1. Army and Navy \$\iff 40\$—Espionage Act—Intent—Evidence—I. W. W. Certificate.

Mere possession of an "I. W. W." certificate by one using abusive language against the United States and the President, without testimony of the real aims and purposes of that organization has no tendency to prove a charge against him, under Espionage Act, § 3, for willfully causing or attempting to cause insubordination, etc., in military or naval forces.

2. ARMY AND NAVY \$\infty\$40—Espionage Act—Causing Insubordination, etc., in "Military or Naval Forces."

Men, merely because between the ages of 18 and 45 years, are not in the military or naval forces of the United States, within Espionage Act, § 3, denouncing willfully causing or attempting to cause insubordination, etc., in such forces.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Military Forces; Naval Forces.]

3. Army and Navy \$\iff 40\$—Espionage Act—Willfully Obstructing Recruiting or Enlistment—Intent.

Willful obstruction of, or willful attempt to obstruct, the recruiting or enlistment service, within Esplonage Act, § 3, involving intent, is not proved by mere use of abusive language against the United States and the President among laborers of military age, at a place where no recruiting or enlistment service was going on or was in contemplation.

Criminal prosecution under the Espionage Act by the United States against Frank Mayer. Defendant's motion for directed verdict sustained.

P. B. Miller, Dist. Atty., and S. M. Russell, Asst. Dist. Atty., both of Louisville, Ky., for the United States.

Ernest P. Rowe, of Owensboro, Ky., for defendant.

WALTER EVANS, District Judge. There are two counts in the indictment in this case, only the first of which need receive any attention, inasmuch as it is practically conceded that the testimony does not establish the charge made in the second count. Leaving out of view the latter count, the indictment is based upon section 3 of the Espionage Act, approved June 15, 1917, and which, so far as pertinent, is as follows:

"Whoever, when the United States is at war, \* \* \* shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully

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obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished," etc. 40 Stat. 219, c. 30.

Charging generally in the one count these two offenses, the indictment avers:

"That said Frank Mayer did then and there use vile, abusive, and insulting language concerning the United States, the President of the United States, and the citizens of the United States, and did then and there state that he would like to destroy the United States, and that if he were put in the army he would kill American soldiers and fight for the Kaiser, the leader of the enemies of the United States, and did then and there make other statements obviously intended to arouse discontent and disaffection with the conduct of the war among those who should hear said statements, and did use the language tending to promote and cause an insubordinate, disloyal, and mutinous spirit in the military and naval forces of the United States, and said statements were made in a construction camp of the Illinois Central Railroad Company, at Providence, Ky., in the presence and hearing of a large number of men who constituted a part of the national forces of the United States, and liable to perform military duty in the service of the United States, and in the presence and hearing of divers other persons, the names of which said men liable to service and said other persons are to the grand jurors aforesaid unknown, and said statements were made by said Frank Mayer with the purpose and intent of causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty as aforesaid."

The undisputed testimony showed that the defendant and all those who, it is supposed, heard what he said, were laborers employed in the work of building a short branch of the Illinois Central Railroad from Providence to Dawson Springs, in Kentucky. These persons were all, at the time, engaged as laborers in the construction work of the railroad company near the first named of those towns, but at the moment all were off duty and in the camp. No recruiting nor enlistment service of the United States was going on or was in contemplation there, nor was any part of the military or naval forces of the United States present when the alleged acts were done, nor when the utterances were made, unless all those personages present who were between the ages of 18 and 45 years, by virtue of that fact alone, are to be held to be part of the "military or naval forces of the United States" within the intent and meaning of the statutory provisions set forth above.

Other testimony tended to show that the defendant, in the presence of the persons described, and in the construction camp, used language abusive of the United States and of the President, which is much too indecent to be here inserted. The defendant vehemently denied the use of any of the language imputed to him; but as he, at the close of all the testimony, moved the court to direct a verdict of not guilty, we shall, for the purposes of that motion, assume the truth of all the testimony offered by the United States. Except as we have stated it to be undisputed, the testimony was limited to showing the disgustingly abusive character of what was said, and that at least two of the laborers at the camp who testified they heard what was said were persons 18, but under 45, years of age, and that others who heard it, but who did not testify, were described as appearing to be between those ages.

[1] No one of the persons present had ever been drawn or called into service under the Selective Draft Act (Act May 18, 1917, c. 15, 40 Stat. 76) or otherwise. It was, however, shown that the defendant had on him when arrested a certificate of membership in the Industrial Workers of the World (I. W. W.), though no testimony was offered as to what the real aims and objects of that organization were, except as shown by the certificate of membership. This testimony was objected to by the defendant, but the questions thus arising were left open for decision when the whole case should be developed, and we may now express the opinion that this mere certificate, without more, had no tendency to support the charge in the indictment, and

the objection is sustained.

In this situation the decision of the pending motion must turn upon the two inquiries: (1) Whether the mere abuse of the United States or of the President in the grossly indecent language used by the defendant was sufficient to establish the charges made in the indictment; and, (2) whether all persons between the ages of 18 and 45 by virtue of that fact alone are, under the statute, made actual parts of the military and naval forces of the United States within the meaning of this criminal statute, which established general rules require to be somewhat strictly construed. The occurrences were shown to have taken place on December 31, 1917, at which time there was no statute in existence which made abuse of the United States or of the President a criminal offense, and as the use of this language was the only thing done, and was accompanied by no other act, did this, under the facts shown, establish the charge that the defendant "willfully caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States," or did it establish the charge that the defendant did "willfully" obstruct the recruiting or enlistment service of the United States, when nothing of the sort was going on or was in contemplation at that point?

[2, 3] It was energetically argued on behalf of the government that it did so, because it was claimed that under the law every man in the country between 18 and 45 years of age and not an alien enemy was, by virtue of that mere fact, already in the military or naval service. To so hold would be a very forced construction. Grant that all such persons are thereby liable to be put into that service if called, nevertheless we are clearly of opinion that they are not yet in law or in fact "in the military or naval service of the United States" within the intent and meaning of section 3 of the Espionage Act. Nor under the circumstances shown can the use of such abusive language merely of itself and without more be held, under the circumstances indicated, to sufficiently prove a "willful" obstruction, or a willful attempt to obstruct, the recruiting or enlistment service of the United States. The persistent use of the word "willful" in the statute clearly shows that the intent to do the forbidden thing must be then in the mind or purposes of the accused.

For these reasons, our duty is to sustain the motion, and the jury

will be directed to find the defendant not guilty.

#### VANEK v. CHICAGO GREAT WESTERN R. CO.

(District Court, N. D. Iowa, E. D., at Dubuque. September 25, 1918.)

No. 142.

NEW TRIAL \$\infty 75(5)\to Inadequate Damages.

Where, in action for destruction, by railroad car, of auto, and killing of its driver, contributory negligence might well have been found, plaintiff will not be given new trial because of verdict for \$1; it not clearly indicating finding of absence of contributory negligence, and inadequate damages from prejudice, passion, or misconduct.

At Law. Action by Thomas Vanek, administrator of Adolph T. Zemanek, deceased, against the Chicago Great Western Railroad Company. On plaintiff's motion for new trial. Denied.

F. B. Blair, of Manchester, Iowa, and Trewin, Simmons & Trewin, of Cedar Rapids, Iowa, for plaintiff.

Geo. T. Lyon, of Dubuque, Iowa, and Carr, Carr & Evans, of Des Moines. Iowa, for defendant.

REED, District Judge. The plaintiff, as administrator of the estate of Adolph T. Zemanek, deceased, sued the defendant railroad company for its alleged negligence in causing the death of plaintiff's intestate and the destruction of his automobile. A trial to a jury resulted in a verdict in favor of the plaintiff for \$1, and plaintiff moves for a new trial solely on the ground of the inadequacy of the verdict.

The negligence of which the plaintiff complains is that the motoneer or engineer of a motor car of the defendant, which it was operating on its railroad, was driven by the motoneer at a dangerous and excessive rate of speed upon the railroad where it crosses a public highway in Delaware county, this state, and collided with an automobile the deceased was driving on such highway over the railroad crossing, demolishing the automobile and killing the plaintiff's intestate, to the damage of his estate, in the sum of \$300 as the value of the automobile and \$15,000 for his untimely death. In its answer the defendant denies all negligence upon its part and of its motoneer, and alleges that the deceased was guilty of negligence which directly contributed to the injuries of which the plaintiff complains. At the close of the testimony the defendant moved for a directed verdict in its favor, upon the ground that the evidence conclusively shows that the accident and resulting injury to the deceased and his property arose from his own neglect, which directly contributed to his death and the destruction of his automobile. This was the principal question on the trial, for the evidence as to defendant's neglect, and that of its motoneer, was amply sufficient to take that question to the jury.

At the place of the accident the railroad runs east and west, and the highway north and south. The deceased approached the railroad from the south in the forenoon of a clear day in August, 1917;

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and from a point on the highway a mile south of the railroad the crossing was in plain view, and so was the railroad for more than a mile to the west and until within about 30 rods of the railroad crossing, and from that point trees and some brush along the highway partially obscured the view of the railroad to the west until within 30 feet or so of the crossing, from which distance of 30 feet there was a plain view of the crossing, and of the railroad to the west for a distance of more than a mile: the grade of the railroad being some feet above the level of the highway. The deceased was of middle age, in robust health, in full possession of his sight and hearing. familiar with the railroad and highway where they cross each other, and as he arrived within the 30 feet of the railroad, had he looked to the left, there was nothing to obscure his view of the railroad upon which the motor car was approaching, and as he drove the automobile upon the track it was struck by the motor car, which carried it several rods along the railroad to the east, demolishing it, and injuring the deceased to such an extent that he died shortly thereafter. This is a brief statement of the testimony upon which the question of the contributory negligence of the deceased was submitted to the jury under an instruction (to which no exception was taken):

"That if the jury found from the evidence that the deceased was guilty of negligence that in any degree contributed to the accident, which resulted in his death and the destruction of the automobile, the plaintiff cannot recover, and your verdict must be for the defendant; but if you find from the evidence that the deceased was not so guilty of negligence, then the plaintiff would be entitled to recover from the defendant, for the benefit of the estate, the damage to the automobile and because of the untimely death of the deceased, as shown by the evidence."

The plaintiff contends that the verdict of \$1 in his favor is conclusive that the jury found the deceased was free from contributory negligence, and, having so found, that its verdict should have been for the plaintiff in a substantial amount, instead of a mere nominal sum. If it could be fairly said that the verdict established that the deceased was not guilty of contributory negligence, the contention of the plaintiff might be upheld; but the verdict is conclusive that the plaintiff was not, under the testimony and instructions, entitled to recover any damages, and the only reasonable inference is that they found deceased was guilty of contributory negligence, and upon that question the finding was in fact for the defendant: but the defendant or its motoneer, under the testimony, was also negligent, and the jury might well have believed that defendant should pay the costs of the action, and that a verdict of \$1 would authorize the court to tax the costs to the defendant. This inference is more reasonable than that the jury deliberately intended to disregard the testimony and the court's instructions.

The deceased left no wife, child, parent, or other dependent relative surviving him, but only collateral heirs; and it is obvious that the jury did not intend to allow the plaintiff any substantial damages, and allowed only a sum that would authorize a judgment against the defendant for costs. But, whatever may have prompted the verdict for \$1, it is the settled rule of the federal courts that dis-

puted questions of fact are to be found by the jury, and such findings will not be disturbed by the court, unless it was the result of passion, prejudice, or some manifest misconduct. It cannot fairly be said that this verdict of \$1, under the circumstances of this case, indicates either passion, prejudice, or misconduct on the part of the jury; it is more indicative of a purpose to authorize a judgment for costs only against the defendant, which might prove acceptable to the parties and thus end this controversy. See Kelley v. Penn Ry. (C. C.) 33 Fed. 856. If the verdict in this case had been for the defendant, that finding would have had ample support in the testimony, upon the ground that the deceased was guilty of contributory negligence; and it is quite obvious that the verdict of \$1 was to carry the costs against the defendant, and so long as it does not complain the verdict should not be set aside at the instance of the plaintiff.

The plaintiff cites in support of his contention Schrader v. Hoover, 87 Iowa, 654, 54 N. W. 463, Tathwell v. City of Cedar Rapids, 122 Iowa, 50, 97 N. W. 96, and Carter v. Wells Fargo & Co. (C. C.) 64 Fed. 1005. In the Iowa cases the verdicts were set aside by the trial court and were affirmed by the Supreme Court upon the well-settled rule in Iowa that the discretion of the trial court in interfering with verdicts will not ordinarily be disturbed by the appellate court. It may be conceded that Carter v. Wells Fargo & Co. (C. C.) 64 Fed. 1005, supports the plaintiff's contention. But as against that we may cite Reading v. Tex. & Pac. Co. (C. C.) 4 Fed. 134; Lancaster v. Providence & S. S. Co. (C. C.) 26 Fed. 233; Olek v. Fern Rock Woolen Mills (C. C.) 180 Fed. 117; Hubbard v. Mason City, 64 Iowa, 245, 20 N. W. 172; Talty v. City of Atlantic, 92 Iowa, 135, 60 N. W. 516; Young v. Great Northern Ry. Co., 80 Minn. 123, 83 N. W. 32. The rule of the federal courts is fairly stated in Lancaster v. Providence & S. S. Co. (C. C.) 26 Fed. 233, 234, where it is said of the evidence in that case:

"The evidence would warrant a much larger verdict beyond a doubt. Indeed, it may be said that, had the assessment been made by the court, the recovery would have been considerably in excess of the sum awarded by the jury. But the question of damages was for the jury. A wide discretion was allowed them, and the court should be clearly convinced of the rectitude of its position before trespassing upon their peculiar domain. \* \* \* The verdict should not be disturbed, even though the court may regard it as inadequate, unless something is shown which indicates that the jury were actuated by passion, prejudice, or corrupt motive, or that they made an important and manifest mistake. There is nothing here upon which to found such a conclusion—[citing authorities]."

The practice, especially of the federal courts, to not interfere with findings of juries on questions of fact, unless prompted by prejudice or manifest misconduct is well settled. See Fox v. Chicago Great Western R. R. (D. C.) 207 Fed. 886.

The motion for new trial is denied, and plaintiff excepts. It is ordered accordingly.

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#### TUCKER v. ELWELL.

(District Court, E. D. Pennsylvania. September 23, 1918.)

#### No. 8.

Wharves \$\infty\$20(2)—Injury to Vessel—Unsafe Bottom—Liability.

Respondent, who, knowing conditions and assuring libelant, ign

Respondent, who, knowing conditions and assuring libelant, ignorant thereof, that they were safe, invited him to berth his barge at a wharf for unloading, *held* liable for injury from grounding on obstructions alongside the pier, on ground that it occurred while she was moving there in accordance with his directions.

In Admiralty. Suit by Bernard Tucker against Samuel P. Elwell. Sur trial hearing on libel, answer, and proofs. Decree for libelant.

George P. Rich, of Philadelphia, Pa., for libelant. Willard M. Harris, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The principle of law invoked by the libelant is that one who, for his own benefit, induces another to bring a vessel to a wharf apparently or represented to be adapted to the safe mooring of the vessel, may be held liable for injuries to the vessel caused by obstructions unknown to the master. In Smith v. Burnett, 173 U. S. at page 433, 19 Sup. Ct. 442, 43 L. Ed. 756, the general principle, with its qualifications, and the supporting considerations, are fully stated. The ground of liability, it will be observed, is not responsibility for the creation or continued existence of the obstruction, or control of the local situation, but inducing another to unwittingly meet with injury, the danger of which is known. Woodburn v. Sheehy, 240 Fed. 952, 153 C. C. A. 638, cited by respondent, illustrates the distinction.

There is no dispute as to the principles of law applicable. The controversy is over the fact, not of injury, but how it came to be incurred. The facts are found to be:

(1) The respondent assumed to know the condition of the berth which the barge of the libelant was to occupy, and did in fact have such knowledge.

(2) Respondent invited libelant to berth the barge at the wharf, provided for its unloading, assuring the libelant that conditions were such as to justify him in believing, as he did believe, that the berth was a safe one.

(3) The injury to the barge resulted from obstructions existing, not at the place at which the barge was to be unloaded, but near to the berth provided, and the obstructions were encountered before the unloading berth was reached.

# Discussion and Further Findings.

There is little, if any, controversy over the facts, so far as above outlined. The differing versions relate to what happened between the time of an interruption of the effort to berth the barge and the sustaining of the injuries. The barge had been brought to a wharf at Pennsville.

The general location and wharf conditions were that there was a construction extending from the shore into the river on the up-river, or what, in the evidence, is called the north, side of which was the place provided for the unloading of the barge. At the outer end of the entire construction a wharf pier head extended from the upper or north side at right angles to the main construction. The barge was brought around the end of this pier head, and the attempt was then made to have her drop back toward the shore to a position from which she could be warped alongside of the bulkhead wharf, where she was to be unloaded. This pier head was about 30 feet on its end face, and a little more than that in its extension upstream. The whole wharf construction extended into the river a little over 300 feet, and the place at which the barge was to be unloaded was about midway of the whole length of construction. In the attempt to drop the barge astern toward the shore, she grounded, so that the effort to warp her into the desired place at the wharf was for the time given up.

There is nothing in the case to indicate that there was any obstruction which would have caused injury to the barge after she had reached the berth provided for her. There were, however, such obstructions on the bottom near the wharf, further out from the shore. These obstructions were present from the corner formed by the extension of the pier head from the main construction for some distance toward the shore and out from the wharf. It was these obstructions which caused

the injuries to the barge.

The real controversy is over the question of how the barge came upon the obstructions. The operation of warping the barge into its intended place was under the general charge of the respondent, who was present and gave the master directions as to the movement of the barge. The theory of the libelant is that the boat stuck upon the obstructions in the act of being moved, in accordance with the directions of the respondent. The theory of the respondent is that the barge had merely grounded at the stern, and was in a perfectly safe place, in which she could have rested upon the bottom without injury, and that she was injured because the master of the barge, in disregard of the directions of the respondent to let the barge remain where she was until the rise of the tide would permit of her being moved, attempted to swing her around nearer the wharf, and thus brought her against the obstructions. This change of position, it is averred, took place in the absence of the respondent, and brought about the damage done.

Our finding upon this point is influenced by, among other considerations, two features of the case. One is that there does not appear to have been any occasion for the master of the barge to have changed the position of his boat, and nothing to have induced him to desire to do so. On the contrary, there is an unlikelihood he would move the barge into a dangerous place, against which he had been warned by the respondent. The other is the difficulty he would have had in his effort to move the boat after she was so firmly stuck on the bottom that she could not

be moved by him with the aid of the respondent.

The following additional fact findings are made, after a consideration of all the evidence:

(4) The barge was injured by grounding upon obstructions while

moving, as directed by the respondent.

(5) Neither the libelant nor the master of the barge had knowledge of the danger of damage to the boat, but in taking her where she was taken the master was obeying the instructions of the respondent, and was relying upon his assurance that the movement which brought her up against the obstructions was one which could be made in safety.

(6) The respondent knew of the presence of the obstructions, and neglected to warn the libelant or the master of the barge of their ex-

istence.

# Conclusion of Law.

The conclusion reached is:

(1) The respondent is answerable in damages to the libelant for the loss sustained by him in the injury which the barge suffered, and is entitled to a decree awarding such damages, with costs. The ascertainment of the amount of the damage has, we understand, been provided for.

The libel is sustained, and a formal decree embodying these findings may be submitted.

#### THE JOHN J. FREITUS.

(District Court, W. D. New York. September 3, 1918.)

#### No. 1121.

1. Admiralty \$\infty\$ 101-Liens-Priority.

Although the season rule appears to have been recognized and followed upon the Great Lakes, yet, where a tugboat was actively engaged beyond the season, the rule that claims of equal rank incurred in the same calendar year should have equal priority, while those in subsequent years should have priority over any earlier, is properly applied.

2. MARITIME LIENS @==37-REPAIRS-ELECTION OF REMEDIES.

Where libelant, which repaired a vessel, had a possessory lien, such lien merely gives the right to hold the vessel upon which repairs were made; and where the possessory lien was interrupted by the libelant's enforcement of its maritime lien, it was an election on the part of libelant to rely on its maritime lien, which took the same rank as other supply and repair claims for that year.

In admiralty. Libel by the Buffalo Dry Dock Company against the tug John J. Freitus, her engines, etc. On exceptions to the report of the commissioner. Report corrected and affirmed.

Thomas C. Burke, Roland Crangle, R. E. Babcock, Ellis H. Gidley, Lawrence Coffey, and C. H. Baldy, all of Buffalo, N. Y., for claimants. Brown, Ely & Richards, of Buffalo, N. Y., for respondent.

HAZEL, District Judge. The libelant in a proceeding in rem against the tugboat John J. Freitus claims priority for repairs, under the 40-day rule applicable to harbor tugs prevailing in the port of New York, and also under an asserted possessory lien, In re Samuel Little

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Index

221 Fed. 308, 137 C. C. A. 136. The season of navigation in lake ports is generally about seven months in length, but it appears that the tugboat in question was engaged in harbor towing at Buffalo during the entire year of 1916 and the fore part of 1917. On January 2, 1917, while thus engaged, she negligently caused the stranding of the steamer Alleghany, damaging her to the extent of approximately \$14,081.44. The fund in the registry of the court is insufficient to pay such damage, or to pay in full the various claims for repairs and supplies accruing after the disaster. Claims were presented and allowed for repairs and supplies furnished both before and after the accident. The tugboat remained in libelant's possession after the repairs in question until October 23, 1917, when she was seized by the marshal in this proceeding. She was subsequently sold for \$4,550.

The commissioner in his report stated that seamen's wages should be paid first, and after that claims for supplies and repairs furnished the tug after the disaster to the Alleghany; all such claims being of equal rank. To this finding libelant objects, contending that its repairs to the tug in June and July, 1917, should be paid prior to other claims for repairs and supplies furnished prior to the expiration of 40 days from October 23, 1917, when this proceeding was begun, and in any event that its possessory lien for repairs is superior to all other claims save claims for seamen's wages and claims accruing, if any, after June 29, 1917, when the tug was taken to the dry dock. In considering the latter contentions of libelant, the commissioner, George Clinton, Jr., in his report states:

"The Buffalo Dry Dock Company claims priority over the other repair and supply liens which accrued during the season of 1917, inasmuch as it held possession of the Freitus while those repairs were being made, and continued in possession until the seizure by the marshal, holding the Freitus as security for its claim. Counsel for the Dry Dock Company contends, therefore, that the Dry Dock Company has a common-law possessory lien in addition to its maritime lien, which gives it priority over other maritime liens which would otherwise be of equal rank with it. If the possessory lien does entitle the Dry Dock Company to priority, it is not deprived thereof by the marshal's seizure of the vessel. In my opinion, however, the possessory lien adds nothing to the maritime lien. The question does not seem to have been directly passed upon by the courts. The cases of The Ulrica (D. C.) 224 Fed. 140, and American Trust Company v. Fletcher Company, 173 Fed. 471, 97 C. C. A. 477, do not decide it. If the claim upon which the possessory lien is founded were nonmaritime, the lien would be subordinated to those arising by the maritime law, as is apparent from the analogy of a chattel mortgagee in possession, or the much stronger case of a purchaser, where, instead of a lien, ownership of the property would be in the claimant. I therefore hold that the claim of Buffalo Dry Dock Company should take equal rank with the other repair and supply claims of 1917."

[1] In considering the contention that the 40-day rule applies, the commissioner states:

"It has been suggested that the 40-day rule applied upon the Atlantic coast should be enforced. There are three rules now applied under varying circumstances: The forty-day rule, adopted in the case of harbor vessels on the Atlantic coast; the voyage rule, applied to vessels engaged in oceanic commerce; and the season rule, applied to vessels engaged in commerce on the Great Lakes. All of these rules are more or less arbitrary; the voyage rule being the only one of undoubted antiquity, both the 40-day and the season

rules having been adopted as matters of convenience, and the former never having been adopted heretofore upon the Great Lakes, so far as my information and investigation go. An examination of the authorities show that the 40-day rule was adopted on the Atlantic coast in the case of harbor vessels, as resulting in less inconvenience to vessel men and their creditors than any other rule which might be thought to apply. When it was adopted, the season rule had never been in force on the coast, inasmuch as there is no limited season of navigation there, such as there is upon the Great Lakes. For many years, however, the season rule has been recognized as applicable to vessels navigating the Great Lakes, and to my mind the adoption of the 40-day rule in Great Lakes ports would result in greater inconvenience and in unsettled business conditions to a greater extent than the adoption of a rule analogous to the season rule. It is manifestly impossible to apply the strict season rule to vessels engaged in harbor towing throughout the year, and I therefore hold that, in my opinion, the proper rule to be applied is that claims of equal rank incurred during the same calendar year should have equal priority; those of a later year having priority over those of an earlier one. This I believe coincides with what business men generally upon the Great Lakes understand to be the law, although I know of no decisions heretofore rendered establishing such a rule. The repair and supply claims. therefore, accruing during the calendar year 1916, are to be given equal priority against the fund."

The commissioner is a proficient and careful proctor in admiralty, and I am persuaded of the correctness of his decisions, and therefore concur therein. Although the season rule appears to have been invariably recognized and followed upon the Great Lakes (see The City of Tawas [D. C.] 3 Fed. 170, and The J. W. Tucker [D. C.] 20 Fed. 134), the fact that the tugboat in question was engaged beyond such period would seem to justify applying the rule that claims of equal rank incurred in the same calendar year should have equal priority, while those in subsequent years should have priority over any earlier.

[2] A possessory lien merely gives the right to hold the tug upon which repairs are made, and as such right was interrupted in the present case by libelant's enforcement of its maritime lien, which I think amounted to an election of remedies, the claim in question takes equal rank with the supply and repair claims of 1917. Benjamin on Admiralty (4th Ed.) § 132: The General Smith, 4 Wheat, 438, 4 L. Ed. 609.

The Lenahan claim, which was allowed at \$33, concededly should

have been \$53, and the decree will make correction.

The commissioner's report is affirmed.

#### BONIFACI v. THOMPSON, Adjutant General, et al.

(District Court, W. D. Washington, N. D. November 1, 1917.)

1. Equity \$\insigm 15\to Subjects of Jurisdiction.

The jurisdiction of a court of equity, unless enlarged by express statute, is limited to the protection of property rights.

2. Courts 342-Jurisdiction-Federal Courts.

The United States courts have always recognized the distinction between common law and equity under the Constitution as a matter of substance, as well as of form and procedure, though both jurisdictions are vested in the same courts.

3. Injunction 55-Jurisdiction-"Property Right."

Judicial Code, § 24, subd. 14 (Comp. St. 1916, § 991), gives a federal court no jurisdiction over a bill to enjoin a local board and adjutant general from inducting complainant into military service under the Selective Service Act, on the ground that interruption of complainant's employment would deprive him of a property right, for complainant has in no just sense a property right in his employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

4. Injunction \$\iff 28\$—Jurisdiction—Local Draft Board.

As a local board provided for by the Selective Service Act, is a public body, exercising quasi judicial functions in passing on the right of exemption, a court of chancery has no jurisdiction to interfere with such a board's exercise of its function.

In Equity. Bill by Peter Quarte Bonifaci against Maurice Thompson, Adjutant General, and W. M. Whitney and others, Local Board for Division No. 6, Seattle, Wash. On motion to dismiss. Motion granted.

Christofer Jacobson, of Seattle, Wash., for plaintiff.

Clay Allen, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash., for respondents.

NETERER, District Judge. Plaintiff filed a bill in equity, alleging that he is a "native-born citizen of the kingdom of Italy," born September 17, 1886; that he came to the United States on May 13, 1906, and declared his intention to become a citizen of the United States April 13, 1917; that he has been certified for military service by defendants Whitney, Conner, and Lee, as qualified and acting members of Local Board for Division No. 6, Seattle, Wash., under the Selective Service Act (approved May 18, 1917 [40 Stat. 76, c. 15]) to defendant Thompson, Adjutant General; that he filed claim for exemption under article 5 of the United States Constitution and article 3 of the treaty of commerce and navigation of February 26, 1871, between the United States and the kingdom of Italy (17 Stat. 847) as amended February 25, 1913 (38 Stat. 1669); that said exemption was denied by the local board, and also by the Division Board for Division No. 1, Western District of Washington, and prays that defendants be enjoined from requiring plaintiff to do military service.

[1, 2] The defendants have filed a motion to dismiss upon the ground that the court has not jurisdiction to hear and determine this matter, in that the issue involved is one concerning the personal rights only, and not any property rights; that the bill is wholly without equity, and the facts stated are not sufficient to entitle the plaintiff to any relief; that the bill of complaint upon its face shows that the

plaintiff does not come into court with clean hands.

The first question to be determined is whether this is a matter of which chancery takes cognizance.

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property." In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

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In the same case Mr. Justice Gray (124 U. S. at page 213, 8 Sup. Ct. at page 489, 31 L. Ed. 402) quoted from Kerr on Injunctions, as follows:

"'It is elementary law, that the subject-matter of the jurisdiction of a court of chancery is civil property.'"

# And again:

"Nor has the court of chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances and when necessary for the protection of rights of property." Sheridan v. Colvin, 78 Ill. 247.

United States courts have always recognized the distinction between common law and equity, under the Constitution, as matter of substance as well as of form and procedure, and this has been maintained, although both jurisdictions are vested in the same courts. Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Miss. Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052.

- [3] Complainant asserts that special equity jurisdiction has been conferred by the Congress in subdivision 14, section 24, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [Comp. St. 1916, § 991]) and contends that, the employment of the plaintiff being about to be interrupted, he will thereby be deprived of a property right. This contention is not sustained. Judge Baker, in Taylor v. Kercheval (C. C.) 82 Fed. 499, said:
- "\* \* \* And it is clear that the complainant has in no just sense a right of property in his office or employment. \* \* \* \*"
- [4] It must be conceded that the District Board is a public body exercising quasi judicial functions in passing upon the right of exemption within the provisions of the rules and regulations prescribed by the President and the Selective Service Act (approved May 18, 1917), and, being such, this court of chancery has not jurisdiction to interfere with the duties of the board, exercising functions under another department of the government. It is said that the District Court for the Southern District of New York has within a day or so dismissed a like application. I have not had the opportunity of seeing this decision.

The motion to dismiss is granted.

# THE MEXICO. THE FORMICA.

(District Court, E. D. Virginia, July 13, 1918.)

1. Salvage \$\infty\$26—Compensation for Services—Amount.

Allowance should not be for entire time consumed in rendering salvage services, where time consumed was not a full loss; but to some extent part of the route of the ship rendering the services.

2. SALVAGE \$\infty 27\$—Compensation for Services Rendered.

In libel for salvage services rendered in towing a bark to anchor, total allowance of \$20,000 held just for services rendered; value of the ship, when salvaged, together with cargo and freight money, being \$91,930.

In Admiralty. Libel by Charles Christien, master of the steamship Mexico, against the bark Formica, to recover for salvage service. Decree in accordance with opinion, to be entered on presentation.

Allen D. Jones, of Newport News, Va., for libelant. Hughes & Vandeventer, of Norfolk, Va., for respondent.

WADDILL, District Judge. The libel in this case is filed to recover for services rendered by the steamship Mexico to the bark Formica, commencing on the 13th day of May, 1917, under the following circumstances:

The Mexico was en route from New Orleans to Havre, heavily laden with iron billets, cotton, etc., and when some 100 miles to the southeastward of Cape Hatteras was signaled by the Formica, then in distress, en route from Plymouth, England, to Philadelphia, with a cargo of china clay. This was on Sunday, the 13th of May, about 12:30 p. m. The weather was such that it was impracticable for the Mexico to pass a line to the Formica, and she stood by until the following morning, about 9:30, when she succeeded in doing so, and towed her into Hampton Roads, reaching the Virginia capes the following Wednesday morning about 7:30, and Hampton Roads, off Old Point at 1:55 p. m., where the bark was safely anchored. The Mexico thereupon proceeded to Newport News, coaled, and took on stores, and was detained there until Friday morning at 6 o'clock; it being impracticable for her to leave before that time, under the war regulations then existing.

That the libelant's claim is one of merit is uncontroverted; indeed, the essential facts showing the meritorious service are all admitted, save as respects the value of the bark. The weather, at the time the service was undertaken and partly performed, was heavy, involving some risk to the salvors. The property saved was in a perilous condition, and might probably have proven a total loss, but for the fortuitous arrival of the Mexico. The service was timely, promptly, and efficiently rendered, and the time taken, as claimed by the libelant, was approximately six days, including the time necessary for the ship to get back on the across seas course. The libelant claims a direct loss of \$3,400 a day for the time taken. The Mexico was a large ocean-going steamship of 4,885 tons gross, 3,100 net, 354 feet 4 inches long, 47.6 beam, 27.3 depth, admitted to be worth \$1,387,000, and her cargo \$1,200,000; her freight money due \$186,324, and, estimating the time usually allowed for making her trips, her earnings were \$3,400 a day. The Formica was a three-masted bark, iron hull, 226 feet long, 34 feet beam, 1,145 tons, and 42 years old. Her value is the chief subject of dispute. She had on board a cargo valued at \$13,-586, and her freight money due \$3,344, a total of \$16,930. Respondent insists that the bark, in her damaged condition, was not worth more than \$30,000 to \$35,000; whereas, libelant contends that she is worth very largely in excess of that, and at least \$100,000, that the vessel sold shortly before the service was rendered for \$120,000, and that she had been repaired at a cost estimated from \$90,000 to \$134,-

000, and her present value was \$250,000.

[1] The court's conclusion on the disputed testimony as to the value of the ship, when salved, is that it was probably worth \$75,000, which, with the cargo and freight money, amounting to \$16,930, made a total value of \$91,930, and that the time for which allowances should be made for the service should be five, and not six, days, as the time consumed in coming to Hampton Roads was not a full loss, it being to some extent on the journey; that is, from the Virginia capes to a point intersecting the original course. The libelant claims for six days' time of the ship, at \$3,400 per day, as actual loss, and \$1,749 for money expended for ship's supplies and coaling at Newport News, made necessary by the departure of the vessel from the original course.

[2] The court is not inclined to award the full \$3,400 a day, but thinks, on account of the loss of time, five days, at \$3,000 a day, should be awarded, making \$15,000, and on account of expenses and coaling \$1,000 which sums, and a bounty of \$4,000, making a total of \$20,000, would seem to be a just allowance for the service rendered, taking into account the usual considerations that control in salvage awards.

A decree in accordance with the foregoing will be entered on presentation.

#### UNITED STATES v. DIRECT SALES CO.

(District Court, W. D. New York. February 5, 1918.)

Druggists 5-Misbranding-Offenses.

Under Food and Drugs Act, § 2 (Comp. St. 1916, § 8718), declaring that any person who shall ship in interstate commerce any article adulterated or misbranded shall be guilty of a misdemeanor, and for the first offense fined not exceeding \$200, and upon conviction for each subsequent offense not exceeding \$300, etc., the shipment of seven different articles, each of which were both adulterated and misbranded, constituted fourteen separate, distinct violations of the act, for which separate penalties might be imposed, though the aggregate exceeded \$200.

The Direct Sales Company a corporation, was by information charged with the offenses of misbranding and adulteration of medicines, denounced by the Food and Drugs Act. Fine imposed on each count.

Stephen T. Lockwood, U. S. Atty., and John H. O'Day, Asst. U. S. Atty., both of Buffalo, N. Y.

Donald Bain, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. The information in fourteen counts charges the misbranding and adulteration, in violation of the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St.

1916, §§ 8717-8728]), of each of seven different medicines (acetanilid; calomel; quinine sulphate; salol; sodium salicylate; elixir iron pyrophosphate, quinine, and strychnine; and hydriodic acid) contained in a single shipment from Buffalo, N. Y., to East Falls Church, Va. Defendant company pleaded guilty, as charged in the indictment, and the question presented is as to the penalty to be imposed; defendant's counsel contending that but one offense is charged and that there should therefore be imposed only a single penalty.

Section 2 of the act in question makes it an offense to transport in interstate commerce any article of food or drugs which is adulterated,

stating that:

"Any person who shall ship \* \* \* any such article so adulterated or misbranded \* \* \* shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court." Comp. St. 1916, § 8718.

According to this, the article is clearly specified as the unit of the offense, as distinguished from the shipment, and as there were seven different articles in the shipment, and each was both adulterated and misbranded, it would seem that there were fourteen separate and distinct violations of the act, for which separate penalties may be imposed. This is the view, I think, quite generally adopted in other federal districts. The brief of the United States attorney directs attention to a number of cases in other districts in which separate penalties were imposed on different counts of information charging a single shipment of misbranded and adulterated articles. Here the various offenses charged are such that not only is a deception as to money value practiced upon the purchaser, but also as to medicinal value, which may be injurious to the health of the user. The intent undoubtedly was to consider each misbranding and adulteration of an article a violation of the statute, regardless of the number of articles contained in any one shipment.

In opposing the imposition of a penalty in excess of \$200, counsel cites Byrne on Criminal Procedure, § 357, to show that separate offenses committed at one and the same time are inspired by one criminal intent, and that therefore but one punishment may be imposed; but I think that rule does not strictly apply, as the statute specifically designates the articles as the item the transportation of which is prohibited. The imposition of a penalty in excess of \$200 would not be the imposition of a penalty for a subsequent offense. Each bottle comprised in the shipment contained a different article, and the misbranding and adulteration constituted concurrent offenses. The provision for different punishment for subsequent offenses was made in contemplation of violation of the statute subsequent to conviction for

similar violations.

A fine of \$50 is imposed on each count, amounting in the aggregate to \$700.

### HARRIS v. AKE et al., County Com'rs.

(District Court, N. D. Ohio, E. D. June 27, 1917.)

No. 9357.

HIGHWAYS \$\infty 190-Accidents-"Proper Repair."

Gen. Code Ohio, § 2408, declaring liability of county for damages from negligence in not keeping a county road in "proper repair," is not limited to deterioration from a condition in which the road was put, but applies to original construction in an unsafe or defective manner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Repair.]

At Law. Action by O. L. Harris, administrator of Mary B. Harris, deceased, against Samuel Ake and others, as County Commissioners of Stark County, Ohio. On demurrer to petition. Overruled.

Amerman & Mills, of Canton, Ohio, for plaintiff. Frank N. Sweitzer, Pros. Atty., of Canton, Ohio, for defendants.

WESTENHAVER, District Judge. Defendant's demurrer raises the question whether, assuming all the facts well pleaded in the petition to be true, is a cause of action stated? The action is one against the county commissioners of Stark county to recover damages for a personal injury said to be due to a county highway being out of repair. The alleged want of repair is due to the fact that in constructing and improving the road the county commissioners left in the center of the highway, at its intersection with another county road, a tree four feet in diameter, and paved the roadway around each side thereof.

Defendant's argument is on the assumption that a liability under section 2408, G. C., is imposed on the county only when a public or a county road has been improved according to a specific plan, and then through decay or usage part of the improvement becomes out of repair,

and the injury is due to a failure to make such repairs.

I am of opinion that the statute cannot be so strictly limited. A road may be out of repair, within the meaning of this statute, if it were originally improved or constructed in an unsafe or defective manner. I reach this conclusion in part from the following authorities: Commissioners v. Coffman, Adm'x, 60 Ohio St. 528, 54 N. E. 1054, 48 L. R. A. 455; Black v. Commissioners, 13 Ohio Cir. Ct. R. (N. S.) 252, affirmed without report 88 Ohio St. 587, 105 N. E. 767; Whitney v. Niehaus, 21 Ohio Cir. Ct. R. (N. S.) 273 (a motion to certify record denied by the Supreme Court); Brownfield v. Clapham, 25 Ohio Cir. Ct. R. (N. S.) 443; Milner v. Commissioners, 14 Ohio N. P. (N. S.) 141.

The case of Smith v. Williams County, 29 Ohio Cir. Ct. R. 610, and 10 Ohio Cir. Ct. R. (N. S.) 115, if to be regarded as a decision contra, must be limited to the exact holding therein contained, namely, that the road itself on which the injury was sustained is not the kind of road included within section 2408, G. C.

In order to avoid misunderstanding, I should add that I am not holding as a matter of law that the construction here is or was so far defec-

tive or improper as to be a want of "proper repair." It may be that this question is a mixed one of law and of fact, and should be submitted to a jury under proper instructions. I am merely holding that it cannot be said, as a matter of law, that this construction does not amount to a failure to keep a county road in a state of "proper repair." Upon this limited ground I am overruling the demurrer.

The other ground of demurrer, namely, that this court has not jurisdiction, because an action cannot be maintained in this court against the county commissioners of an Ohio county, was not urged upon ar-

gument, counsel conceding that it is not well founded.

An order will be entered, overruling the demurrer, with leave to answer within 10 days. An exception may be noted on behalf of defendant.

#### CHARAK v. DURPHEE.

#### In re LARKIN.

(District Court, D. Massachusetts. July 31, 1918.)

No. 875.

BANKRUPTCY 258-FILING OF INVOLUNTARY PETITION-EFFECT.

The liquidation of property in the possession of a bankrupt at the date of the filing of an involuntary petition against him rests with the bankruptcy court, and the receiver is entitled to sell mortgaged property in possession of the bankrupt at the time of the filing of the petition as against the mortgagee, who sought to take possession of the same for foreclosure.

In Bankruptcy. In the matter of Jacob D. Larkin, bankrupt. Petition by William Charak, receiver, against Chester W. Durphee. Receiver's petition for leave to take and sell mortgaged property granted.

Edward A. Nathanson, of Boston, Mass., for plaintiff. Frank A. Pease, of Fall River, Mass., for defendant.

MORTON, District Judge. At the time when the involuntary petition in bankruptcy was filed the mortgaged property was in the bankrupt's possession. Thereafter, and before the appointment of a receiver, the mortgagee took possession of it for the purpose of foreclosure. The question is whether he should be allowed to proceed with the sale. The receiver objects to his doing so, and has petitioned for authority to take and sell the property himself.

In Re Wellmade Gas Mantle Co., 233 Fed. 250, 147 C. C. A. 256, it was held by the Court of Appeals for this circuit that a person from whom goods had been obtained by fraud could not replevy them under a state court writ after an involuntary bankruptcy petition had been filed. In Matthews & Sons v. Webre & Co. (D. C.) 213 Fed. 396, it was held that a suit to foreclose a mortgage of real estate could not be maintained in the state court under similar facts.

The result of these cases and of those on which they rest appears to be, generally stated, that the liquidation of property in the possession

of an alleged bankrupt at the date of the filing of an involuntary petition against him rests with the bankruptcy court. In so far as the matter rests in the discretion of the court, I am of opinion that the practice above stated should be followed in this case. There is no doubt that the property in question ought to be sold as soon as practicable.

Accordingly an order should be entered restraining the defendant from proceeding with his foreclosure, and a further order allowing the receiver's petition for leave to take and sell said property, the proceeds of such sale to be held subject to the same valid liens that the property itself was subject to.

So ordered.

#### In re ADDIS.

(District Court, N. D. California, First Division. May 7, 1918.)

ALIENS \$\infty 62-Naturalization-Requirements.

An application for citizenship by one who within a year has pleaded guilty to a charge of conspiring to hire others to enlist in the service of a foreign king, in violation of Criminal Code, § 10 (Comp. St. 1916, § 10174), and has been sentenced to pay a fine therefor, although subsequently pardoned by the President, will be denied naturalization, as not having fulfilled the statutory requirement of behaving as a man well disposed to the good order and happiness of the United States.

Application by Thomas Addis for naturalization. Denied.

George A. Crutchfield, Chief Naturalization Examiner, for the United States.

DOOLING, District Judge. Thomas Addis makes application to be admitted to citizenship. He has proved his residence for the requisite period and has produced two witnesses who have testified that during his residence in this country he has, in the requirements of the statute, "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1916, § 4352).

The examiner calls attention to the records of this court, which show that within a year the applicant pleaded guilty to an indictment which charged him with conspiring with others to violate section 10 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. 1916, § 10174]); that is to say, conspiring to hire and retain others to enlist and go beyond the limits and jurisdiction of the United States with intent to enlist in the service of a foreign king. Upon this plea of guilty the applicant was sentenced to pay a fine of \$1,000. Applicant, in response to this showing, produced a pardon from the President of the United States for the said offense.

The question then is: May the applicant, under the circumstances, be held to be one who during his residence here "has behaved as a man

of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

I am of the opinion that the commission of an offense against the United States, which by the Criminal Code is declared to be a felony, precludes the offender from claiming successfully that he has behaved as a man well disposed to the good order and happiness of the same. While a pardon releases the punishment and blots out the existence of guilt, it does not obliterate the fact that the applicant has not behaved as one well disposed to the good order and happiness of the United States.

I say nothing of the question of good moral character, which may also be involved in the commission of the offense to which applicant pleaded guilty, as his application must be denied for the reasons stated. These views find support in Re Spencer, Fed. Cas. No. 13,234, 5 Sawyer, 195.

The application is therefore denied.

#### THE CHEMUNG. THE BAKER BROS. THE W. S. TAYLOR,

(District Court, S. D. New York. September 13, 1918.)

1. Collision 591-Fault-Selecting Side to Pass.

Tug B. B., with tow, having already lapped tow of tug B., on B.'s starboard side, when B. and tug T., with tow, all in mid-stream, and in close proximity, exchanged signals for starboard passing, could assume T. would pass her to starboard, and was not in fault in selecting that side to pass.

- 3. Collision 5-102—Contributory Fault.

  The danger having been created by the fault of one vessel, the other will not also be condemned, unless her fault, occurring, if at all, in the

In Admiralty. Suit for collision by the Potter Transportation Company, owner of the barge Chemung, against the steam tug Baker Bros.; the W. S. Taylor being impleaded. Decree against the W. S. Taylor alone.

George W. P. Whip, of New York City, for libelant. J. A. Martin, of New York City, for Baker Bros. T. Catesby Jones, of New York City, for the W. S. Taylor.

stress of the danger, appears clearly and satisfactorily.

HUTCHESON, District Judge. This is a collision case, in which the Potter Transportation Company, owner of the barge Chemung, charges the steam tug Baker Bros. with liability, and the steam tug

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Baker Bros. impleads the tug W. S. Taylor, claiming that the fault

lies with that tug.

The collision occurred on December 28, 1916, in the East river, about mid-stream, just off of Hudson street, Brooklyn. The weather was clear and no wind. The testimony shows that at and about the point of collision the only boats on the river were the Bern and her tow, the Baker Bros., with the barge Farrell in tow, the W. S. Taylor, with three barges, including the Chemung, bunched, and the ferryboat Maine, with perhaps one or two small boats, between the Bern and the New York shore. On some points there is no conflict, but on the vital points in the case the testimony is not only conflicting, but quite confusing.

Those matters which are not disputed are that the ferryboat Maine was on the Brooklyn side of the channel, the tug Bern was on the Manhattan side, and that the river was at this point about 1,400 feet wide. It was also agreed that the Bern and the Taylor exchanged signals for a starboard to starboard passing, and that this was done because it was desirable, if not necessary, for the Bern to keep inside at that point. The distance in feet from the Manhattan shore of the Bern and the distance in feet of all vessels both from the respective shore and from each other presents a mass of conflicting testimony, all of which is plainly inaccurate and unreliable. Out of this mass of testimony, however, it clearly appears that the Bern and her tow were near the middle of the river, favoring the Manhattan side, when the Bern and the Taylor exchanged their signals, and that the Bern continued to draw slowly toward the Manhattan side; her tow however, maintaining up to the point of collision a position almost in midstream.

It is undisputed that the Taylor and the Bern not only exchanged signals, but proceeded to pass each other starboard to starboard as agreed; but there is very sharp conflict on the question of whether the Taylor and the Baker exchanged signals, and, if so, what signals were exchanged. The witnesses for the libelant and for the Taylor, except Capt. Bill, all declare that the Baker blew no signals. Capt. Bill, however, admits hearing a danger signal from the Baker. Witnesses for the Baker stoutly maintain that the Taylor and the Baker exchanged the same signals, which had passed between the Taylor and the Bern, and that in addition the Baker blew danger signals. While there is some evidence to the contrary, the great preponderance of the testimony clearly establishes that at the time the Bern and the Taylor exchanged passing signals the Baker had already lapped on the tow of the Bern and was in such proximity to the Bern as that the prudent and proper thing for the Baker to do was to make a starboard passing of the Taylor, just as the Bern had already been signaled to do.

[1] This being so, it is not material to the decision of this case to determine whether the Baker gave any signals, as she had a right to assume that the Taylor would pass the Baker to starboard, just as she passed the Bern, and it was her duty to so maneuver as to pass on that course. I, however, believe and hold that the Baker did exchange

whistles with the Taylor, as testified to by the witness on behalf of the Baker, and that for that further reason she had the right to make a starboard passing. I therefore hold that the Baker was without fault in the matter of signals, and further, that the proper method for the two tugs to pass was starboard to starboard, and not port to port, as contended by libelant, and that the Baker is without fault

in selecting the starboard side to pass the Taylor.

[2] In this view, then, the only issue left for determination is whether, in making the passage, the Taylor and the Baker, either or both, failed to exercise the care that was incumbent upon them under the circumstances, either in the matter of giving a wide enough berth to the other boat to pass, or in the matter, at the very time of the collision, of handling it in a proper and skillful way. It is proper to state that the libelant and the Taylor are under the same ownership, and in that sense have a common cause against the Baker: vet the theory, as disclosed by the libel and the testimony of the libelant's witness, that the fault of the Baker lay in attempting to pass the Taylor and her tow starboard to starboard, instead of port to port, is wholly different from the theory advanced by the Taylor, in her answer and through her witnesses, that the fault of the Baker was in hauling over to the Brooklyn shore, instead of pulling toward the New York shore, though the Taylor, in addition to this claim, also charges the Baker with fault in permitting her tow to sheer as she passed the Taylor.

The testimony of the captain of the barge Chemung, offered on behalf of the libelant, puts the fault on the Baker, in that it did not make a port to port passing, and claims that this was the passage which was the reasonable and logical one, and in his testimony he declares that there was not room for the Baker to pass between the Taylor and the Bern, or, as he significantly puts it on page 16 of

his testimony:

"The Bern had gone by, but his tow had not; that is why he [the Baker] was caught in the trap and could not get out of it."

Later, this captain says that the Baker slewed his boat over right alongside of the Bern's tow and tried to clear him, that he slewed his tug over as close to the Bern's tow as he could, and that this slewing of the tug caused the barge to sheer. On page 25 he says:

"When we [the Chemung] passed the Bern, we were between 30 and 40 feet from the Bern. The course of the tug Chemung was not changed at all; she came straight down on her course."

This view of the facts, that the accident was caused by the Baker being squeezed between the Bern and the Taylor, is substantially the theory which is supported by the testimony of the witnesses for the Baker. The Baker's witnesses, however, claim that this condition was caused by the fault of the Taylor in not pulling over to the Brooklyn shore to make a safe starboard passing. The witnesses for the Taylor, however, proceed on a different theory, and some of them declare that the Taylor went as close to the Brooklyn shore as she dared on account of the ferryboat Maine, and that she left ample space between

the Taylor and the Bern for the Baker to pass. If there were any reliable testimony in the record on the matter of actual distances in feet from object to object in the river, this clear conflict and apparent confusion could be easily cleared up. As a matter of fact, however, the court will be compelled to disregard absolutely the estimates of the various witnesses in feet, and rest the decision of the case upon the fact of the position of the boats established by the testimony, not expressed in terms of feet.

The substance and effect of the whole tetsimony clearly establishes that the collision occurred near the middle of the river. It is undisputed that, when the Taylor and the Bern exchanged signals, the Taylor was in the middle of the river. The preponderance of the testimony shows that at that time, or shortly thereafter, the Baker and the Taylor were head and head, and that thereafter the Taylor shifted her course, some of the witnesses say not at all, and some very slightly. The captain of the Chemung testified that the course of the Chemung was not changed at all; that she came straight down on her course. I think it clear, therefore, that the evidence establishes that the Taylor was at fault in not so directing her course as to give the Baker a wider berth to pass between her and the Bern, and that, had the Taylor directed her course more to the Brooklyn shore, as she should have done, the collision would not have occurred. I shall therefore hold the Taylor primarily responsible for the collision.

[3] The only question remaining is whether the Baker, in maneuvering just before the collision, was handled in such a negligent way as to contribute to the accident. I think it clear that there was a slight sheer on the part of the Farrell, caused by the stopping of the Baker just prior to the collision. But for this sheer, it is claimed by the Taylor, the collision would not have occurred, and that therefore the Baker is either wholly or partly responsible. The Baker admits the stopping, and claims that it was necessary to stop in order to avoid the collision with the Chemung; the distance being not only very slight between them, but that barge having itself a sheer, due to the slackening of a line from the Taylor to her tow. The captain of the Taylor admits that the barges took a slight sheer, but claims to have straightened that out prior to the collision; while the witnesses for the Baker claim that the sheer was a considerable one and that it was not straightened out

Had the vessels up to that point been equally blameless, if the Taylor had given the Baker as wide a berth as possible, and were the question of the fault to turn entirely upon the matter of the sheer, I might have difficulty in determining which set of witnesses should be given credence on that point. In view, however, of the fact that I find the Taylor did not conduct her passage up the river with the care necessary, that she crowded the Baker into a space so narrow as that it was designated by the captain of the Chemung as a "trap," it ought not to lie in the mouth of the Taylor to say that, in the stress of the danger which occurred as a result of that crowding, everybody testifying that danger signals were being blown, the Baker should be held to the exercise of that meticulous care which would assume a prescience of

what conditions would be and an omnipotence to avoid that which happened. It is a familiar principle that, where the danger has been created by the fault of one vessel, the other will not also be condemned, unless her fault appears clearly and satisfactorily. The Stadacona, 242 Fed. 624, 155 C. C. A. 314. As was said by Judge McPherson in The Saratoga (D. C.) 180 Fed. 620:

"The fault of the Saratoga being plain, it is well settled that the fault in the Taunton must be clearly proved, before she can be called upon to contribute to the cost of the injury."

It is therefore my opinion, and I so hold, that the Taylor is solely responsible, and a decree may be entered adjudging the W. S. Taylor to be solely at fault, and appointing a commissioner to ascertain the damages.

### UNITED STATES V. PHELAN.

(District Court, S. D. California, S. D. October 22, 1917.)

1. CRIMINAL LAW \$\sim 720(1)\topImproper Argument.

It is not legitimate argument to refer to the fact that counsel objected to the admissibility of excluded evidence.

2. CRIMINAL LAW \$\sim 730(8)\$—IMPROPER ARGUMENT—CURE.

Where the court directed the jury to disregard argument of the prosecutor concerning an objection to evidence, etc., and admonished counsel not to refer further to the matter, a mistrial should not be adjudged.

- 3. Witnesses \$\infty\$387 Inconsistent Statements Cross-Examination Written Statements.
  - Upon cross-examination a witness may be asked if he had not previously made statements inconsistent with his present testimony.
- 4. Witnesses €=388(7)—Inconsistent Statements.

If contradictory statements are written, the writings should be produced and exhibited to the witness.

5. WITNESSES \$\iiin\$388(7)\to-Impeachment\to-Photographic Copies of Written Instruments.

Where defendant's mother testified he was born in March, 1886, and denied that she had ever stated he was born in July of that year, held that, in a prosecution for failure to register under the Selective Service Act, photographic copies of a written instrument wherein she stated defendant was born in July, 1886, could be exhibited to her as foundation for impeachment: the original papers being unobtainable, and the statute making photographic copies admissible.

6. CRIMINAL LAW \$\infty 400(1)\$—BEST AND SECONDARY EVIDENCE.

Where an original instrument is lost, oral testimony may be given of its contents.

Edward H. Phelan was convicted of misdemeanor for failure to register under the Selective Service Act (40 Stat. 76, c. 15), and he moves for new trial. Motion denied.

W. Fleet Palmer and Gordon Lawson, both of Los Angeles, Cal., for the United States.

Isidore B. Dockweiler, of Los Angeles, Cal., for defendant.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

TRIPPET, District Judge (orally, denying motion for new trial). [1,2] The first point made is in regard to the argument of the prosecution concerning the objection to evidence and what effect that might have on the question. It is not a legitimate argument to the jury to refer to the fact that counsel objected to the admissibility of evidence that was excluded, and it would tend to mislead the jury and prejudice them. In this case the court did all that it could do. It instructed the jury to disregard the argument of counsel, and admonished counsel not to refer further to the matter. I do not think that a mistrial ought to be adjudged by reason of such slight misconduct on the part of the United States attorney.

The indictment charges, necessarily, that the defendant was not an officer of the United States Army, etc. Besides, the matter to which Mr. Palmer referred was the statements of counsel during the trial that the only issue was the age of defendant, and that the defendant testified that he would have registered, had he been within the age limit. I think there is evidence tending to show that the defendant is a farmer, and not a soldier or sailor, or otherwise engaged in the service of the United States.

[3-5] There is a very interesting question presented by this record. I have thought of it a great deal since the trial, and have worked hard on it. A witness upon the stand, a witness very material and important to the defendant, his mother, was asked whether or not she had ever made any statement to the effect that the defendant was born on July 13, 1886. This question was asked in various and sundry ways, and there is no doubt of the position taken by the witness, namely, that she always had in her mind that the defendant was born March 13, 1886, that there was no occasion for her to ever state any different date, and that she never had stated any different date in connection with the matter.

Subsequently photographic copies or photographs of writings were exhibited to her, bearing her name; that is to say, a similar name. The presumption of law is that it was her name, being similar. She was asked if that was her signature, and she replied in various ways. She would not say positively that it was not her signature, nor that it was; but she testified that she had filed in the Pension Office certain applications and affidavits and an application for a pension. The defendant objected that she could not be impeached by the introduction in evidence of these photographic copies of writing. The objection was overruled, and the photographic copies admitted in evidence. She having testified as to the date on which defendant was born. March 13, 1886, it was relevant to the case to show that she had made statements of a contrary nature, and upon cross-examination a witness may be asked if he did not make certain statements which were inconsistent with his present testimony. The general rule is that, if the alleged contradictory statements were in writing, the writing must be produced and exhibited to the witness. Greenleaf discusses this question. At section 465 he says:

A witness cannot be asked on cross-examination whether he has written such a thing, stating its particular nature or purport; the proper course be-

ing to put the writing into his hands and ask him whether it is his writing. And if he is asked generally whether he has made representations of the particular nature stated to him, the counsel will be required to specify whether the question refers to representations in writing or in words alone, and, if the former is meant, the inquiry, for the reasons before mentioned, will be suppressed unless the writing is produced. But whether the witness may be asked the general question whether he has given any account, by letter or otherwise, differing from his present statement—the question being proposed without any reference to the circumstance whether the writing, if there be any, is or is not in existence, or whether it has or has not been seen by the cross-examining counsel—is a point which is considered still open for discussion. But so broad a question, it is conceived, can be of very little use, except to test the strength of the witness' memory or his confidence in assertion; and, as such, it may well be suffered to remain with other questions of that class, subject to the discretion of the judge.

This subject is discussed by Jones on Evidence, § 847:

Witnesses may be impeached by producing their written statements—for example, their letters, affidavits, depositions, or the like—which are inconsistent with the testimony given at the trial. Thus, where the witness testified that the plaintiff had been discharged from service for neglect of duty, a letter of the witness stating that the plaintiff had performed efficient service was held admissible. But the witness cannot, in the first instance, be asked as to the contents of what he has thus written, since this would be a violation of the familiar rule as to best evidence. This is the rule maintained in nearly all jurisdictions in this country, and in many states is declared by statute. If the question is asked whether the witness had made certain representations, his counsel has the right to ascertain whether the representation or statement was written or oral, and, if it appears to have been in writing, the paper should be produced before he is compelled to answer.

That last statement seems to be supported by a great weight of authority, and I have always understood it to be the rule. When this woman was asked concerning her contradictory statements, counsel for defendant, having full faith and belief in this case, and believing in the witness, thought, of course, that she had never made any such representations, and did not follow the course that the law prescribes should be followed; that is, he did not demand to know whether or not these supposed representations about which she was being asked were in writing or oral. He did not demand that the circumstances of time and place, etc., should be stated to the witness, but permitted her to answer that she never had made any contradictory statements. After answering, any evidence that would dispute her testimony would be relevant to the case. The statute makes these photographic copies competent evidence.

[6] But, coming down now to the exhibiting to her of these photographic copies: It does seem to me that the rule concerning exhibiting the writing to witnesses is complied with by exhibiting a photographic copy. The purpose of the exhibition to the witness of the writings is to refresh the memory of the witness; to call the attention of the witness to the circumstances; to caution the witness. That could be done by a photographic copy, as well as by the original. Where an original is lost, the fact of the loss may be established, and then oral testimony may be given of the contents of the writing. Under such circumstances, of course, the writing could not be exhibited to the witness. In this case the papers are in Wash-

ington City. As I said before, the purpose of the rule is to call the attention of the witness to the statement, in order to remind the witness of the circumstances and contents of the statement. This is a novel case, I must admit; but I think that the procedure during the trial is in entire accord with the rules of evidence concerning the admissibility of this evidence.

It is argued that this telegram and this statement here are not admissible in evidence, being hearsay of the Commissioner of Pensions. The purpose of the telegram and letter No. 6 is to show that the prosecution had endeavored to get the original papers. Bielaski is not in the Pension Department, but he is a sworn officer of the government. These two documents are public records, and establish the facts contained therein. I think they are admissible in evidence as to the facts therein stated.

There is another matter, however, in regard to the admissibility of these documents to impeach the witness, and that is concerning whether or not she had been properly asked on cross-examination whether she had ever made a statement that the defendant was born July 13, 1886. I call attention to this matter, not for the purpose of asserting my opinion that it is the law, but because I think that counsel ought to investigate the statement, to see whether or not it is the common law and proper practice. I find in a note in Stephen's Digest, at page 328, that in some of the New England states the contradictory statements of a witness can be proved without his attention being first called to them on cross-examination. There is a Maine case, one in New Hampshire, and one in Massachusetts, and one in Connecticut cited in this note. You will find in Jones on Evidence, p. 1081, a Missouri case to the same effect. It may be the common law of this country that contradictory statements may be produced in evidence without asking the witness concerning them and without exhibiting writing.

While there is some doubt in my mind as to whether or not the procedure upon the admissibility of this evidence was just exactly as it should have been, I am not satisfied that the rulings of the court were wrong. In fact, I am of the opinion that they were right, and that the evidence was properly adduced. Under these circumstances it is the duty of the court to deny a new trial, which will be done, and exceptions entered in favor of the defendant.

### UNITED STATES v. DEMBOWSKI.

(District Court, E. D. Michigan, S. D. September 19, 1918.) No. 6220.

1. Army and Navy \$\iffill 40\$—Offenses—Seditious Utterances.

Where defendant, in the presence of a soldier of the national army and others, stated that he would never go into the United States army, that the Kaiser could lick England and France, and would soon come to the United States, and that all would have to acknowledge his supremacy,

etc., such statements were a violation of the Espionage Act, § 3, in that they might obstruct the enlistment and recruiting service, and were calculated to cause insubordination and disloyalty in the military forces.

2. Indictment and Information @=125(2)-Duplicity.

It is elementary that two separate offenses cannot be included in one count of an indictment.

3. Indictment and Information \$\information 125(20)-Duplicity

Where a statute creates a single offense, but specifies in the alternative different acts, any one of which will constitute the offense, an indictment may charge the commission of such offense by all of the means mentioned, using the conjunctive "and" wherever the statute uses the word "or," without being duplicitous.

4. Indictment and Information €==125(2)—Duplicity—Espionage Act.

The Espionage Act, § 3, declaring that whoever shall willfully make or convey false reports with intent to interfere with military operations, and whoever shall willfully cause or attempt to cause insubordination, or shall obstruct the recruiting or enlistment services, shall be punished, includes three different offenses, which cannot be joined in one count of an indictment.

5. Indictment and Information \$\iiii 125(4)\$—Duplicity.

An indictment charging in a single count violations of the Espionage Act, § 3, etc., held not to charge one transaction as a single offense committed by different acts.

6. Indictment and Information \$\iff 159(1)\to Amendment\to What Constitutes \to "Amend."

To amend is to correct or rectify or to free from error; hence to cure an indictment of the defect of duplicity, by striking from the single count in which several offenses were charged, is to amend the same.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amend.]

7. Indictment and Information \$\iiii 132(2)\to Amendment\to Priority.

Where an indictment was duplications because charging, in one count, the three several offenses denounced by the Espionage Act, § 3, the United States attorney will not be allowed to elect to rely on one of the offenses and nolle pros. the others; for that would amount to an amendment, and violate U. S. Const. Amend. 5, declaring no person shall be held to answer for an infamous crime unless on presentment of an indictment of a grand jury, etc.

8. Indictment and Information \$\iiii125(19)\$—Duplicity.

Where a statute prohibits the doing of a certain thing, or attempting to do such thing, these are merely different modes of doing one thing; hence an indictment in one count charging that defendant with the offense of causing insubordination in violation of the Espionage Act, § 3, and attempting to cause such insubordination, is not duplicitous.

Joseph Dembowski was indicted for violation of the Espionage Act, § 3. On demurrer and motion to quash. Demurrer sustained, and motion to quash granted.

John E. Kinnane, U. S. Dist. Atty., of Detroit, Mich. A. Joseph Seltzer, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This matter comes before the court on demurrer and motion to quash an indictment charging the defendant with violation of section 3 of the Espionage Act. The indictment, which is in one count, alleges that the defendant, at a time and place specified therein, did—

"willfully and knowingly make and convey false reports and false statements against the United States army and the United States navy, with intent to then and there interfere with the operations and success of the military and naval forces of the United States, and with the intent to then and there promote the success of the enemies of the United States, and did then and there and thereby cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the said military and naval forces of the United \* \* \* and did then States by the members of such service, respectively, and there willfully obstruct the recruiting and enlistment service of the United States to the injury of the said United States, said false reports and false statements having been then and there made, to wit, No. 105 Martin street, in said city of Detroit, and in a certain saloon at said address, in the presence of certain persons, to wit, one John Hencel, one John Chierpik, one Anna Londka, and one Felix Jorowski, said Felix Jorowski being then and there a member of the military forces of the United States and of the national army thereof, and said false reports and false statements so made being then and there in substance and to the effect that he, the said Felix Jorowski, was crazy to go and fight for the United States, and that he, the said Joseph Dembowski, would like to see the Kaiser come to this country and he would be the first one to help him out: that said Felix Jorowski could do nothing to a German, and that the Kaiser could lick England and France, and would soon come to the United States, and then all you men (meaning above named persons) would have to kiss the Kaiser's hands and feet, and that he, said Joseph Dembowski, would never go into the army of the United States."

The objections to the indictment are that it does not allege any offense against the United States, and that it is bad for duplicity in charging in one count several distinct offenses, to wit:

- (a) The offense of making and conveying false reports with intention to interfere with an operation of the military and naval forces of the United States.
- (b) The offense of obstructing the enlistment and recruiting services of the United States.
- (c) The offense of causing insubordination, disloyalty, and mutiny in the military and naval forces of the United States.
- (d) The offense of attempting to cause insubordination, disloyalty, and mutiny in the military and naval forces of the United States.

Section 3 of title 1 of the Espionage Act, being the act of June 15, 1917, c. 30 (40 Stat. 219), is as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

[1] I think that there can be no doubt that the making of the statements set forth in the indictment might obstruct the enlistment and recruiting service of the United States, and might also constitute an attempt to cause insubordination, disloyalty, and mutiny in the military and naval forces of the United States. This seems to me so plain that I do not deem it necessary to discuss the subject further. The objec-

tion based on the contention that the indictment does not allege any offense against the United States must be overruled.

Does the indictment charge more than one offense in the same count? If so, it is bad for duplicity. United States v. American Naval Stores Co. (C. C.) 186 Fed. 592; Ammerman v. United States, 216 Fed. 326, 132 C. C. A. 470; Lewellen v. United States, 223 Fed. 18, 138 C. C. A. 432.

[2] As was said in the case first cited, "it is elementary that two separate offenses cannot be included in one count of an indictment."

- [3] It is, of course, well settled that where a statute creates a single offense, but specifies, in the alternative, a number of different acts, any one of which will constitute the offense thus created, these various acts not being in themselves separate crimes, but only different means of committing the offense against which the statute is directed, an indictment may charge the commission of such offense by all of the means mentioned in the statute, using the conjunction "and" wherever the statute uses the word "or," and such an indictment will not be duplicitous; and proof of the doing of any one of the acts whereby the offense may be so committed will warrant a conviction of the offense in question.
- [4] Does section 3 of the Espionage Act, then, create only one offense, which may be committed in any one of several modes specified, or does it contemplate and create several and distinct offenses? An examination of the language of the section makes it, in my opinion, clear that Congress had in mind several distinct evils, and that in order to guard against all of such evils, and the different dangers consequent upon each, prohibited three different kinds of acts, viz, the willful making of false statements with intent to interfere with the success of our military or naval forces; the willful causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in such forces, and the willful obstructing of our recruiting or enlistment service, to the injury of such service or of the United States. It seems plain that each of the acts thus prohibited is separate and distinct in its nature and object, and that the commission of each of such acts constitutes a distinct and separate offense. In my opinion, therefore, they cannot be joined in one count of an indictment, but, if alleged therein, must be set forth in different counts.
- [5] A careful examination of the present indictment shows that it does not charge one transaction as a single offense committed by different acts. It will be noted that it charges the defendant, in the language of the statute, with having done all of the things forbidden by this section of the Espionage Act. It then proceeds to allege that "said false reports and false statements" were made at a time and place specified, and that they consisted of certain language quoted in the indictment. The only false reports or false statements previously mentioned in the indictment were those charged to have been made with intent to interfere with the operation and success of the military and naval forces of the United States. It would seem, therefore, that the making of the statements quoted is charged under the first clause

of section 3 of this statute. If the other clauses of such section were violated, it is not specifically set forth how, although, from the allegations that these statements were made in the presence of a soldier, it would appear that it was intended to charge the defendant with also having attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States. In view, however, of the conclusion which I have reached, that the statute creates, and this indictment charges, three distinct offenses, and that such indictment is therefore bad for duplicity, it is unnecessary to consider to what extent the indictment properly charges the commission of any one of such offenses.

[6, 7] It is, however, urged by the District Attorney that, even if the indictment should be held to be duplicitous, it should not for that reason be quashed, but he should be permitted to elect to rely upon one of the offenses charged and nolle pros. the others. It seems clear that, if the District Attorney is permitted to nolle pros. a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the grand jury. An amendment is, in the language of the Century Dictionary, "The correction of an error in a writ, record, or other judicial document." To amend is, according to Webster's New International Dictionary, "To correct; rectify." To amend is to "free from error"; to "remove what is erroneous, superfluous, faulty, and the like." 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 et seq., and in vol. 1, Second Series, at p. 199 et seq., numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof.

It is, however, well established that, in view of the Fifth Amendment to the United States Constitution, which provides that no person shall be held to answer for \* \* \* an infamous crime unless on the presentment of the indictment of a grand jury, except in certain military cases, an indictment returned by a federal grand jury cannot be amended without being first resubmitted to the grand jury for that purpose. Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

In the case just cited it appeared that one section of the United States Revised Statutes prohibited the making by any bank official of any false statement with intent to injure or defraud such bank or other company or individual person, or to deceive any officer of such bank, or any agent appointed to examine the affairs thereof. Another section of the Revised Statutes required every such bank to make certain reports to the Comptroller of the Currency. The indictment as returned by the grand jury contained only one count, and alleged that the defendant had made certain false statements in a report, which it was alleged were made with intent to injure and defraud said bank and other companies and individual persons. In another portion of the indictment it was charged that the defendant had made said

false statements and report with intent to deceive the Comptroller of the Currency. A demurrer was filed to the indictment, which was sustained by the trial court. Thereupon, on the motion of the United States Attorney, said court ordered that the indictment be amended by striking out the reference to the Comptroller of the Currency in the portion of the indictment just referred to, thus eliminating an intent to deceive such Comptroller as an element of the crime charged.

The defendant was convicted of the crime thus charged. The case was taken to the United States Supreme Court on the ground that the court erred in permitting this amendment of the indictment, and the Supreme Court, after thoroughly reviewing and discussing the subject, held that the court erred in permitting such amendment, and ordered the defendant discharged from custody. The reasoning and the decision of the court in that case are, in my opinion, decisive of

the present case.

It is quite possible that if the indictment in the present case had been limited to one of the various crimes now charged therein, before it had been presented to the grand jury, the latter might not have been willing to return it in that form. It is not unlikely that the required number of jurors were satisfied to return the indictment in its present broad form because of a belief that its scope would be narrowed, as it is now sought to narrow it, to a single offense before the trial. Some members of that tribunal, less than the number necessary to find a true bill, may have found probable cause to believe that one of the crimes thus charged had been committed, while others may have been satisfied of the commission of another of such crimes. but may not have been willing to return an indictment joining these various offenses, except upon the understanding that the defendant would not be actually tried for all such offenses. If this be so, it is impossible to know whether the required number of jurors would have voted for a bill charging only the offense which the District Attorney may elect to rely on. At all events, it certainly cannot be said that if part of this indictment be removed the remainder will constitute the indictment as returned by the grand jury. Furthermore, in view of the manner in which the various allegations in this indictment are connected and interwoven with each other, it would, in my opinion, be impossible to attempt to abandon any of the charges therein made without also amending the form in which the allegations are made; so that, even if there might be cases in which an election and nolle pros. of part of a count would not necessarily involve an amendment of the indictment, yet this is certainly not such a case.

[8] In conclusion, it may be noted that the defendant contends that the offense of causing insubordination, disloyalty, etc., is a separate and distinct crime from that of attempting to cause such insubordination, etc. It is, however, well settled that where a statute prohibits the doing of a certain thing, or attempting to do such a thing, these are merely different modes of committing one offense, and an indictment charging such offense may allege its commission in both of such modes, and will not be duplicitous on that account. Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033;

Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; May v. United States, 199 Fed. 53, 117 C. C. A. 431.

For the reasons stated the demurrer must be sustained and the motion to quash granted, and an order to that effect will be entered.

## UNITED STATES v. CAPITAL CITY DAIRY CO.

(District Court, S. D. Ohio, E. D. April 13, 1915.)

No. 40.

1. INTERNAL REVENUE 28-APPOINTMENT OF RECEIVER-PROOFS.

On hearing of application for receiver in suit to impound, and apply to government's claim for oleomargarine tax, dividends paid by the manufacturer to stockholders, its officers and directors, which but for fraud should have been paid for said tax, held, considering pleadings, affidavits, admissions, and counter affidavits, weight of evidence was with plaintiff.

2. Internal Revenue @==28-Collection-Suit in Equity.

Equity has jurisdiction, on the ground of inadequacy of remedy at law, of suit by government, based on fraud and a trust, and involving an accounting of business for 10 years, to impound dividends paid by an oleomargarine manufacturer, since insolvent, to stockholders, its officers, and directors, which but for fraud should have been paid for oleomargarine tax.

3. INTERNAL REVENUE \$\infty 28\$—Collection—Judgment as Condition Pre-

Judgment need not be obtained before maintenance to suit to impound, and apply to government claim for oleomargarine tax, dividends which an oleomargarine manufacturer, now having no property left, paid to its officers and directors, and which, but for fraud, should have been paid for such tax.

In Equity. Suit by the United States against the Capital City Dairy Company. Heard on application for a receiver. Receiver appointed.

Sherman T. McPherson, U. S. Dist. Atty., of Cincinnati, Ohio, and H. E. Burns, Asst. U. S. Dist. Atty., of Columbus, Ohio, for the United States.

Henry J. Booth, of Booth, Keating, Peters & Pomerene, A. T. Seymour, of Vorys, Sater, Seymour & Pease, and R. W. McCoy, of Webber, McCoy & Jones, all of Columbus, Ohio, for defendant.

SATER, District Judge. The averments of the amended bill briefly are these:

The defendant corporation was, for 10 years or more prior to July 24, 1914, engaged in the manufacture of oleomargarine. On that date the collector of internal revenue ascertained that it had manufactured, sold, and removed from its factory large quantities of oleomargarine, on which, on account of its false and fraudulent representations, the United States had been induced to accept as a tax one-fourth of a cent per pound, whereas the lawful tax was 10 cents per pound. The collector called upon the defendant to account. The demand was refused. The Commissioner of Internal Revenue estimated the tax due

from the defendant to be about \$2,000,000. He assessed that sum against the defendant and certified the same to the collector. On August 25th the collector notified the defendant of the assessment and demanded payment, which was refused. By reason of the premises the sum assessed became a lien on the defendant's property and rights of property. The notice of lien was filed in the clerk's office of the judicial district and in the office of the county recorder. A subsequent demand of payment was made September 5th for the sum assessed, 5 per cent. penalty, and the interest, which demand was also refused. The collector thereupon took the requisite statutory steps and sold the property specifically described in the bill and credited the proceeds (\$209,757.17) on the sum assessed plus penalty and interest, and also returned:

No further goods and chattels and no real estate standing in the name of the Capital City Dairy Company found upon which levy can be made.

The defendant's officers and directors, who for more than 10 years past have been its only stockholders, have paid themselves as stockholders large sums as dividends, amounting to more than \$2,000,000 (the exact amount of each of which, the dates when paid, and the amounts paid to each stockholder, for want of exact knowledge, cannot be stated), which dividends were unlawfully paid, and were not paid out of the profits, whereby the officers, directors, and stockholders have unlawfully diverted, converted to their own use, and concealed large sums of property belonging to the defendant, and still continue so to do, for the purpose of placing it beyond the plaintiff's reach. The defendant is insolvent, has abandoned the objects and purposes for which it was created, and has no property on which distraint and levy can be made, or out of which the United States can make the sum due it; the defendant's property having been diverted, converted, and concealed as above mentioned. The remedy at law has been exhausted, and relief can be had in equity only. A receiver is necessary to pursue and reduce to possession and to take charge of the defendant's property, money, and assets so wrongfully and illegally diverted, converted, and concealed, that the same may be used to satisfy the assessment and lien of the plaintiff. The stockholders, directors, and officers all having participated in the wrongdoing, it would be useless to demand that the corporation proceed to recover its aforesaid equitable interest and assets, and if its property is not seized there is great danger of its being placed beyond the plaintiff's reach.

The plaintiff asks that its lien be declared valid, subsisting, and a first lien upon all the defendant's property and rights to property; that the amount of such lien, with interest and costs, be allowed to the plaintiff; that in default of its so doing the defendant and all others claiming under it be forever barred and foreclosed of all equity of redemption, and all claim in and to such property and rights to property, which it is asked may be sold to satisfy the lien, and the proceeds arising therefrom be applied to its payment. A receiver is also asked to take possession of all property and interest of every kind and character belonging to the defendant, with power to collect and reduce to possession by appropriate legal proceedings, or otherwise, the right to

property belonging to the defendant in the money and property diverted and converted to their use and concealed by the officers, directors, and stockholders of the defendant company, and that upon final hearing the sums recovered from such persons be applied to the payment of the plaintiff's assessment and lien, and that an accounting of the defendant's assets and liabilities be had, and for all other and further relief. The petition is verified on belief.

In support of the petition are two affidavits. That of the collector recites the action of the Commissioner of Internal Revenue, the proceedings to sell the defendant's property, the sale, the application of the proceeds arising therefrom, the balance due on the plaintiff's assessment and lien, the absence of leviable property of the defendant out of which to make such balance, that he has examined the defendant's books for 10 years past, that such examination convinces him that the officers and directors paid about \$2,000,000 in dividends out of funds which should have been paid to the United States as taxes, and that but for such dividends the defendant would have had no profits for distribution. He expresses the belief that, unless a receiver is immediately appointed, with authority to recover, reduce to possession, and preserve the assets and property of the corporation wrongfully diverted, converted, and concealed, there will be a further concealment, diversion, and dissipation of the same by the persons having possession thereof, and that the plaintiff will thus be left remediless. The affidavit of the deputy collector recites the levy and sale, his inability after diligent search to find any property belonging to the defendant other than that sold, and his belief, resulting from his investigation, that the defendant is insolvent.

The affidavit of Corbett, filed by the defendant, admits the sale set forth in the bill, denies that the defendant has abandoned the purposes and objects for which it was created, and that any of the officers, directors, and stockholders are about to convey assets of the defendant or of their own to place the same beyond the plaintiff's reach. He also denies that the defendant is indebted to plaintiff. There is an averment in the petition, which is denied by certain affidavits filed by the defendant, that one of their number (Dennis Kelly) conveyed with wrongful intent property worth \$350,000. Amplification as to this feature of the case is not, for present purposes, necessary.

[1] Giving the denials made in behalf of the defendant and the inferences to be drawn from them their full value, and considering also the fact, freely admitted in oral argument, that the defendant did not appeal to the Commissioner of Internal Revenue, as it might have done under section 3226, Revised Statutes (Comp. St. 1916, § 5949), it must be found, for the purposes of this hearing and for such purpose only, that the weight of the evidence is with the plaintiff; that the several steps taken by the Commissioner of Internal Revenue and the local collector and his deputy were taken as named in the petition, such facts not being controverted; that the defendant has no discoverable property subject to seizure; that it has no working capital or funds of any kind; that the United States has made prima facia proof of its claim; that it has a prima facie valid lien on the property and be-

longings of the defendant; that the defendant is prima facie insolvent; and that the source, amount, and legality of dividends paid to the

stockholders is a proper subject of investigation.

[2] The relief which the plaintiff seeks inevitably involves an accounting on an extensive scale. The investigation to be made will extend over a period of 10 years. The daily output of the defendant's factory, and the amount of the defendant's product daily removed from its factory and put into the channels of trade, and also the amount of taxes chargeable against the same, whatever may be the correct rule applicable, will have to be determined. Whether the dividends were declared annually, semiannually, or quarterly is not stated; but, whatever their number may be, each is to be investigated. The sources of the profits distributed on each occasion, the amount paid to each stockholder, the separation of the legal (if any) from the illegal profits and sums distributed, if fraud be proved, and the interest on each respective illegal payment to each stockholder from the date it was made, will have to be ascertained. Books of account for the whole of the period in question, and the entries made thereon, will have to be examined, and evidence given concerning them. Comparison of the results wrought out from such books will have to be made with the statements submitted from time to time to the government. All of the above will be necessary in a suit against the defendant alone, whether such suit be at law or in equity.

Considering how difficult it would be for a judge and jury, in a trial according to the strict rules of common law, where a jury must hastily agree upon a verdict before they separate, to correctly determine the rights of the parties in the present case, the reasons for equitable jurisdiction become apparent. The evidence will necessarily be voluminous. Just deductions from it can be drawn only in a court of equity in which a careful, patient, and extended examination of all such evidence can be made after it is submitted. A court of equity, with its authority to select and appoint a master and refer the cause to him, and with ample power to adapt its proceedings to the requirements of the case as it progresses, is the only tribunal fit to fairly try and justly decide the issues that may be presented in the case. The plaintiff has no adequate remedy at law for the wrongs of which it complains. It seeks to enforce a lien, to recover misappropriated funds, to set aside a fraudulent diversion of them, and so to restore them as to satisfy its claim and lien. The case falls within the rule announced in Lively v. Picton, 218 Fed. 401, 134 C. C. A. 189 (C. C. A. 6). Miers v. Zanesville & Maysville Turnpike Co., 11 Ohio, 273, is instructive and helpful. See, also, Hayden v. Thompson, 71 Fed. 60, 17 C, C. A. 592 (C. C. A. 8); Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336 (C. C. A. 6); Gunn v. Brinkley Car Works & Manufacturing Co., 66 Fed. 382, 13 C. C. A. 529; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660 (C. C. A. 8).

If the fraud charged was perpetrated, the money which arose in consequence of the fraud and was paid as dividends is still the defendant's money. The transfer was void—was a nullity—as against

the plaintiff, and the money so paid is held in trust by the several stockholders, respectively, and the plaintiff by operation of law has a claim on it. Swift & Nichols v. Holdridge, Bailey et al., 10 Ohio, 231, 232, 36 Am. Dec. 85. Both a fraud and a trust are involved. The assessment declared by the revenue department is of such a high character as a lien that by statutory provision the plaintiff, to satisfy it, can foreclose as against real estate and seize and sell personalty. The plaintiff, if it has any right at all, has a lien on the funds in the stockholders' possession, not enforceable at present, because they claim title adversely. The ultimate object is to overthrow that claim, divest them of possession, and subject the property to the plaintiff's lien for its satisfaction. But for the fraud of the officers and directors, if it be ultimately found to exist, the money distributed as dividends would have been paid to the United States. Only the defendant's fraudulent statements to the United States left the money in the defendant's hands. If the plaintiff finally establishes its case, it will appear that the directors, officers, and stockholders knowingly and fraudulently withheld such money from the plaintiff. It is essentially an equitable proceeding for impounding the defendant's tangible (if any) and intangible corporate assets, and applying them to the payment of the defendant's obligations to the plaintiff.

[3] On the facts presented, the plaintiff was not required first to obtain a judgment. The case is ruled by the federal cases above cited and especially that of Lively v. Picton. See, also, Hedlund v. Dew-

ey (C. C.) 105 Fed. 541.

The plaintiff is entitled to the appointment of a receiver.

GOLDEN, BELKNAP & SWARTZ v. CONNERSVILLE WHEEL CO. et al.

(District Court, E. D. Michigan, S. D. September 11, 1918.)

1. ABATEMENT AND REVIVAL \$\igcream 3\top Motion to QUASH SERVICE\top QUESTIONING JURISDICTION.

Judicature Act, c. 14, § 4 (Comp. Laws Mich. 1915, § 12456), abolishing pleas in abatement and to the jurisdiction, provides that questions previously raised by such pleas may be raised by motion to dismiss, and so it is proper to question jurisdiction by motion to set aside service of summons, etc.

2. COURTS 338-FEDERAL COURT-CONFORMITY STATUTES.

When the question of the jurisdiction of a federal court is raised in an action pending therein, that court is not bound by the laws of the state, but follows its own rule of practice; the so-called conformity act not being applicable.

3. ABATEMENT AND REVIVAL \$\igcress{3}\$—Lack of Jurisdiction}\$—Mode of Taking \( \Delta \text{VANTAGE}. \)

The proper method of raising the question of the court's lack of jurisdiction over the defendant is by motion to set aside the service of summons.

4. Corporations \$\isplies 665(2)\$—Foreign Corporations—Jurisdiction.

When it is sought to obtain a personal judgment against foreign corporation, it must appear that the corporation was doing business within the state in which service was had to such an extent as to warrant the in-

ference that the corporation was present within such state, and also that the process was served on a duly authorized agent.

 Corporations \$\infty\$=665(2)—Foreign Corporations—Doing Business in State.

Though an Indiana corporation be conceded to have done business in Michigan, *held* that, as the contracts whereby the Indiana corporation had done business in Michigan had previously expired, etc., such corporation cannot be deemed doing business within that state, so that service on an officer temporarily in Michigan would be binding on the Indiana corporation.

6. Corporations \$\infty\$668(10)—Foreign Corporations—Jurisdiction.

Service of process on the president of an Indiana corporation, who was within the state of Michigan, held not binding on the Indiana corporation, on the theory that its president was acting in his official capacity in Michigan at the time of the service; it appearing that the president or the Indiana corporation declined to consider matters which furnished the basis for the suit until his return to Indiana.

At Law. Action by Golden, Belknap & Swartz, a Michigan corporation, against the Connersville Wheel Company, an Indiana corporation, and another, begun in the state court and removed to the federal court. On motion to set aside the service of summons and to dismiss. Motion granted.

Clark, Emmons, Bryant & Klein, of Detroit, Mich., for plaintiff. Angell, Bodman & Turner, of Detroit, Mich., for defendants.

TUTTLE, District Judge. This matter is before the court on motion to set aside the service of the summons and to dismiss the cause for want of jurisdiction of the persons of the defendants. The plaintiff is a corporation organized and doing business in the state of Michigan, in this district. The defendants are Indiana corporations having their principal places of business in the state of Indiana. This action was begun by summons in the circuit court for the county of Wayne, which lies within this district. The summons was served upon one Hull, the president of the defendant Connersville Wheel Company and vice president of the other defendant corporation, while said Hull, who is also a resident of Indiana, was temporarily within said county of Wayne and state of Michigan.

The defendants appeared in the cause specially and solely for the purpose of this motion, without admitting the jurisdiction of said court, and filed the motion referred to, and in support thereof an affidavit by the said Hull. In this affidavit it was alleged that each of the defendants was a corporation organized and existing under the laws of Indiana and having its principal place of business in such state; that each of them was a manufacturing company; that neither of them had or maintained, or ever had had or maintained, an office or manufacturing plant or place of business in the state of Michigan, and that neither of them had a resident agent within said state of Michigan; that on July 23, 1917, affiant was in the city of Detroit, in said county, on business of the Hoosier Castings Company, an Indiana corporation, of which he was an officer, and not on the business of either of said defendants, and that while in said city he was served with a summons in

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

this cause. Thereafter, and before the motion referred to had been brought on for hearing, this cause was removed by the defendants to this court, where it is now pending on said motion. The facts have been submitted by affidavits and counter affidavits, and there appears to be no substantial conflict between these affidavits. As the matters in dispute consist in the proper inferences and conclusions to be drawn from the allegations of fact, rather than in such allegations themselves, the questions in issue may be determined without the necessity of tak-

ing testimony in open court.

The meritorious question involved is whether the service of the summons upon the officer of the defendants, temporarily within the jurisdiction of the court, was, under the circumstances, sufficient to confer upon such court jurisdiction over the persons of said defendants, so as to warrant the recovery of a judgment against them in this cause. The defendant Central Manufacturing Company was apparently made a party to the cause merely because, as alleged in one of the affidavits filed on behalf of the plaintiff, it "is to some extent the successor of the Connersville Wheel Company," although it is also alleged in such affidavit that said Central Manufacturing Company "is also liable for the indebtedness of the Connersville Wheel Company." The transactions, however, on which this action is based, were between the plaintiff and the defendant Connersville Wheel Company alone, and, as the status of the Central Manfacturing Company with reference to the material facts involved does not differ from that of the Connersville Wheel Company, and as the former appears to be a nominal rather than an actual party, only the defendant Connersyille Wheel Company will be referred to whenever it is necessary hereinafter to mention either of the defendants.

[1] A question of practice may first be disposed of. It is urged by plaintiff that according to the local law in Michigan the question whether proper service has been made upon a foreign corporation should be raised by plea in abatement and not by motion to set aside the service, based upon affidavits, and that therefore the defendant has not pursued the proper practice in this case. This contention is clearly without merit, for two reasons. In the first place, by section 4 of chapter 14 of the Michigan Judicature Act now in force in Michigan, pleas in abatement and pleas to the jurisdiction were abolished, and it was provided that all questions previously raised by such plea might thereafter be raised by motion to dismiss. Section 12456, Compiled Laws of Michigan of 1915.

[2, 3] Aside, however, from the question as to the proper practice in the state courts, whenever the question of the jurisdiction of a federal court is raised in an action pending therein, that court is not bound by the laws of the state in which it is sitting, but follows its own rules of practice in determining such question. The so-called Conformity Act (Act June 1, 1872, c. 255, 17 Stat. 196 [Comp. St. 1916, §§ 1537, 1539, 1540]) is not applicable to such cases. In the federal courts the proper method of raising the question involved herein is by motion to set aside the service. Meisukas v. Greenough Red Ash Coal Co., 244

U. S. 54, 37 Sup. Ct. 593, 61 L. Ed. 987.

[4] Coming, then, to the merits of the question to be determined: Was the service made upon the president of the defendant corporation while temporarily within the state of Michigan, under the circumstances disclosed by the affidavits herein, sufficient to confer jurisdiction upon such defendant in this cause? When it is sought to obtain a personal judgment in one state against a corporation organized under the laws of another state, two facts must affirmatively appear: First, that such foreign corporation was, at the time of the attempted service upon it, engaged in doing business within the state in which such service was made to such an extent and of such a nature as to warrant the inference that the corporation is present within such state and has subjected itself to the jurisdiction thereof; and, second, that proper process has been served upon a duly authorized agent of such corporation. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; Philadelphia & R. Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; People's Tobacco Co., Ltd., v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587.

In the present case no question is raised as to the authority of the agent of the defendant corporation served with process; it being undisputed that he was the president of such corporation and authorized to receive service of process on its behalf. He was, in fact, the officer of the defendant corporation who represented it in its dealings with the plaintiff out of which this action arose. There can be no doubt that, if the defendant corporation was subject to this suit within the state of Michigan at the time of the attempted service upon said agent, such service was sufficient to confer upon the court herein the jurisdiction

sought to be maintained.

[5] The question, therefore, to be decided, is whether the defendant corporation was at the time referred to doing business in Michigan of such a character as to warrant the inference that it had entered the state and subjected itself to the jurisdiction of the courts thereof. It is urgently insisted by the plaintiff that the affidavits filed on its behalf show that said defendant was so engaged in such business. It appears from these affidavits that in the fall of each of the years 1912, 1913, and 1914 a written contract was entered into between the plaintiff and the defendant, by each of which contracts the former agreed to manufacture at its plant in Detroit, Mich., certain motors for the defendant. delivery thereof to be made during the year following the making of each contract respectively; that delivery of the motors under the first two contracts was to be f. o. b. Detroit, and delivery under the last contract was to be f. o. b. Indiana; that title to such motors was reserved in the plaintiff until full payment therefor: that defendant was to purchase and deliver to plaintiff at Detroit certain transmissions, to be attached by the latter to the motors mentioned, before delivery

thereof to the defendant, such transmissions remaining the property of said defendant; that during part of the period covered by said contracts the defendant maintained at the plant of the plaintiff in Detroit an employé whose duty it was to inspect the motors so manufactured for it by the plaintiff; and that the present action is brought for the recovery of an amount claimed by plaintiff to be due under the last of the contracts mentioned. It is insisted by the plaintiff that the making and performance of these contracts by the defendant constituted the

doing of business by it within the state of Michigan.

Whether this contention is correct it is not necessary to determine, for the reason that, even if during the period covered by said contracts defendant was so engaged in business in the state of Michigan, it had ceased to carry on such business prior to the time of the attempted service herein. It is apparent from the affidavits filed that defendant was not, at the time mentioned, performing any acts under any of such contracts. It is not disputed that both parties had completed the performance of the first two contracts. By the terms of the last contract, which was executed September 19, 1914, the manufacture and delivery of the motors in question was to cover the season's requirements of the defendant from and after the date of the making of the contract, "ending July 1, 1915," more than two years before the time of the service in question. It is not claimed that at the time of the commencement of this action anything remained to be done under this contract, except. as claimed by plaintiff, the payment of the sum alleged to be due from defendant. If, then, in carrying on its dealings with plaintiff under these contracts, defendant was doing business in Michigan, it had ceased to do such business before the time when this action was commenced. It was not, therefore, at such time present within the state of Michigan, People's Tobacco Co. v. American Tobacco Co., supra. The mere fact that claims growing out of the business previously transacted by defendant in Michigan remain unsettled does not show a present doing of business, so as to manifest the presence of defendant Cady v. Associated Colonies (C. C.) 119 Fed. 420; Lathrop-Shea & Henwood Co. v. Interior Construction Co. (C. C.) 150 Fed. 665.

It must be borne in mind that, in order that proper personal service may be made in a state upon a foreign corporation, it is necessary that such corporation be present in such state at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there, it must appear, in such a case, that the foreign corporation in question was, at the very time of the service, doing such business in the state where jurisdiction is sought. It may be difficult, as a matter of fact, for a court to determine at just what particular moment a corporation begins to do business in a state. or at what particular instant it ceases to do such business there. This difficulty, however, is one of fact. There is no doubt or uncertainty as to the rule of law applicable. Service cannot be made an instant prior to the time that the corporation actually begins to do business in the state, so as to show its presence there. Neither can service be made an instant after the corporation has ceased to do such business there. So, in this case, if there is anything doubtful or hazy about the time when the defendant corporation ceased to do business in the state of Michigan, it is entirely a difficulty of fact.

It may be urged that if, at some prior date, the foreign corporation did, in fact, do business in the state, it is a hardship upon a plaintiff to deprive it of the right to bring suit in the state on a cause of action growing out of such business. No different or greater misfortune, however, results to the plaintiff in such a case than in a case wherein he is seeking to sue a natural person. If the defendant be such a person, the plaintiff must obtain service while the defendant is personally within the state in which suit is brought. If he permits the defendant to leave the state before commencing his action, he cannot, of course, obtain personal service so long as the defendant remains absent from the jurisdiction of the court. The question as to the presence in the state of the agent upon whom service is sought to be made must not be confused with the question as to the presence in the state of the foreign corporation itself. Unless such corporation is present in the state, of course, no personal service can be there made upon it.

[6] It is further urged, however, that at the time of the attempted service upon the president of the defendant corporation he was acting in his official capacity for such corporation in negotiating a settlement of this disputed claim, and that therefore the corporation was present in the person of its agent. Whether, if this officer of the defendant had intentionally come or had been sent by it into Michigan to endeavor to compromise this claim, and had been served with this process while so engaged, it could properly be said that his presence in the state involved also the presence of his corporation, is a question which, in view of the circumstances, it is unnecessary to consider. I am satisfied that the affidavits filed by plaintiff, read together, fail to show that the officer referred to was sent to, or visited, the state of Michigan, or the plant of the plaintiff, for the purpose, or with the intention, of discussing the relations between the parties hereto, or that he did discuss such relations voluntarily and in his official capacity.

There is no showing that he transacted or intended to transact any business for defendant while in the state of Michigan on the trip in question. It appears that after he had inspected the plant of the plaintiff, and had discussed a business matter on behalf of the Hoosier Castings Company, another corporation of which, as already stated, he was an officer, he was questioned by representatives of the plaintiff concerning the claim on which this action is based, and upon his failure to immediately adjust such claim and his statement that he would take the matter up on his return to Indiana, he was promptly served with the summons herein by an attorney for the plaintiff, who was evidently at the plant for that purpose. These facts do not, in my opinion, show that at the time of this service the officer of this foreign corporation was so engaged in carrying on the business of such corporation in Michigan as to manifest its presence there.

It not appearing, then, that at the time of the attempted personal service of process, in the state of Michigan, upon the defendant corporation, the latter was either incorporated under the laws of, or engaged

in doing business within, such state, such service was insufficient to confer jurisdiction over the person of the defendant, and the motion to set aside the service and to dismiss the cause for lack of jurisdiction must be granted.

# PANNILL V. ROANOKE TIMES CO.

### JERRICK v. SAME.

(District Court, W. D. Virginia. September 6, 1918.)

1. COURTS \$\infty 307(1)\to JURISDICTION OF FEDERAL COURTS\to DIVERSE CITIZENSHIP \to "CITIZEN."

Plaintiff, in suit against Virginia company in the Western district of Virginia, who, though not a "citizen" of Virginia, had left California with no intention to return to that state, and who had not acquired a domicile in any other state, could not maintain his suit on the ground of diversity of citizenship.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. Domicile \$=4(1)—Domicile of Choice—Loss.

A domicile of choice, once acquired, is not lost until a new domicile has been acquired.

3. Domicile @==1-Distinguished from "Citizenship."

"Domicile" and "citizenship" are not always synonymous, though where domicile means home, and describes the state in which a citizen of the United States has his home, and to which he intends to return if absent, it is usually, if not always, equivalent to state citizenship; but when no new domicile has been acquired, and domicile exists only by legal fiction, and describes the former home state of a citizen of the United States to which he never intends to return, they are not synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizenship; Domicile.]

4. Courts €=307(1)—Jurisdiction of Federal Courts—Diversity of Citizenship.

The grant of jurisdiction to the federal courts is not of controversies between citizens of the United States domiciled in different states, but of controversies between citizens of different states.

5. CITIZENS == 2-Who Are-CITIZENSHIP.

Citizenship implies membership in a political society, the relation of allegiance and protection, identification with the state, and a participation in its functions, and while a temporary absence may suspend the relation between a state and its citizen, his identification with the state remains where he intends to return.

6. Courts ⇐=307(1)—Jurisdiction of Federal Courts—Diversity of Citizenship.

Grant of jurisdiction to the federal courts in controversies between citizens of different states does not include a mere homeless wanderer, a citizen of the United States, but not of any state.

7. COURTS ←307(1)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—"CITIZEN."

The theoretical domicile, which is equivalent to state citizenship, is always one which exists animo revertendi, and such a domicile, clinging to a homeless wanderer, who never intends to return, is not equivalent to citizenship, in the sense in which the word "citizen" is used in the Judiciary Act.

8. COURTS \$\iii 351\frac{1}{2}\$—Federal Courts—Following State Practice—Non-suit.

The state court practice should be followed, where the case is submitted to the jury, or where the jury has been waived. In the first event the plaintiff cannot take a nonsuit after the jury has retired, nor in the latter after the case has been submitted to the court for decision.

9. Courts \$\infty\$351\!2\\_Federal Courts\\_Following State Practice\\_Non-suit.

After a defendant's motion for a directed verdict a plaintiff has no absolute right to then suffer a nonsuit; the state statute (Code Va. 1904, § 3387) against taking a nonsuit after the jury retires not governing, in view of the accepted Virginia practice (Hurst's Code Va. 1913, § 3384b; Acts 1912, p. 52) not to direct verdicts.

10. Courts €=351½—Federal Courts—Absence of State Practice.

Where there is no state practice as to the granting of a nonsuit, the federal courts of the state are governed only by the general law.

11. DISMISSAL AND NONSUIT \$\iff 15\in \text{DISCRETION OF COURT.}\$
From the time of the submission of a motion to instruct a verdict, the granting of a nonsuit lies wholly in the discretion of the court.

12. DISMISSAL AND NONSUIT \$\iff 12\to Grounds\to Surprise.

Where defendant's introduction of evidence offered practically at the close of the trial was a surprise to plaintiff, and he had no opportunity to investigate it, or to seek to rebut it, the court might grant a nonsuit.

13. DISMISSAL AND NONSUIT €=30—ELECTION.

The court may require plaintiff to make an election whether he will suffer a voluntary nonsult before indicating its views on defendant's motion for a directed verdict.

14. DISMISSAL AND NONSUIT \$\iff 30\to Election\to Motion to Direct Verdict.

A plaintiff should not be allowed to first ascertain the court's conclusion on defendant's motion to direct a verdict, and thereafter have the unfair advantage of taking a nonsuit, if the court intends to sustain the motion, and of submitting the case to the jury, if the court intends to overrule it.

At Law. Actions by one Pannill and by one Jerrick against the Roanoke Times Company, consolidated for trial. Action by plaintiff Pannill dismissed for want of jurisdiction, and plaintiff Jerrick permitted to take a voluntary nonsuit.

Holman Willis, of Roanoke, Va., for plaintiffs. Waller R. Staples, of Roanoke, Va., for defendant.

McDOWELL, District Judge. 1. These actions for libel were consolidated for trial, without objection from any party, as both cases grew out of the same publication. The first case was, after some of the plaintiffs' evidence had been heard, dismissed without prejudice for want of diversity of citizenship, which ruling was excepted to by both Pannill and the defendant. The defendant is a corporation created by the state of Virginia. The plaintiff was born in West Virginia, and in his early manhood went to Oklahoma, where he bought a farm near Lawton, and was living there with the intention of residing in that state permanently. In 1910 he met with an accident which resulted in almost entire paralysis. His own means were shortly exhausted in efforts to be cured, and as he was and had been before his injury a member of the Lawton local lodge of Elks, he applied through his local

SimpFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

lodge to the Grand Lodge of Elks for assistance. It developed that the Grand Lodge had no fund applicable to the relief of any but superannuated members, and Pannill is even now apparently under 40 years of age. He then undertook to visit a number of the local lodges of Elks in several of the Western states in an effort to have them send delegates to the next Grand Lodge convention instructed to have a fund created for the assistance of members in his condition. In undertaking this journey, according to his own evidence, Pannill left Oklahoma with no intention of returning to that state, but with the expectation of living in California if he succeeded in his endeavor. The result of this campaign was temporarily successful. The Grand Lodge agreed to pay a certain sum monthly for Pannill's support, on condition that the Lawton lodge would also pay a specified part of the expense. This arrangement having been made, Pannill went to California, intending to stay there, as he said, "for the remainder of my life."

Some few months after Pannill had established himself in California. the Lawton lodge found itself unable to raise from its few members the share of the expenses it had undertaken to contribute, which resulted in a refusal by the Grand Lodge to continue its contributions. Thereupon Pannill left California and commenced a tour of the United States in an effort to induce the Elks to establish a fund for his support without reference to contributions from the Lawton lodge, which had surrendered its charter. Pannill testified that when he left California he had the intention of never returning to that state at any time, and all the facts adduced substantiated this statement. His intention was, if successful in his quest, to take up his abode in Florida or Texas. He had no plans based on the possibility of entire want of success of this last campaign among the Elks. He left California in 1915, and had been traveling since then, making short stops in many cities and towns, and had covered about 40,000 miles. The expenses of Pannill and his nurse had been mainly obtained from local lodges of Elks, from individual members of that order, and in some cases transportation had been obtained from other charitable organizations. The plaintiffs had come to Virginia a few weeks before these actions were instituted, not intending to stay permanently, but only to stay long enough to institute, and possibly to bring to a conclusion, a suit by Pannill against the Grand Lodge on what he conceives to be a valid cause of action against that body.

As has been said, Pannill's Case was ordered dismissed for want of jurisdiction. As the term at which the order of dismissal was made has not been brought to an end, and as the question of Pannill's citizenship is to me novel and rather perplexing, I have taken advantage

of the first opportunity to give it further consideration.

[1] (a) It would seem that Pannill cannot be regarded as a citizen of Virginia. He was at the institution of this action residing in this state, but with no intention of remaining here permanently. His intent was and is to stay here only long enough to finish the business which brought him here and to then go to some other state. As Virginia is not the state of his birth, as his residence here is not animo

manendi, I cannot satisfactorily class him as a citizen of this state. It is true that he is not here with intent to return to either California or to West Virginia, and he intends to stay here for a somewhat indefinite time. But the fact which is necessary to convert mere residence into citizenship is the intent to remain permanently.

[2] (b) It is, I take it, entirely settled that a domicile of choice, once acquired, is not lost until a new domicile has been acquired. Story, Conflict of Laws (2d Ed.) § 47; Wharton, Confl. of Laws (2d Ed.) § 55; 14 Cvc. 851; Mitchell v. United States, 21 Wall. 350, 352, 353, 22 L. Ed. 584: Desmare v. United States, 93 U. S. 605, 610, 23 L. Ed. 959.

[3] If ascertaining the domicile of a citizen of the United States always ascertains his state citizenship, we have arrived at a simple solution of the question before us. However, domicile and citizenship are, as I think, not always synonymous. Where domicile means home, where it describes the state in which a citizen of the United States has his home, or what he regards as his home, and to which he intends to return, if absent therefrom, it is usually, if not always, equivalent to state citizenship. But when (no new domicile in fact having been acquired) domicile exists only by legal fiction, and describes the state in which a citizen of the United States once had his home, but to which he intends never to return, I cannot see that domicile and citizenship are synonymous. It has in some cases been said that domicile is synonymous with state citizenship. But in every case in which this has been said, so far as I have found, the court had in mind a domicile, to which the party, if absent therefrom, intended ultimately to return. In Williamson v. Osenton, 232 U. S. 619, 624, 34 Sup. Ct. 442, 58 L. Ed. 758, the agreed facts, as construed by the court (232 U. S. 624, 625, 34 Sup. Ct. 442, 58 L. Ed. 758), showed an actual domicile in Virginia—a residence with intent to remain permanently. In Prentiss v. Barton, Fed. Cas. No. 11384, Chief Justice Marshall said:

"In the sense of the Constitution and of the Judicial Act, he who is incorporated into the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state in which his domicile is placed."

But here, also, the court was dealing with a case of actual domicile and an intent to return to it. In Collins v. City of Ashland (D. C.) 112 Fed. 175, 177, it is said that "citizenship depends upon domicile." But in that case the evidence showed a domicile in Ohio, a merely temporary residence in Kentucky, and a clear intent to return to Ohio. In Harding v. Standard Oil Co. (C. C.) 182 Fed. 421, 426, it is said that domicile is usually coextensive in meaning with citizenship; but in this case also (pages 428 and 430) the court finds that the plaintiff, after his departure from Illinois, always had the intention to return to that state, and consequently the case is not one in which, as in the case at bar, the departure from the state of domicile was with intent never to return there. In Hammerstein v. Lyne (D. C.) 200 Fed. 165, 170, it is said that state citizenship is the practical equivalent of domicile. But here again the court had in view an actual domicile animo revertendi.

- [4, 5] It must be borne in mind that the grant of jurisdiction to the federal courts is not of controversies between citizens of the United States domiciled in different states, but of controversies between citizens of different states. Beyond any doubt a question of domicile (in fact) is often determinative of the question of citizenship (Morris v. Gilmer, 129 U. S. 315, 328, 9 Sup. Ct. 289, 32 L. Ed. 690); but it is a very different thing to assert that a mere theoretical domicile, existing with intent never to return to it, is the same thing as citizenship. In the case before us the plaintiff at the institution of the suit did not reside in California, he had no place of abode there, and he intended never to return there. Assuredly it is very difficult to reconcile any theory of citizenship or any definition of the word "citizen" with such facts. Citizenship implies membership in a political society, the relation of allegiance and protection, identification with the state, and a participation in its functions. While a temporary absence may suspend the relation between a state and its citizen, the latter's identification with the former remains because of his intention to return. If A., a citizen of California, sells his home and with his family takes up his residence in Virginia, for a temporary purpose, intending to return to California, he undoubtedly retains his domicile and citizenship in California; and his case may bear close resemblance to the case at bar. A, may also be said to have only a theoretical domicile in California. But the essential difference between A.'s status and that of Pannill is that A. intends to return to California and Pannill does not; California is A.'s home, and it is not in any sense Pannill's home. A. has only temporarily surrendered his membership in the political society of California and his participation in its functions; while Pannill has permanently ended his connection with that state.
- [6] It is true that a citizen of the United States, who is a mere homeless wanderer and not a citizen of any state, would encounter the same risk of local prejudice in the state courts that would be encountered by citizens of other states. But so would citizens of the District of Columbia. The latter are not included in the grant of jurisdiction, and the most satisfactory conclusion I can reach is that Pannill is not included. In both cases the exclusion is due simply to the wording of the grant. Its language is not broad enough to include a citizen of the District of Columbia or a citizen of the United States who is not a citizen of any state. In Prentiss v. Brennan, 2 Blatchf. 162, 19 Fed. Cas. 1279, 1280, Mr. Justice Nelson said:

"A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicile in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts."

[7] As has been said, citizens of the District of Columbia were not granted the privilege of litigating in the federal courts on the ground of diversity of citizenship. Possibly no better reason for this fact exists than that such citizens were not thought of when the judiciary article of the federal Constitution was drafted. It is even more

probable that citizens of the United States, occupying the very unusual status that Pannill does, were also not thought of; but in any event a citizen of the United States, who is not a citizen of any state, is not within the language of the Constitution. And to my mind Pannill is not a citizen of California, simply because he never intends to return to that state, and has finally severed his connection with that state. The theoretical domicile which is equivalent to state citizenship is always one which exists animo revertendi. The theoretical domicile which clings to a homeless wanderer, who never intends to return, has its uses in deciding rights of succession to property, in respect to taxation and to the administration of pauper laws, but is not, I think, equivalent to citizenship in the sense in which the word "citizen" is used in the Judiciary Act. While domicile, in some sense, may not be lost by mere departure with intent not to return, state citizenship is thus lost. In other words, where the word "domicile" is used as meaning home, where absence from domicile is animo revertendi, domicile may be equivalent to state citizenship; but where domicile exists merely by legal fiction, and absence is accompanied by intent never to return to the state of domicile, the word is not synonymous with citizenship.

2. The Pannill Case having been dismissed for want of jurisdiction, the trial of the Jerrick Case proceeded until all the evidence was in. At this juncture defendant moved for a directed verdict. When this motion was submitted, and before giving any intimation as to my decision thereon, I required plaintiff's counsel to then elect whether he would or would not suffer a voluntary nonsuit. He elected to suffer a nonsuit. Thereupon counsel for defendant excepted to

the ruling permitting the plaintiff to then take a nonsuit.

[8-11] In cases tried by a jury, which reach the point where the jury retires to consider its verdict, I see no reason why this court should not follow the state statute. Section 3387, Code 1904. So, too, in cases in which by stipulation a jury is waived, I think the state practice should be followed, and that a motion for leave to suffer a nonsuit after the case has been submitted to the judge for decision comes too late. Harrison v. Clemens, 112 Va. 371, 373, 71 S. E. 538. However, a motion for a directed verdict creates a very different situation.

(a) I have very little hesitation in holding that a plaintiff, after a motion by the defendant for a directed verdict has been submitted, has no absolute right to then suffer a nonsuit. The Virginia statute (section 3387, Code 1904), providing that "a party shall not be allowed to suffer a nonsuit, unless he do so before the jury retire from the bar," does not seem to me to govern here, because it has never been the accepted Virginia practice to direct verdicts (section 3384b, Hurst's Code Va. 1913; Acts 1912, p. 52; Taylor v. B. & O. R. Co., 108 Va. 817, 819, 62 S. E. 798; Hargrave v. Shaw Land Co., 111 Va. 84, 90, 68 S. E. 278, Ann. Cas. 1912A, 151). Consequently the statute, which has been in force since 1788 (12 Henning's St. at Large, 749; 1 Shepherd's St. at Large, 33; 1 Code 1819, p. 510; 1 Code 1849, p. 672; Code 1887, § 3387), never contemplated, and does not apply

to, a case where a motion to direct a verdict has been submitted. For the same reason there is no state court practice on the point. It follows that the federal courts in this state, in the situation which arose here, are governed only by the general law. In this circuit the case of Parks v. Southern R. Co., 143 Fed. 276, 279, 74 C. C. A. 414, 417, is of controlling authority. It is there said:

"From the time of the submission of the motion to instruct a verdict the granting of a nonstit lies wholly in the discretion of the court."

This ruling (see, also, Francisco v. Chicago & A. R. Co., 149 Fed. 354, 359, 79 C. C. A. 292, 9 Ann. Cas. 628), while not followed in some of the other circuits (Meyer v. National Biscuit Co., 168 Fed. 906, 94 C. C. A. 335; Knight v. Illinois Cent. R. Co., 180 Fed. 368, 373, 103 C. C. A. 514), requires the conclusion in this court that the plaintiff had no absolute right to a nonsuit, and also that there was a discretionary power in the court to grant the nonsuit.

[12] (b) As there was a discretionary power to grant the nonsuit, it may be well to state why it was exercised in favor of the plaintiff. The evidence of the defendant's managing editor, to the effect that he had ordered the suppression of the article concerning the plaintiffs, and that it was published by mistake as the result of an error in the composing room, was to me a complete sur-There had been no previous intimation that the defendant would, practically at the close of the trial, introduce such evidence. At the time I granted the nonsuit I supposed, and I still suppose, that this evidence was as surprising to the plaintiff and her counsel as it was to me. Plaintiff had had no sort of opportunity to investigate the accuracy of this testimony, or to seek to rebut it. The best possible reason for taking a nonsuit is that evidence offered by the defendant has taken the plaintiff by surprise, and such a situation must likewise afford the best possible reason for a court to permit a nonsuit. If, after opportunity to investigate the facts, it is ascertained that the evidence of the editor cannot be rebutted, the plaintiff is very unlikely to bring another action. But, if there is rebuttal evidence in existence, the plaintiff assuredly ought to have the opportunity of producing it.

[13, 14] (c) The right of the court to require the plaintiff to make election before indicating its views on the motion to direct a verdict is also settled in the affirmative by the opinion in Parks v. Southern R. Co., supra, 143 Fed. 276, 279, 74 C. C. A. 414, 417:

"The plaintiff upon the making of a motion to instruct a verdict against him \* \* \* should then elect whether or not he will take a non-suit. \* \* \*"

See, also, upholding the right of the court to refuse to allow a nonsuit after announcing its conclusion to direct a verdict, Huntt v. McNamee, 141 Fed. 293, 72 C. C. A. 441 (C. C. A. 4th Circuit); Barrett v. Virginian R. Co., 244 Fed. 397, 157 C. C. A. 23 (C. C. A. 4th Circuit).

And, independent of authority, the ruling made was dictated by considerations of fairness. A plaintiff should not, in circumstances

such as existed here, be allowed to first ascertain the conclusion of the court on the motion to direct a verdict, and thereafter have the unfair advantage of taking a nonsuit if the court intends to sustain the motion, and of submitting the case to the jury if the court intends to overrule the motion. The very object of the state statutes (found in the laws of nearly all the states) limiting the time for taking a voluntary nonsuit is to prevent just this unfairness to the defendant.

#### In re ARTHUR E. PRATT COMPANY.

(District Court, N. D. New York. September 9, 1918.)

- 1. BANKRUPTCY \$\sim 340\to Claims\to Proof of.
  - Sworn proofs of claim in a bankruptcy proceeding are prima facie true, and an objector has the burden of overcoming such prima facie case.
- 2. Bankruptcy \$\sim 342\to Claims\to Objections.

On objections to a duly proven claim for a balance on a note given by claimant to the bankrupt corporation, which was indorsed by and discounted by it, held, that an order rejecting the claim on the ground that the note was given in payment of corporate stock which the claimant received at the time he gave the note was improper, and the matter should be remanded for further hearing.

3. Bankruptcy \$\sim 340\to Claims\to Evidence.

Where the trustee in bankruptcy objected to a claim for a balance due on a promissory note given by a claimant to the bankrupt corporation and by it discounted, on the ground that the note was given in payment of stock bought, *held*, that evidence as to the use by claimant of the stock which he received, etc., was admissible.

In Bankruptcy. In the matter of the bankruptcy of the Arthur E. Pratt Company. On review of an order of the referee disallowing the claim of Charles H. Schupp. Order reversed, and matter remanded to referee for rehearing.

Review of an order of the referee disallowing on objections the duly proved claim of Charles H. Schupp for \$2,971.10, balance of promissory note given by said Schupp to the Arthur E. Pratt Company, and which was indorsed by it and discounted at New York State Bank at Albany, N. Y., for its own benefit, and which the claimant claims was given to said now bankrupt solely for its accommodation and as a loan, he receiving certain shares of the capital stock of the company issued in his name and an assignment of other shares of such stock, which had been issued to Arthur E. Pratt or Mrs. Pratt individually, as collateral security for such loan. In the proofs of claim it is set forth as a secured claim; the security being specified. The trustee of the bankrupt claims the note was given to the company in payment for the stock of the company so issued to him, not including that assigned to him by Arthur E. Pratt, and that there was an agreement to repurchase, secured by the pledge of the stock issued to Mr. Pratt or his wife.

Tracey, Cooper & Townsend, of Albany, N. Y., for trustees. Alex. T. Selkirk, of Albany, N. Y. (John W. Searle, of Albany, N. Y., of counsel), for claimant. RAY, District Judge (after stating the facts as above). [1] The proofs of claim are in due form in every respect, and in the absence of proof against its justice and validity such proofs were and are sufficient to establish it as against the objections. The sworn proofs of claim in a bankruptcy proceeding are prima facie evidence of all its allegations, when objected to. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; In re Sumner (D. C.) 101 Fed. 224; In re Shaw (D. C.) 109 Fed. 780; In re Cannon (D. C.) 133 Fed. 839; In re Carter (D. C.) 138 Fed. 846; In re Doty, 5 Am. Bankr. Rep. 58. The Supreme Court expressly holds:

"The words of the statute suggest, if they do not expressly import, that the objector is to go forward (that is, prove the invalidity of the claim, overcome the prima facie case made by the proofs duly verified), and thus that the formal proof is evidence, even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. Section 57f. It is the objection, not the claim, which is pointed out for hearing and determination."

The burden of overcoming this prima facie case was therefore on the trustees.

[2, 3] But the claimant went forward with proof in addition to the proofs of claim. Mr. Schupp, the claimant, testified that in March or April, 1914, the original note of \$4,000 was given; that claimant had an interview with Mr. Pratt, president and treasurer of the company; that Mr. Pratt requested him to purchase stock in the company, and that he declined as he had declined before; that Pratt told him they (the company) needed some ready cash and wanted it quick, and if he would help them out that time they would help him when he got ready to construct his big plant.

"He told me that if I would take out stock that the company would take it back. I told him I couldn't. He said he would give me 83 shares of stock in my name and 64 of his own as security and good will. Q. If you would indorse the note? A. If I would indorse the note. He made out a note for \$4,000, and I gave him \$700 and the note for \$4,000, and then he said, when I needed the money, he would give it back to me. I said I didn't need it right away, but it would be about a year before I would need it."

It was conceded by the trustees that the note for \$4,000 was drawn by Mr. Pratt, signed by the claimant, and delivered to Mr. Pratt, who turned over the stock, 147 shares (the par value of which was \$7,350, conceded on the argument and shown by the proof), and that the company discounted the note at the bank and used the money in its business. There is nothing in the testimony of the claimant that indicates other than a loan of this note and \$700 cash to the now bankrupt, with these shares of stock given him as security. The claimant is not a lawyer. If he had been, probably the transaction would have been put in different form. The evidence of the claimant substantiates the proofs of claim and makes the case the stronger.

What is there in the case to change or overcome this? Mr. Schupp does not say Mr. Pratt agreed to "buy" the stock back, and such is not the import of his testimony as a whole. The original note of \$4,000 was reduced by payments thereon, renewal notes being given, until, February 8, 1916, the balance was \$2,900 only. The payments

were all made by the Arthur E. Pratt Company except \$345. This is uncontradicted. There is no pretense Mr. Schupp was insolvent, or in financial difficulties, or unable to pay, if this was his note and debt to the bank, or that the company paid the interest and about \$800 of principal at the request of Mr. Schupp. Mr. Schupp testified that Mr. Pratt told him, at the time he gave the note, the dividends on the stock would pay the interest on the note. Mr. Schupp was given a check for one dividend of \$54. Mr. Schupp was asked:

"And that's the purpose for which it [this dividend check] was used?"

That was objected to as improper, and the objection was sustained. Why was this improper? Why not show that Mr. Schupp used the dividend as agreed or understood it should be used? Then Mr. Hatt, for the trustees, brought out by questions to Mr. Schupp that the 83 shares of stock were in the bank as collateral, put there by Mr. Schupp. As collateral for what does not appear.

The claimant sought to show, and also the circumstances under which

pledged at the bank:

"Q. Will you state how you came to pledge it at the New York State National Bank?

"Mr. Hatt: I object to that as immaterial. (Sustained and exception.)"

Then claimant sought to show it was pledged as collateral for the note on which the claim is based. This was objected to, and the objection sustained. Then Mr. Schupp said he did not intend to state, or be understood as saying, the stock was then pledged at the bank. Then he was asked by his counsel:

"Q. Was it at any time pledged with the New York State National Bank in connection with any other transaction than the renewal of the note given by you to the Arthur E. Pratt Company? A. No.

"Mr. Hatt (one of trustees): I object to that as improper, and move to

strike out the answer. (Granted.)"

I am unable to understand why this was improper, or on what grounds the objections could be sustained. On the other hand, the

evidence was very proper and material.

The claimant offered in open court to return the stock. The referee said: "You evidently have no power to return it." On the evidence it did not so appear. It did appear on the evidence of Mr. Schupp that he loaned this note to the Arthur E. Pratt Company, and that finally, after the Pratt Company had reduced it to \$2,900 (voluntarily, so far as appears, except the \$300 paid by the maker and claimant, how and why he was not permitted to show), Mr. Schupp paid the renewal note of \$2,900, as he was obliged to do so far as the bank was concerned. If, as he claims, he held these shares of stock as collateral security for this loan to the Pratt Company, he was not under obligations to surrender his collateral until paid by the Pratt Company. But, aside from this, he was entitled to show when and where and for what purpose he pledged the stock as collateral. If it was turned over to him as collateral for his signing the note, and to secure him in case he paid the note, why could not he use it as collateral when he renewed the note. without making himself the absolute owner and turning the transaction into a sale of the stock to Schupp and payment therefor by the giving of the note? This stock is, of course, worthless. The Arthur E. Pratt Company is unable to pay its debts. But suppose the company had been successful, and this stock, worth at least \$7,350 at par value when turned over to Schupp, had appreciated in actual value above par; what would have been the position of Mr. Pratt and the company?

Mr. Pratt, the president and treasurer of this company, was sworn as a witness for the trustees; but he did not deny, except by inference, the statements of Mr. Schupp. Neither side asked specific questions involving such denial, however. Mr. Schupp testified that at the time of the original transaction Mr. Pratt gave him a letter showing what it was, and that later he gave that back to Mr. Pratt. When and why does not appear. Mr. Pratt did not deny the letter was returned to him. This question was asked Mr. Pratt, and he gave this answer:

"Q. Will you tell us, as nearly as you can now recall, the facts of that letter that you say you gave Mr. Schupp? A. The letter, as near as I can remember, was in regard to my personal stock, which I had given him as additional security—not given to him outright—only as additional security, and that in case that anything happened to know the stock was to be returned to Mrs. Pratt. If anything happened to me, I wanted to increase the business. Q. That was 64 shares, if that's the correct number, of your own individual stock holding in the Arthur E. Pratt Company? A. That's the fact."

If this company sold Mr. Schupp this stock and took his note for \$4,000, with \$700 cash, and turned over the stock, it is difficult for this court to understand why Pratt, the president and treasurer, was giving his personal stock as "additional security." "Additional security" for what? Mr. Pratt did not produce the letter, nor claim it was lost or destroyed. Its production would be quite illuminating. Was this "additional security" for the loan of the note, or "additional security" for an agreement to purchase back the stock? "Additional" to what?

The referee placed some stress on the use made by Mr. Schupp of the stock, but did not permit an explanation of that use—its time and purpose and the circumstances under which used. The trustees in their brief and argument on this appeal lay great stress on that use of the stock by Schupp; but what the facts were, under their objections, is concealed from the court. The bankruptcy court is a court of equity, and justice should prevail. As the case stands, the weight of evidence is decidedly with the claimant; but with all the pertinent facts fully developed it might not be.

There was error in restricting the inquiry in the respects mentioned. Mr. Pratt testified in effect he sold the stock to the claimant, and that it was agreed the company would take it back, and that he gave 63 shares of stock as security that it would. If so, the letter would show. If this agreement was made, and the company failed to take the stock back, why is it not indebted to Schupp in the amount of damages sustained for the breach of the agreement? It seems to me that a full and complete inquiry should be made as to all these matters. What has become of the 63 shares of stock turned over to Schupp as "additional security"? It is not even suggested that the stock issued to Schupp in his name was the property of Pratt. It was unissued com-

pany stock, and Pratt was dealing with it. As president and treasurer of the company, he could bind the company in the transaction. To defeat this claim it must be established as a fact on all the evidence that Schupp actually purchased the stock and paid for it with his note and the \$700 cash. The order rejecting and disallowing the claim is reversed, and the matter sent back to the referee for a rehearing and trial.

So ordered.

RENSSELAER & SARATOGA R. CO. v. IRWIN, Collector United States
Internal Revenue, et al.

(District Court, N. D. New York. September 5, 1918)

COURTS \$\infty 344\)—Federal Courts—Suit to Establish Lien—Absent Defendants.

A railroad company, against which it was adjudged that dividends paid directly to its stockholders as rental by the lessee of all its property, constituted net income subject to federal corporation tax, brought suit in equity to have such taxes declared an equitable lien upon such dividends in the hands of lessee. *Held*, that the stockholders were indispensable parties, but that nonresidents could be brought in by publication under Judicial Code, § 57 (Comp. St. 1916, § 1039).

In Equity. Suit by the Rensselaer & Saratoga Railroad Company against Roscoe Irwin, Collector of Internal Revenue for the Fourteenth District of New York, and the Delaware & Hudson Company. On motion to dismiss bill. Permission to complainant to amend. See, also, 239 Fed. 739; 249 Fed. 726, — C. C. A. —; 246 U. S. 671, 38 Sup. Ct. 424, 62 L. Ed. —.

This is a motion to dismiss this suit in equity, the object of which suit is to secure a decree of this court providing for the retention from the net income of Rensselaer & Saratoga Railroad Company and payment thereof to the collector of internal revenue direct, or to said railroad company for the purpose, a sum sufficient to pay the federal income tax on the net income of such company duly assessed, and which net income, under the terms of a lease between the said Rensselaer & Saratoga Railroad Company, lessor, and Delaware & Hudson Company, lessee, is now paid by the Delaware & Hudson Company direct to the stockholders of the company as "dividends," instead of to the Rensselaer & Saratoga Company, and the Delaware & Hudson Company pursuant to the terms of such lease having indorsed on each certificate of stock an agreement to pay the stockholder the "dividend" specified. Such payments in such manner exhaust all the income and available funds of the Rensselaer Company, leaving it without funds to pay such federal tax unless it borrows, and this borrowing will gradually incumber and, so to speak, eat up the property of the company.

The facts will appear more in detail in the opinion. The main ground of the motion is the absence of necessary parties defendant. The law providing for this tax was passed long after the making of the lease.

Geo. B. Wellington, of Troy, N. Y., for plaintiff Rensselaer & Saratoga R. Co.

Walter C. Noyes, of New York City, for defendant Delaware & Hudson Co.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant Roscoe Irwin, Collector, etc.

RAY, District Judge. In 1871, the Rensselaer & Saratoga Railroad Company, a New York corporation, leased to the Delaware & Hudson Company its railroad and all its physical property during its charter life, and the latter company agreed as rent to keep same in repair and as rent to pay the interest on its bonded indebtedness, etc., and a semiannual dividend of 3½ per cent, on its capital stock January 1, 1872, and July 1, 1872, and also "a semiannual dividend of four per cent, on such capital stock upon each first day of January and the first day of July thereafter; it being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bondholders and stockholders." This lease further provided as follows:

"And the said party of the second part hereby further covenants and agrees, in manner aforesaid, that on presentation of the respective bonds and of the scrip, certificate of stock respectively, the interest and dividends upon which are to be paid as herein provided by the party of the second part, it will, by a proper instrument in writing to be indorsed or stamped thereon respectively, and duly executed, guarantee to the owners and holders thereof payment of the interest and dividends thereon as aforesaid, the dividends to be payable semiannually," etc.

The Delaware & Hudson Company went into possession under the lease and in all respects complied with its terms, and same is now in full force and effect, and each stockholden has indorsed on his or her certificate of stock the guaranty of the Delaware & Hudson Company to pay such dividends. This guaranty, of course, creates an obligation on the part of the Delaware & Hudson Company to the several stockholders which they may enforce.

This lease makes no provision for the payment of the federal income tax imposed by the act of October 3, 1913, c. 16, 38 Stat. 114, by either the stockholders or the Delaware & Hudson Company.

The taxes imposed under that act for one or two years were paid by the Rensselaer & Saratoga Company under protest, and it then brought an action to recover same on the ground such dividends so paid did not constitute income within the meaning of the act; but this court held they did, and that the amount thereof was properly taxable as income, and that the tax was properly assessed and collected. Rens. & S. R. Co. v. Irwin, Col. Int. Rev. (D. C.) 239 Fed. 739. An appeal was taken to the Circuit Court of Appeals, Second Circuit, and the decree of this court was affirmed. Rens. & S. R. Co. v. Irwin, Col. Int. Rev., 249 Fed. 726, — C. C. A. —. Certiorari was denied by the Supreme Court (246 U. S. 671, 38 Sup. Ct. 424, 62 L. Fd. —). The Circuit Court of Appeals said:

"The plaintiff contends that it has no other income than the \$1,000 paid it annually by the lessee as expense of keeping up its corporate organization and an income from other sources amounting to \$3,600 annually, and that the moneys paid as rent to the holders of its bonds and stocks is their income. On the other hand, the defendant contends that the rent, though so paid, is as matter of law income of the plaintiff. Judge Ray took the latter view, sustained the demurrer, and dismissed the complaint. We entirely concur with him.

"It is true that the rent of its road does not go into the plaintiff's treasury, and that it has no means of withholding the tax from it. It is also true that the rent reserved by the lease is paid by the lessee in fixed sums to third

parties. All the same, the rent is the property of the plaintiff, and remains such, though by the terms of the lease paid out to others, whose rights are derived through it. While the rent is a debt of the lessee to the lessor, it is, as between the lessor and its stockholders, the lessor's income, out of which the dividends, if any, are to be paid.

"The application of the rent under the lease is a mere labor-saving device, the effect being exactly the same as if it be paid to the lessor and by it paid out as far as necessary to bondholders for interest, and the surplus in dividends to its stockholders. The description of the fixed sum to be paid by the lessee of 8 per cent. to the lessor's stockholders as a dividend shows that the payment is made as agent of the lessor."

As an equitable and just proposition, it is evident to all fair-minded men that these rents paid for the use of this railroad of the Rennselaer & Saratoga Company and its personal property, but under the provisions of the lease and as a "labor-saving device," paid to the stockholders direct in the form of and under the name of "dividends," ought not to go into the pockets of the stockholders free and discharged of the payment of the income tax imposed by the federal law on the net income of the railroad and which the railroad company must pay and pay from money borrowed for the purpose unless in some legal way its payment can be charged on this income. If lessor and lessee had contemplated or foreseen that such a tax would be imposed by act of Congress, undoubtedly some provision for payment would have been made in the lease as was done with reference to other taxes.

It is clear, I think, that to make a decree, in the absence of the stockholders as parties, directing the Delaware & Hudson Company to retain the amount of the taxes imposed under the act of Congress, would be unwarranted. First, the stockholders have a right to be heard; and, second, such a decree in the absence of such stockholders would afford no protection to the Delaware & Hudson Company as against its liability under its written guaranties indorsed on the certificates of stock held by such stockholders. It is a fact that most or all the stockholders within the jurisdiction of the court have voluntarily paid their share of these taxes, but those beyond such jurisdiction have refused so to do.

Is there any way by which these nonresident stockholders can be brought within the jurisdiction of this court so as to be bound by a decree in the premises? If under the circumstances and conditions a suit in equity can be maintained to make and declare this federal income tax an equitable lien on the annual net income of the Rennselaer & Saratoga Railroad Company and enforce it as such, all the stockholders can be brought in and made parties and service on them made by publication and jurisdiction obtained. Judicial Code of the U. S. § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102, 1 U. S. Comp. St. 1916, pp. 1165, 1166, § 1039).

That section of the Judicial Code provides:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or

demur by a day certain to be designated," and further provides for personal service if practicable wherever the defendants are found, and, if not found, for service by publication, and then continues, "In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be limited by the court, in its discretion, \* \* \* it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district," and then provides that the adjudication shall only affect the property within the district.

These rents are money and personal property owing by the Delaware & Hudson Company within the Northern district of New York and are there situated. If this court as a court of equity has power to declare this federal income tax an equitable lien on such taxable income and subject it to the payment of such taxes, jurisdiction can be obtained. It would be premature to hold that this court has such power. All parties interested should be brought in and heard. The plaintiff should be permitted to amend its complaint, if it elects so to do, as it may be advised, and to bring in and make parties defendant all the stockholders of the plaintiff corporation and apply for an order for services on those outside the jurisdiction under section 57 of the Judicial Code. Thirty days will be allowed for such amendment and action. If such action is not taken, the motion to dismiss is granted. The motion to dismiss, etc., can then be renewed if defendants are so advised and the questions suggested brought properly before the court.

Ordered accordingly.

### In re WILLIAMS.

(District Court, N. D. Ohio, E. D. July 11, 1918.)

No. 6174.

1. Usury €==56—Commission to Agent.

That one accepted an agreed commission for securing a loan and other services, and had the mortgage for the loan made to another as mortgagee, and himself advanced money from funds of the clients in his own bank account, and was prevented from finally placing the mortgage by the bankruptcy of the mortgagor, did not constitute commission money paid for the use of money, so as to make the transaction usurious.

2. Brokers \$\infty\$=65(4)-Dual Agency-Commission.

That a broker, contracting to secure a loan and perform other services for an agreed commission, advanced money on the loan secured by a mortgage taken in the name of another as mortgagee, intending to sell the mortgage, did not constitute him a dual agent, so as to forfeit his commission.

3. Mortgages 58—Execution—Witnesses.

A mortgage is not invalid because witnessed by the agent who negotiated the loan for the mortgagee.

4. ACKNOWLEDGMENT \$\ightarrow\$20(3)—Interest of Notary.

A mortgage, the acknowledgment to which was taken before the agent who negotiated the loan for the mortgagee, is not invalid.

Mortgages ⇐=151(3)—Priority—Statutes.

Gen. Code Ohio, § 8321—1, as enacted by Act May 27, 1915 (105-106, Ohio Laws p. 531), providing for priority of improvement mortgages over

mechanics' liens, etc., limited to the extent the proceeds are actually used as by statute provided, cannot apply to the proceeds of mortgage not containing the statutory requisites of an improvement mortgage, and the priority of such mortgage is covered by sections 8310, 8321.

6. Bankruptcy €=342½--Allowance of Claims-Correction of Referee's Report.

Where a referee in bankruptcy held that one furnishing labor and materials under contract with the owner and complying with Gen. Code Ohio, § 8314, was not entitled to a mechanic's lien because of failure to file statement required by section 8312, and counsel for all lienors, they representing all persons interested, admit that such statement was filed, the order will be modified, and such lien allowed.

In Bankruptcy. In the matter of Joseph C. Williams, bankrupt. On petition for review of the referee's report, marshaling liens and establishing priority thereof. Order modified and confirmed.

A. J. Hackman and White, Johnson, Cannon & Neff, all of Cleveland, Ohio, for bankrupt.

Dorr E. Warner, of Cleveland, Ohio, for lienholders.

P. S. Crampton, of Cleveland, Ohio, for trustee.

Frank Higley, of Cleveland, Ohio, for Lake View Land & Improvement Co.

A. O. Dickey, of Cleveland, Ohio, for H. S. Johns.

WESTENHAVER, District Judge. This matter is before me on petitions for review of the trustee in bankruptcy and of certain creditors of the bankrupt claiming mechanics' liens, seeking to review the findings and order of the referee, made herein on or about March 18, 1918, marshaling liens and establishing priority thereof against the sale proceeds of lot No. 11, located at 11805 Castlewood avenue, Cleveland, Ohio. The referee's findings of fact are not disputed, and, so far as necessary to determination of the questions arising on these petitions for review, will be briefly stated.

The bankrupt, Joseph C. Williams, bought this lot April 20, 1916, from the Lake View Land & Improvement Company, hereinafter called the land company, and agreed to pay therefor \$1,600, one-half cash and the residue on time, to be secured by a second mortgage. Coincidently therewith he employed one H. S. Johns to negotiate for him a loan of \$2,500, to be secured by a first mortgage on this lot. He further agreed to pay Johns a commission of \$150 for services in securing this loan, procuring and examining the abstract, recording the deeds, taking out insurance, and disbursing the proceeds of the mortgage loan in a manner presently to be stated. A deed was duly executed by the land company to the bankrupt. A mortgage was executed by the bankrupt to Mary Warren to secure the payment of \$2,500, evidenced by a note for that amount payable to her. Another mortgage was executed by him to the land company securing \$800, the deferred payment of purchase money. All of these writings bear the same date and were delivered to and intrusted with H. S. Johns. He recorded the deed and mortgages in the following order: First, the deed from the land company to the bankrupt; second, the mortgage from the bankrupt to

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Mary Warren; and, third, the mortgage from the bankrupt to the land company. This order, it is not disputed, was in accordance with the understanding of all the parties interested; the land company having in writing expressly agreed that the mortgage for \$2,500 should

have priority over its mortgage of \$800.

The mortgage executed to Mary Warren was witnessed by Johns and acknowledged before him as a notary public. Mary Warren was his mother-in-law. She did not lend or advance any money on the mortgage, and it was not expected that she would. Her name as mortgagee and as a party to the note was used by Johns for convenience only, so as to enable him thereafter to negotiate a loan on the basis of this note and mortgage, and also conceal for taxing purposes the name of the future holder thereof. This method of doing business had been pursued by Johns in many similar transactions, both with the bankrupt and other persons prior thereto. Mary Warren, immediately upon the execution of the note and mortgage, assigned them in blank. Johns, at the time Williams became insolvent and the petition in bankruptcy was filed, had not placed the mortgage and note with any client, but had from time to time made payments and advances on the faith and credit thereof to Williams as follows:

1916.	
April 20.	Commission
	Abstract and record
May 2.	Lake View Land Company 800.00
May 8.	Cash
July 1.	Insurance
July 2.	Cash 500.00
August 8.	Cash 300.00

The referee has found that the aggregate of these items, with interest thereon from the dates thereof, is the amount due on this mortgage, and that it is a valid and subsisting mortgage, entitled to priority. The residue of principal, amounting to \$222.20, was not allowed; but as Johns, the only person prejudiced by this holding, has filed no petition for a review, it will be regarded as final.

Williams, when this lot was purchased and these two mortgages were executed, intended to erect a building thereon, and this was known to Johns. He was in the business of buying lots and erecting buildings thereon and selling the lots thus improved. He had been doing this for several years, and had, when adjudged a bankrupt, some 15 or 20 buildings in various stages of progress towards completion. Johns had financed his building operations in this manner in many similar transactions. His practice was not to pay the money direct to contractors, laborers, or materialmen, but to Williams, making such payments, however, from time to time, as Johns believed the stage of his construction would warrant. Williams, the bankrupt, began building operations on this lot about July 1, 1916. Johns advanced \$800 thereafter. Williams became financially involved, and the petition in bankruptcy was filed in November following.

The petitioners assign as error and argue that the referee erred in the following respects: (1) In including the item of \$150 commission as a part of the aggregate due on the \$2,500 mortgage. (2) In not

holding that the \$2,500 mortgage was invalid, and therefore not a lien in any amount, because Johns was interested therein as mortgagee, and was disqualified to act as a witness or notary in the execution thereof.

(3) In not holding that, even if said mortgage was valid, it was subordinate in priority to the mechanic's liens. (4) In disallowing the claim of Mrs. A. B. Tindall to a mechanic's lien.

- [11] 1. I am of opinion that the referee properly allowed the item of \$150. This allowance is objected to, because it is said to be usurious. Usury is the exaction of more than the lawful rate of interest for the use of money. If the amount paid is in whole or in part for other lawful services, then it cannot be said to have been paid for the use of the money, and is not usurious. 39 Cyc. 931 (111), 888; White Water Valley Canal Co. v. Vallette, 21 How. 414, 422, 16 L. Ed. 154. As already said, other services were to be performed by Johns, and it is in part for these services that Williams agreed to pay \$150. It was not expected that Johns would make the loan himself, but that he would secure the money by negotiating a loan. The money advanced, it is true, was advanced by check on Johns' personal bank account: but it also appears that this bank account was used by Johns as the common deposit of his own and funds received and handled by him for various clients, whose money was lent out by him on mortgages. Shortly prior to this date he had received from his wife and deposited therein a sum of \$6,500, which it was expected he would invest for her in real estate mortgages. This was the course pursued in other transactions between Johns and the bankrupt, and between Johns and other persons, and Johns from time to time delivered notes and mortgages to persons who had intrusted him with money to be invested in real estate mortgages. The fact that Williams became financially involved before Johns had placed this mortgage, as had been originally intended and as undoubtedly would have been done. except for such bankruptcy, does not convert a contract to pay a lawful compensation for lawful services into a usurious agreement for the use of money.
- [2] The contention is also made that Johns is not entitled to this commission because, as agent of the mortgagor to negotiate a loan, he had no right to have an interest in the loan to be made. The principle of dual agency has, it seems to me, no application to the present situation. Johns was not representing another party at the time he made this contract for a commission, and it was not understood that he himself would lend his own money. This transaction was handled in the usual manner of other transactions between the same parties; that Johns eventually, owing to Williams' bankruptcy, was obliged to keep the mortgage and collect it, does not give the transaction a different color.
- [3, 4] 2. I am of opinion that the referee did not err in holding that the mortgage was properly executed, and was not invalid because Johns was a witness thereto, and, as a notary, certified the mortgagor's acknowledgment. This conclusion is in accord with and fully supported by the decision of the Supreme Court of Ohio in Read v. Loan Co., 68 Ohio St. 280, 67 N. E. 729, 62 L. R. A. 790, 96 Am. St. Rep. 663.

The facts are so nearly similar, the principle involved is precisely the same, and the considerations involved are so fully and ably considered in that opinion, that a reference thereto is deemed adequate for the purposes of this memorandum.

[5] 3. I am of opinion that the referee did not err in giving the \$2,500 mortgage priority over the mechanics' liens. This position is the one mainly relied on and was strenuously urged by petitioners. They base this contention upon section 8321—1, General Code, enacted May 27, 1915 (105–106, O. L. 522–531). This section is in part as follows:

"Except as hereinafter provided in this section, the lien of a mortgage given in whole or in part to improve real estate, or to pay off prior encumbrances thereon, or both, the proceeds of which are actually used in such improvement in the manner contemplated in sections 8310 and 8311 of the General Code, or to pay off prior encumbrances or both, and which mortgage contains therein the correct name and address of said mortgagee, together with a covenant between the mortgagor and mortgagee authorizing and empowering the mortgagee to do all things in this act provided by said mortgagee to be done. shall be prior to all mechanics', materialmen's and similar liens and all liens provided for in this chapter that are filed for record after said improvement mortgage is filed for record, to the extent that the proceeds thereof are used and applied for the purposes aforesaid and pursuant to the provisions of this section, and such mortgage shall be a lien on the premises therein described from the time it is filed for record for the full amount that is ultimately and actually paid out under said mortgage, regardless of the time when the money secured thereby is advanced."

This section is to be construed in connection with other sections, declaring when and from what date mortgages and judgments shall be liens on real estate. It must also be construed in connection with sections 8310 and 8321 of the mechanic's lien law. These other sections provide that mechanics' liens shall be prior to all liens which shall be given or recorded subsequent to the date the first item of labor or materials was performed or furnished. This is the general rule of priority, declared and established as between mechanics' liens and other liens, such as mortgages and executions. Section 8321—1 is not to be taken as repealing, modifying, or revolutionizing the general rules relating to the priority of mortgage and judgment liens, unless the legislative intent so to do is clearly expressed.

The question, then, is: To what mortgages and under what circumstances does this special section 8321—1 apply? The petitioners' contention, briefly stated, is that Johns' mortgage is a construction mortgage—that is, a mortgage given in whole or in part to improve real estate, or to pay off prior incumbrances thereon—and that, this being so, it is controlled by section 8321—1 and is entitled to priority only to the extent to which the proceeds are actually used as provided in section 8321—1.

No definition, other than above quoted, is given in the mechanic's lien law of a construction mortgage. The Johns mortgage is an ordinary mortgage such as is used in Ohio to secure money loaned. It is true, of course, that it was the mutual expectation of Johns and Williams that the latter would construct a building on the mortgaged premises, and that this money would be used for that purpose; but there is no covenant in the mortgage, or any agreement between the

parties, that the money should be paid out in any specific way, or for any specific purpose. It is not, in my opinion, a mortgage such as is described in section 8321—1.

This section requires a mortgage to contain the correct name and address of the mortgagee, and the mortgage in question gives no address for the mortgagee. It must also contain a covenant between the mortgager and mortgagee, authorizing and empowering the mortgagee to do all things in this act provided by said mortgagee to be done. This mortgage contains no such covenant. It is vital, in order to bring a mortgage within the purview of section 8321—1, that this covenant should be contained therein. This, it seems to me, is the final test

The things which the mortgagee must be authorized and empowered to do are provided in section 8321—1. Among them the following may be noted: The mortgagee shall not be required to pay out any money on the mortgage until 15 days after it is filed for record, at the end of which time he may, at his option, refuse to go forward with the loan or to pay out the fund, and, if no money has been advanced, he may cancel and release the mortgage. This option is given the mortgagee for some purpose, evidently, it seems to me, in order that he may inform himself of the amount of the prior liens, the probable cost of the improvement, and the feasibility of completing the improvement under the terms and conditions imposed by section 8321—1.

The mortgagee, if, after such investigation, he elects to complete the loan, shall, in order to obtain priority, distribute the mortgage fund in certain order: (1) Pay prior incumbrances or withhold for that purpose the amount thereof. (2) Retain sufficient funds to complete the improvement according to the original plans, specifications, and contracts, and within the original contract price. (3) He shall pay on the owner's order, directly to the contractors or subcontractors, such sums as the owner may certify to be necessary to meet labor pay rolls for said improvement. (4) He shall pay on the order of the owner accounts of materialmen and laborers who shall have given the mortgagee written notice of the amounts then due for material then furnished and labor then performed, and shall retain the same out of said mortgage fund. Certain other provisions are made as to the order in which the mortgage fund shall be distributed, and for the distribution thereof, which need not be stated at length. The mortgagee's obligation to comply with the fourth order above noted is subordinate to the obligation to retain sufficient money to complete the building according to the original plans and specifications. the funds are insufficient, he shall in any event retain enough to complete the building, and, if there is a surplus, distribute the same pro rata among materialmen and laborers who have filed notices; otherwise, they get nothing. It might be interesting to speculate as to how the mortgagee could perform these requirements if the mortgage fund were not sufficient to pay for completing the building and laborers were unwilling to work and materialmen were unwilling to sell on credit.

Manifestly this mortgage is not within the class described in this 252 F.—59

section, nor controlled by it. It does not give the address of the mortgagee, and it does not contain covenants between the mortgagor and mortgagee, authorizing and empowering the mortgagee to do all things therein provided. The mortgagee may well hesitate, even after 15 days' investigation, to assume the burdens and obligations thereby imposed. Obviously this section was enacted to meet a special situation or provision. It contemplates liens prior to the mortgage, and a construction contract for the entire building, entered into prior to the giving of the mortgage or before the expiration of the 15-day period. It gives the mortgagee authority to pay all such prior liens, including mechanics' liens, as have already attached. It next requires the mortgagee to set aside a sufficient sum to complete the improvement according to the original plans, specifications, and contract, and within the original contract price. It subordinates the rights of materialmen and laborers who have or may give written notice to the obligation of the mortgagee to see that the improvement is completed. It does not, in any event, require the mortgagee to pay out more money than the amount of the mortgage; but it does deprive his mortgage of priority over mechanics' liens to the extent that he has disregarded the order of priority provided in this section in making payments. This section cannot be regarded as repealing or modifying the order of priority provided by sections 8310 and 8321. A mortgagor and mortgagee may execute, if they wish, a mortgage containing the covenants required by section 8321—1, and bring themselves within its provisions. They are not, however, required so to do, and until they voluntarily create this situation the provisions of section 8321—1 are not applicable, but those of sections 8310 and 8321 are. The mortgagee, except as modified in section 8321-1, has priority, provided only his mortgage was recorded before the beginning of the construction work; but, if a single item of labor or materials had been furnished before the date of recording the mortgage, then all of the work and labor furnished on that building, no matter at what date, become prior to the mortgage. This is the law which governs the present mortgage and the mechanics' liens asserted by the petitioners.

The petitioners do not urge in their brief or in argument here that the advances made by Johns after July 1st, the date when the construction work began, should be subordinated to the mechanics' liens because of the rule which subordinates future advances to attaching liens under some conditions. The referee has held that they are not subordinate, and I approve his conclusion. I do not, however, wish to be understood as holding that the mortgage in question is one to secure future advances, or is in any event within the rules relating to future advances, made after liens of others have attached to the mortgaged

premises.

[6] 4. The referee held that Mrs. A. B. Tindall, having furnished labor and materials under a contract with the owner, is not entitled to a mechanic's lien, notwithstanding she complied with the requirements of section 8314, because she did not file the statement required of contractors by section 8312. On this hearing it was stated by her counsel, and acquiesced in by counsel for other lienors, that the state-

ment required by section 8312 had in fact been filed by her, and the record of the proceedings before the referee was by consent amended so as to show this fact. I find such a statement attached to and made a part of the referee's record. Inasmuch as other mechanic lien holders are the only persons interested adversely to Mrs. Tindall, and they are not objecting, I shall allow her lien in the amount claimed as a valid mechanic's lien in the same class with the liens of Thomas B. Jamison and others. The amount due her I find to be \$73.34, with interest thereon from November 4, 1916.

The referee's order, marshaling liens and determining priorities as to the proceeds of sublot No. 11, entered March 18, 1918, will be corrected, so as to include Mrs. A. B. Tindall's lien as above noted, and, as thus modified, it is approved and confirmed.

An exception may be noted on behalf of the petitioners.

## UNITED STATES v. JASICK.

(District Court, E. D. Michigan, S. D. August 3, 1918.)

No. 6177.

1. INDICTMENT AND INFORMATION \$==110(17)-THREATS AGAINST THE PRESI-DENT-STATUTORY LANGUAGE.

An indictment under Act Cong. Feb. 14, 1917, providing punishment for persons making threats to take the life of or inflict great bodily harm upon the President of the United States, which follows the language of the statute in alleging the crime charged, and informs the defendant fully of the nature thereof, and sets forth the exact language alleged to constitute the crime, is sufficiently definite.

2. Homicide \$\iftharpoonup 92\\_"Thereat"\\_Language Used.

The assertions by the defendant that "if he could get to President Wilson he would shoot the blinded eye," and that "if he got a chance he would shoot President Wilson," constitute a threat to inflict bodily harm upon and to take the life of the President of the United States.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Threat.]

3. Homicide @=92-Threat Against the President-Contingency of ABILITY-THREAT.

The mere fact that such threat was expressly made conditional upon the ability of defendant to carry it out does not render the same any the less a threat.

4. Homicide \$\iff 92-Threats to Kill the President-Elements of Of-FENSE.

Under Act Cong. Feb. 14, 1917, a threat against the life of the President of the United States need not be communicated to the President to complete the offense.

Louis Jasick was indicted for violation of Act Cong. Feb. 14, 1917, by threatening to inflict bodily injury upon and to take the life of the President of the United States, to which indictment he demurs. Demurrer overruled.

John E. Kinnane, of Bay City, Mich., U. S. Dist. Atty. A. J. Seltzer, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This is a demurrer to an indictment. The indictment charges that said defendant, at a time and place specified, "willfully, feloniously, and knowingly did make certain threats to take the life of the President of the United States and against the life of said President, and certain threats to inflict great bodily harm upon the said President of the United States, to wit, the Honorable Woodrow Wilson, in the verbal use of certain threatening language." There are two counts in the indictment. The threat made is alleged in the first count to have been that "if he could get to President Wilson he would shoot the blinded eye." In the second count it is charged that the defendant threatened "that if he got a chance he would shoot President Wilson." Other language is also alleged, showing a spirit of disloyalty to the United States on the part of the defendant and a desire to aid the enemy, which language it is not necessary to set forth here.

The defendant has filed a demurrer to the indictment, averring that such indictment is not sufficiently definite, and that the language alleged in the indictment to have been used by the defendant does not constitute a threat to take the life of the President, or to inflict bodily harm upon him, and that, therefore, it does not constitute the crime al-

leged.

The statute involved, being the act of February 14, 1917 (39 Stat. 919, c. 64) entitled "An act to punish persons who make threats against the President of the United States," provides as follows:

"Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1,000 or imprisoned not exceeding five years, or both."

- [1] The indictment follows the language of the statute in alleging the crime charged, and clearly and fully informs the defendant of the nature thereof, even setting forth the exact language of defendant which it is charged constituted such crime. The objection that the indictment lacks the necessary definiteness is plainly without merit and must be overruled.
- [2] The question presented, therefore, is whether the language thus alleged to have been used by the defendant did constitute a "threat to take the life of or to inflict bodily harm upon the President of the United States." Bouvier's Law Dictionary (3d Ed.) in volume 3, page 3270, defines a threat as:
- "A menace of destruction or injury to the person, character or property of those against whom it is made; a declaration of an intention or determination to injure another by the commission of some unlawful act."

The Century Dictionary defines "threat" as follows:

"A declaration of intention or a determination to inflict punishment, loss, or pain on another."

Webster's New International Dictionary defines "threat" as:

"The expression of an intention to inflict evil or injury on another; the declaration or indication of an evil, loss, or pain to come."

[3] It seems to me clear that the alleged language of the defendant here involved constituted a threat against the President as charged. The mere fact that this threat was expressly made conditional upon the ability of the defendant to carry it out does not, in my opinion, render

the same any the less a threat.

[4] Another consideration may be noticed. While the demurrer does not specifically urge the objection that the language complained of is not a threat, because it is not alleged to have been communicated to the President, yet, as the language of the demurrer may possibly be broad enough to include such an objection, I deem it proper to state that such a contention appears to me to be wholly without merit. United States v. Stickrath (D. C.) 242 Fed. 151. Such a construction of the statute would defeat its very object. If it were necessary to wait until the maker of such a threat had come close enough to the President to actually communicate it to him before this statute could be invoked, it can be readily seen that the resulting crime would be more serious than that forbidden by such statute. Congress certainly never contemplated such an interpretation of the plain words of this act.

The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. It tends to create among the anarchistic, lawless element, which is always present in this, as in every other, country, a suggestion which may lead to most evil and harmful consequences. It arouses resentment and concern on the part of patriotic citizens; and in general it constitutes a breach of the peace and incitement to disorder and violence.

Having in mind, then, the meaning of the words of the statute and the purposes for which such statute was enacted, I am clearly of the opinion that the language with which the defendant is charged constituted a "threat to take the life of or to inflict bodily harm upon the President of the United States," within the meaning of the statute, and the demurrer must be overruled.

# UNITED STATES v. METZDORF.

(District Court, D. Montana. August 8, 1918.)

No. 3231.

1. CRIMINAL LAW =4-POWER TO PUNISH CRIME-UNITED STATES.

The United States possesses only such powers to make criminal laws as are expressly set out in Constitution, or as may be necessarily implied.

2. Constitutional Law ← 48—Constitutionality of Statute—Presumption—Act of Congress.

The presumption is that statutes are constitutional and that Congress intended to keep within its powers; and, where statutes will bear two

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

constructions, one within the powers of Congress and one without them, courts will adopt the former.

3. HOMICIDE \$\igcreap 92\\_OFFENSES AGAINST THE UNITED STATES\\_THREATS AGAINST THE PRESIDENT.

Act Cong. Feb. 14, 1917, providing punishment for persons threatening bodily harm to or the life of the President of the United States, has reference only to threats made against the President in his public character; the power to punish for threats against the President in his private character and capacity being vested exclusively in the states.

4. HOMICIDE \$\infty\$141(2)\\_THREATS AGAINST THE PRESIDENT\\_INDICTMENT\\_SUFFICIENCY\\_"PRESIDENT."

An indictment charging violation of Act Cong. Feb. 14, 1917, alleging a threat as made against "the President of the United States," being open to the construction that the threat was against the President in his private character and capacity, is insufficient; the word "President" being commonly used in reference to his private as well as his public character.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, President.]

5. Homicide 5-92-Threats to Kill the President-Elements of the Offense.

Oral threats against the President of the United States not communicated to him are within the statute; Act Cong. Feb. 14, 1917, providing for punishment of persons threatening the life or person of the President.

A "threat" is an avowed present determination or intent to injure presently or in the future; and that it is conditioned upon a possible contingency subject to the maker's control does not deprive it of the quality of a threat.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Threat.]

7. HOMICIDE \$\ightarrow\$ 141(2)—THREATS AGAINST THE PRESIDENT—INDICTMENT—SUFFICIENCY—AMBIGUITY—INNUENDO.

An indictment under Act Cong. Feb. 14, 1917, charging defendant with threats against the life and person of the President of the United States, alleging defendant used the words, "If I got hold of President Wilson I would shoot him," is insufficient; such words being ambiguous and alleged without innuendo.

William Metzdorf was indicted for violation of Act Cong. Feb. 14, 1917, providing for punishment for persons threatening the life or the person of the President of the United States, to which indictment he demurs. Demurrer sustained.

B. K. Wheeler, U. S. Atty., of Butte, Mont., for plaintiff.

W. T. Pigott and M. S. Gunn, both of Helena, Mont., for defendant.

BOURQUIN, District Judge. Act Cong. Feb. 14, 1917, c. 64, 39 Stat. 919, provides:

"That any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any postoffice or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1,000 or imprisoned not exceeding five years, or both."

The indictment herein charges that defendant in this state-

"knowingly and willfully, unlawfully and feloniously, did make a threat to take the life of and to inflict bodily harm upon the President of the United States, said threat being then and there uttered and spoken by the said William Metzdorf in words and substance as follows, to wit: 'If I got hold of President Wilson (meaning Woodrow Wilson, the President of the United States), I would shoot him'—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Arraigned, defendant, electing to plead before securing counsel, pleaded not guilty. A day for trial was set. Later defendant sent a message to the court that he was unable to procure counsel. Thereupon the court appointed two gentlemen whose ability and fidelity to the best traditions of the great profession have long since elevated them to leadership, with all the material rewards, esteem, and prestige the term implies. This not alone to serve defendant and the administration of justice, but also to emphasize the duty of the bar therein at a time when there is a disposition no more surprising in its character than in the quarter of its origin, if not to deny those accused of violation of war legislation, more especially the Espionage Law, any counsel, at least to restrict them to the lesser members of the bar, and in addition to virtually deny bail; and also to set the seal of judicial condemnation upon this infringement of constitutional rights.

The plea of not guilty has been withdrawn, and a demurrer to the indictment interposed, upon the ground that the latter "is insufficient in law upon its face in this: That it does not charge a public offense." The demurrer has been argued with thoroughness and ability. In behalf of defendant it is contended: (1) The statute, though in general terms, must be construed to apply to threats against the President in his public character and capacity only, for that, if intended to apply to threats against the President in his private character and capacity, it is without the power of Congress and unconstitutional. (2) This established, the indictment is insufficient, for that it does not charge the defendant threatened the President in his public character and capacity. (3) The language alleged does not in any event constitute a threat within the statute.

[1-3] In respect to the first contention, if counsel for both parties are not in accord, counsel for plaintiff hardly dissent. Its determinative principles, long since made classical by the Supreme Court, will be briefly stated as follows:

Before the federal Constitution and Union of states, the rights and duties of our people were (1) inherent, as affirmed by the Declaration of Independence, and (2) created by the laws of the states. All power to protect the people therein was vested in the states. Each state had complete and exclusive jurisdiction within its borders, and no jurisdiction without them. For mutual benefit the states adopted the federal Constitution and perfected the Union. Therein they ceded part only of their power to the United States, reserving to themselves all not ceded. They vested the United States with some power,

not all. They created and granted to the United States new powers, made up of such cessions—powers the states enjoyed in part and separately, and not wholly and collectively—created and granted powers over all the states, over the Union. And the powers so ceded, created, granted to and vested in the United States, are those only expressly set out in the Constitution, and in addition powers implied in that they are reasonably necessary or appropriate to exercise of the express powers aforesaid. It follows that, while within the states, both states and United States have sovereignty and powers, the United States has only those powers ceded and vested as aforesaid, and can exercise none others. All others are the states', and to be exercised by them alone.

Amongst the powers so vested in the United States is that to provide itself with officers. Therefrom is implied the power in the United States to protect its officers as such, a power necessarily inherent in all governments, to conduct their affairs, to protect their agents, to preserve the government. This implied power extends no farther than necessary and appropriate, viz. to protect officers from injury on account of official action contemplated, in performance or performed, and, it is ventured, on account of official incumbency. brief, the United States has inherent power to prohibit and punish injury to its officers, when the injury is incited and inflicted because they are officers; and this, because the injury is to the United States. In personal character and capacity, however, officers of the United States, including the President, the chief executive officer, are no more than other men. They have no more rights and duties than other men. They stand before all laws as other men. Like other men, for protection in their personal character and capacity, for protection of their rights, privileges, and immunities, that are not created by nor dependent upon the Constitution, within the states, they must look to state power alone, for the United States has none. Personal security is an inherent right antedating the Constitution, neither created by nor dependent upon the Constitution, and is of the power and duty of the states to ensure to every one within their borders. The states ceded none of this power to the United States, they reserved it wholly to themselves, and it is theirs to this day. Any invasion of this personal security is an offense against the state only. Hence the United States has no power to prohibit and punish assault or murder of or threats against individuals generally within the states, but only in cases of the like in relation to its officers as such, and in relation to individuals as beneficiaries of some right or immunity created by or dependent on the federal Constitution.

To these latter ends, Congress has enacted several statutes (sections 19, 20, 21, 62, 65, Penal Code, Act March 4, 1909, c. 321, 35 Stat. 1092, 1100 [Comp. St. 1916, §§ 10183-10185, 10230, 10233]), but this of the instant case is the first expressly designed to afford protection in any particular to the person of the President. It is noteworthy that there is no federal statute denouncing the offense of murder of the President, or any other federal officer, within the states. The presumption is that statutes are constitutional, that Congress

intended to keep within its powers, that general language capable of construction to exceed the powers of Congress, was by it intended to be limited to keep within them, if possible, without violence to clear meaning of the words used. Accordingly, if statutes will so bear two constructions, one within the powers of Congress and one without them, courts will adopt the former. The general language of the statute here involved may be construed to prohibit and punish threats against the President in both public and private character and capacity; but, since Congress has not power in respect to the latter, it is presumed it intended only the former. Thus only is this statute constitutional and it is so construed.

[4] In the matter of the defense's second contention, the indictment, merely alleging the threat was against "the President of the United States," is open to the construction that the threat was against the President on account of his private character and capacity, and so does not charge an offense. Statutory language is not sufficient in cases where, as here, it may apply to innocent as well as to guilty acts. The indictment must add to the statutory words enough to directly and positively charge the offense denounced by the statute, so that, if all be proven, the defendant cannot be innocent. Otherwise, the presumption of innocence requires construction favorable to the accused. In this respect the indictment is fatally defective. That accused used the word "President" does not demonstrate the threat was on account of the office. The title is commonly used in references to the President in private as well as public character and capacity.

[5] In the matter of the defense's third contention, it is based on the theory (1) that oral threats not communicated are not within the statute, and (2) that oral words of action dependent on a contingency within the speaker's control cannot constitute a threat. At common law simple threats, without intent thereby to influence the action of the person threatened, did not constitute a crime, though sufficient to invoke security to keep peace. Threats to so influence were not crimes unless communicated, being impotent otherwise; and it is believed all authorities holding communication to be an essential element of threat, have in mind threats to influence. Threats sufficient to invoke security to keep peace need not be communicated. Any person hearing them may complain, and the maker be held, though the threatened person has not heard of the threats. It is believed Congress had in mind simple threats whether or not communicated. It had in mind possible consequences, even as it had the like in mind in section 21, Penal Code, penalizing conspiracy to threaten federal officers even though no threat be made, much less communicated. These views accord with United States v. Stickrath (D. C.) 242 Fed. 151, but dissent from United States v. French (D. C.) 243 Fed. 785, cases construing this statute.

[6] Congress having power to penalize threats against federal officers, its discretion determines what is a threat, the substance and method thereof. The first part of the statute contemplates (1) a written threat (2) deposited with the postal service for conveyance or de-

livery. The threat is made, when the writing is so deposited. Hence, the offender is the depositor, and not the writer. The second part of the statute, and under which is this indictment, applies to him who "otherwise makes any such threat," importing a threat to kill or to inflict bodily harm, made orally, or in writing exhibited. A threat is an avowed present determination or intent to injure presently or in the future. In threats to influence, existence of intent to execute is not essential; in the threats denounced by the second part of the statute, it is otherwise. That the threat is conditioned upon a contingency subject to the maker's control does not deprive it of the quality of a threat, if the contingency be a possible one. Every threat unexecuted involves some contingency, if none other than that the maker's purpose be not abandoned, or that execution by him be not prevented.

The possibility that the contingency may happen, and the present intent be executed, the possible consequences to the President, is the evil at which the statute is aimed, and which is the gist of the offense. "After a trip to the moon I will kill you" is not a threat, because the contingency upon which execution of the threat is based is impossible. "After a trip to Butte I will kill you" is a threat, for contrary reason. "If A tells me to kill B, I will do so," is a threat. "If I some time form an intent to kill B, I will do so," is not a threat, because of absence of present intent. Ambiguous words may constitute a threat, but must be alleged with innuendo. This to satisfy the rules of pleading hereinbefore referred to.

[7] The threat herein is so far ambiguous that it is as open to the construction that it relates to a situation past, and so is not an avowed determination to injure presently or in the future, as it is to the construction that it relates to a future situation, and so is an avowed determination to injure in the future. Did defendant mean, "If I had gotten hold of President Wilson I would have shot him," which is not a threat, or did he mean, "If I get hold of President Wilson I will shoot him," which is a threat? In any future indictment the innuendo must be included.

The demurrer is sustained.

### UNITED STATES v. TUBERCLECIDE CO.

(District Court, S. D. California. May 15, 1916.)

1. Druggists = 12-Misbbanding-Offenses.

In a prosecution for the alleged misbranding of a medicine, brought under Food and Drugs Act, § 8, par. 3, it is essential to a conviction that the statements on the label of the medicine alleged to have been misbranded be shown to be both false and fraudulent.

2. Druggists \$\infty\$12-Offenses-Misbranding-Evidence.

In a prosecution under Food and Drugs Act, § 8, par. 3, for the alleged misbranding of a medicine sold as a remedy for tuberculosis, evidence held insufficient to show that the statements appearing on the laThe Tuberclecide Company, a corporation, was charged by information with violating Food and Drugs Act, § 8, par. 3. Dismissed.

On May 15, 1916, the United States attorney for the Southern district of California, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Tuberclecide Company, a corporation, Los Angeles, Cal., alleging shipment by said company, in violation of the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771), as amended (Act Aug. 23, 1912, c. 352, 37 Stat. 416 [Comp. St. 1916, § 8724]), on or about August 25, 1914, from the state of California into the state of Arizona of quantities of an article labeled in part, "Tuberclecide," which was misbranded.

Analysis of a sample of the "Tuberclecide," by the Bureau of Chemistry of this department, showed that it consisted essentially of creosote carbonate with traces of creosote and water; specific gravity, 20° C., 1.164.

Analysis of the plaster, which accompanied the article, showed the following composition:

Odor indicates tar oil and camphor.

Atropine	. Present.
Rosin	
Petrolatum	
Vesicating agents	
Lead soap	
Consists essentially of rosin, petrolatum, atropine, with indicat	ions of tar
oil and camphor.	
Analysis of the "Metablitone," which accompanied the article,	showed:
Alcohol (per cent, by volume)	45.9
Methyl alcohol	Absent.
Strychnine	
Quinine	
Other alkaloidsNot	
Solids (grams per 100 cc.)	
Ash (gram per 100 cc.)	
Aesculin	

Summary: A hydroalcoholic solution of extractives carrying quinine, strychnine, and indications of aesculin.

It was alleged in substance in the information that the article described as "Tuberclecide" was misbranded, for the reason that certain statements appearing on its labels falsely and fraudulently represented it to be effective as a remedy for tuberculosis (or consumption), and effective when used in connection with "Metablitone" as a reliable treatment for tuberculosis, and effective when used in connection with the plasters accompanying said articles as a remedy for tuberculosis, and effective when taken in doses of 14 drops in the capsules accompanying said articles as a remedy for tuberculosis, when, in truth and in fact, it was not so effective when used as described, or when used in connection with any plasters, or when taken in any quantity in any capsules or in any other manner. It was alleged in substance that the article was misbranded, for the further reason that certain statements included in the circular accompanying the article falsely and fraudulently represented it to be effective as a remedy, reliable treatment, and cure for tuberculosis, and also to be effective as a remedy, reliable treatment, and cure for tuberculosis when used in connection with the tonic, when taken in number 0 capsules, and when used in connection with the chest pads, when, in truth and in fact, it was not so effective when used as described, or when taken in any capsule, or when used with any chest pads.

On December 13, 1916, the case having come on for trial before the court, after the submission of evidence and arguments by counsel, the information was dismissed.

Clyde R. Moody, Asst. U. S. Atty., of Los Angeles, Cal., and J. B. Horigan, of Washington, D. C., for the United States.

Dudley W. Robinson, of Los Angeles, Cal., for defendant

Dudley W. Robinson, of Los Angeles, Cal., for defendant.

TRIPPET, District Judge (orally). [1, 2] This action is brought under the paragraph denominated third of section 8 of the Food and Drug Act, approved June 30, 1906. That third paragraph reads as follows:

"If its package or label shall bear or contain any statement, design, or device, regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent," it shall be deemed misbranded within the meaning of the act.

The action is one alleging that this shipment in interstate commerce contained a misbranding under the paragraph quoted. It is necessary for the government to establish that the package or label was both false and fraudulent. The word "Tuberclecide" is used, and that is claimed to be a misbranding. The word "Tuberclecide" is a coined word. It has no meaning aside from the meaning which is given to it by the people that coined it and put it out. The evident purpose of the word, and of the representations accompanying the word, is to indicate that it is a remedy or cure for tuberculosis. The representations do not go any further, as I understand it, than to assert that it is a remedy for tuberculosis. Now, let us consider first whether or not this thing is false. I want it distinctly understood that I have not decided, and will not decide, because it is not necessary, that this medicine will cure or will not cure, that it will remedy or will not remedy, tuberculosis. It is not necessary for me to decide that it is or is not a remedy for it, and I am not going to decide that. I may say, however, that that is one of the things which it was necessary for the government to prove—that the claims made for this medicine were false.

The government produced physicians, the most eminent in this city, graduates of the best colleges, who testified upon the subject, and I take it from their testimony that they conclude that there is no cure, in the sense in which that word is understood, for tuberculosis; that there is no specific remedy for it. In that connection, however, I do not construe this medicine as being advertised as a specific. I think it is fair to say that they do not advertise that it is a specific for consumption. The physicians brought by the government testified that creosote carbonate has been discarded, as a remedy for tuberculosis, for a great many years. Creosote carbonate is one of the ingredients of this medicine. According to the analysis given by the chemist testifying on behalf of the government, that is the principal ingredient of this medicine. Now, the defense brings an equal number of physicians. So far as I know, they are regular physicians, of good repute, graduates from good colleges, who testify that creosote carbonate is used to-day as a remedy for tuberculosis. They not only do that, but they bring standard medical works, one printed this year, which say that it is used as a remedy for tuberculosis.

Aside from that, however, the government produced a chemist who testified that he analyzed a bottle of the stuff, and it seems that he

used practically all of the contents of the bottle to make the analysis; there is not a half a teaspoonful left in the bottle. He found certain things in this bottle. The man that got up this medicine testified that it had many other things in it, at least four more ingredients than the chemist gave. The government offers no proof whatever that the testimony of that man is false. There is no proof offered on the subject, but I believe it is a fact that chemists cannot always tell what is in a mixture. It seems to me that, if the government claimed that this medicine did not contain the four other things which the man that manufactured it said it contained, it was up to the government to produce that testimony. The government has another quantity of this medicine, and refused to produce it for the defense. I do not like that attitude.

Now, these physicians, on behalf of the government, testified that a medicine containing the ingredients which the government chemist testified this medicine contains would have no remedial effect upon a consumptive. They were testifying about this medicine as analyzed by this chemist. They were not testifying about this medicine according to its true properties, as proven by undisputed evidence in this case. There are four other ingredients in this medicine, according to the undisputed testimony of the manufacturer. They do not say anything about the medicine as it is proven to be; that is, about the actual ingredients of the medicine. I repeat that I am not deciding that this stuff is a remedy, or is not a remedy, for tuberculosis.

In addition to proving that the statements are not true, the government must show that they are fraudulent. Now, a man may make a statement that is not true; but if he believes it to be true, and is warranted by his information in making the statement, it is not fraudulent. What do these people do that are going to buy this formula and sell this medicine? They get physicians to examine patients that have been treated with it. I think they had four physicians to investigate it, and these physicians advised them that it was a remedy for tuberculosis. Aside from that, they bring three physicians here who say that they have prescribed this stuff to patients, and that it has proven itself by experience to be a remedy. The government doctors never prescribed it to any person, while one of the witnesses for the defense testified that he had treated 3,000 patients with it, with good results. Do not these people representing defendant have a right to act upon that? Can anybody say that they willfully falsified anything in the face of that testimony? We all know from our own observations that doctors disagree. I have heard them disagree in making sworn statements in this court many a time. Schools of physicians disagree. One school thinks that the other school does not know anything, and that they are practicing fraud and deception. Can it be fairly said that a man is practicing a fraud when he acts upon the advice of a physician, although other physicians disagree with him? Have we come to such a pass that fraud can be attributed to a man when he accepts the advice of a doctor, or several doctors, notwithstanding that other physicians may disagree with those whose advice he accepts? For my part, I cannot see why a man cannot act in perfect good faith in following the advice of any doctor that he chooses to consult, if he acts with fair intelligence in getting that advice. The doctors that advised these people are all licensed physicians, and why

could they not accept their advice?

Let me illustrate my idea of this case by a supposititious one. Take vaccine. Vaccine is a coined word. It means what the coiner of the word meant for it to mean, namely, that vaccine is a preventive of smallpox. Suppose a party should transport vaccine in interstate commerce under an advertisement that it was the only known remedy for preventing smallpox, and that it would prevent smallpox. Suppose the government were to prosecute him under this statute. Suppose the government could bring physicians who would testify that vaccine would not prevent smallpox; that it was not only not a preventive, but that it was positively injurious to those who used it. This is by no means an improbable presumption. Then the defense would bring in an array of physicians to testify that it would prevent smallpox. Would any court convict the man that shipped the article for fraud in misbranding it?

The prosecution in this case seems to want to make a point of the fact that the man who prepared the formula for Tuberclecide was not a licensed physician, nor a graduate of any college, although he did practice medicine for several years. Dr. Jenner, who discovered vaccine, did not do it by any scientific method. He discovered it from deduction from the fact that milkmaids did not have smallpox, or, if they did have it at all, they had it only in a mild form. It did not take a graduate from any college, or a licensed physician, to make that deduction, and the same might probably be said concerning Tuberclecide. I cannot see how these people were practicing a fraud in the face of the testimony in the case. They believed they were doing good.

The case will be dismissed.

## In re KELLER.

## In re MILAN GARAGE & SALES CO.

(District Court, E. D. Michigan, S. D. April, 1918.)

No. 3429.

- 1. BANKRUPTCY \$\infty\$311(2)—PREFERENTIAL PAYMENTS—WHAT CONSTITUTES. Where it did not appear that the bankrupt was insolvent when he bought out his copartner or that the firm was ever insolvent, a claim for loans to the bankrupt for that purpose cannot be rejected, on the ground that payments by the bankrupt to his copartner were preferential.
- 2. BANKRUPTCY 5333—CLAIMS—"CLAIM FOUNDED ON WRITTEN INSTRUMENT." Where claimant, who made loans to the bankrupt, made same by check, the items cannot be deemed founded on an instrument in writing, so as to necessitate the checks being set out with the proof of claim, as required by Bankr. Act, § 57b (Comp. St. 1916, § 9641), in cases where the claim is founded on a written instrument.

3. BANKRUPTCY \$\infty 333-Claims-Filing of Written Instrument.

Where the note of a bankrupt, indorsed by claimant, was duly filed by the payee with his proof of claim, but payments made by claimant were indorsed thereon, the note must be deemed filed on behalf of both payee and claimant, within Bankr. Act, § 57b (Comp. St. 1916, § 9641), so as to enable claimant also to make proof of his claim based on the note.

4. BANKRUPTCY €=333—PROOF OF CLAIM—SUFFICIENCY.

Where rent was due from bankrupt to claimant, the lease, being in writing, should be filed with the proof of claim, in accordance with Bankr. Act, § 57b (Comp. St. 1916, § 9641), or the loss or destruction of the instrument explained.

5. BANKRUPTCY \$\sim 336-CLAIMS-AMENDMENT.

Where a properly verified claim was filed by claimant within the statutory period, he is entitled to amend it, so as to correct his omission to file a written instrument on which claim was based.

In Bankruptcy. In the matter of Herman J. Keller, doing business as the Milan Garage & Sales Company, bankrupt. On petition by the trustee to review an order of the referee allowing the claim of one Herman D. Keller. Remanded for further proceedings in conformity with the opinion, with directions that, on certain amendment of claim, the order should be affirmed.

Fred A. Heidenrich, of Detroit, Mich., for petitioner. Christie, Yokom & Martz, of Detroit, Mich., for claimant.

TUTTLE, District Judge. This is a petition to review an order of the referee in bankruptcy, overruling objections filed by the trustee of the estate of the bankrupt to the claim of one Herman D. Keller, father of the bankrupt, and refusing to expunge such claim, as requested by such trustee. The order of the referee allowed said claim in full in the sum of \$3,615.65, and the trustee has brought the matter before this court by a petition for the review of such order.

At the time of the filing of the voluntary petition in bankruptcy herein, the bankrupt, Herman J. Keller, was engaged in operating an automobile garage and salesroom in Midland, Mich., and was doing business under the name of Milan Garage & Sales Company. Shortly before the date of the filing of such petition this garage had been conducted by the bankrupt and his brother, Frank Keller, as copartners, and a few months before the date mentioned the father of the bankrupt, the creditor whose claim is here involved, had advanced to the bankrupt certain sums to enable the latter to pay debts due from said bankrupt to his said brother, and also to purchase the interest of the latter in such partnership.

There is no testimony in the record tending to show that at the time of the making of any of these advances to the bankrupt the latter was insolvent. Furthermore, the testimony shows that the claimant did not himself purchase the interest of his son, Frank, in this partnership, but that such purchase was made by the bankrupt with funds borrowed by him from his father, the claimant. The testimony taken before the referee and returned to this court also shows that the claimant owned the premises in which the garage in question was conducted, and at and

for some time prior to the filing of the petition in bankruptcy leased such premises to the bankrupt on a monthly rental. Nearly \$1,200 of the claim involved and allowed by the referee consists of rent due and unpaid on this lease at the time of the filing of the petition in bankruptcy. The balance of the claim is for money paid on a certain promissory note, given by the bankrupt and indorsed by claimant, and for loans made by claimant to the bankrupt from time to time.

Claimant filed his proof of claim, which was thereupon allowed. Afterwards the trustee filed a petition with the referee, asking that the allowance of said claim be reconsidered, and the different items thereof rejected and expunged, for reasons which will be considered presently. A hearing was held on this petition, the claimant and the trustee giving testimony, which was taken stenographically, and typewritten transcript of which is attached to the return of the referee. All of the objections of the trustee were overruled, the petition to expunge was denied, and the claim was again allowed in full. This court is now asked to review the decision of the referee.

Three objections are urged against the allowance of this claim:

[1] 1. The objections to the items based on the payments by claimant to the former partner of the bankrupt are as follows:

"The item of \$200 (purchase money for interest of Frank Keller) is not a provable debt against this estate, he (Frank J. Keller) being a member of the partnership previous to the filing of the petition in bankruptcy of Herman J. Keller, and said estate being insolvent at the time of the dissolution and during this period, and for the further reason that it is an antecedent debt and a preferential payment.

"Item of \$360 (wages paid Frank Keller) is an antecedent debt, and therefore preferential. Objected to for the further reason that the claimant is the inter alias for Frank Keller, he being a member of the partnership previous to the dissolution in bankruptcy by Herman J. Keller and while this estate was insolvent. Cannot prove a claim for labor and materials contributed to his own bankrupt estate, or to this estate."

I have carefully read all of the testimony, and agree with the referee that there is no evidence tending to support the contention that the bankrupt was insolvent at the time of the making of any of these payments. Nor does it appear that the partnership was at any time insolvent. It cannot, therefore, be said that any preference is involved in this connection. It is clear from the testimony that the sums paid by claimant to the former partner of the bankrupt were charged to the bankrupt, and were simply loans made to the bankrupt for the purpose of enabling him to pay indebtedness due from him to his brother. The claimant was examined at some length by counsel for the trustee, but no facts or circumstances showing fraud, or from which any fraud could be properly inferred, appeared. This objection is clearly untenable. This applies also to the similar objection to one of the other items of the claim to the effect that it involved a preference.

2. A number of the items are objected to as being too indefinite. While, perhaps, the proof of claim is not as definite and specific in some respects as might be desired, yet, as already stated, the claimant was examined and cross-examined in open court in regard to all of these items, and the trustee had ample opportunity to inform himself

concerning them. The referee, having the benefit of observing the claimant and hearing his testimony, was satisfied as to the truth of his statements and the correctness of his claims, and I am not disposed to

disturb his findings in that regard.

- [2, 3] 3. It is further insisted that nearly all of the items in the proof of claim are founded upon instruments in writing, and it is urged that, as none of such instruments were filed with such proof of claim, and no statement of their loss or destruction was filed, as required by section 57b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1916, § 9641]), such items were improperly allowed. As to all of these items, excepting those based on rent due, I agree with the referee that it does not appear that they were founded upon any instrument of writing. While claimant testified that most of such items were paid by check, they cannot for that reason be properly said. to be "founded upon an instrument of writing." The written instrument connected with them was merely the medium of their payment to the bankrupt, and it was not until they were received by him as loans that the obligation of the bankrupt to repay them arose. It is true that these checks, if properly identified, would constitute evidence of such payments; but the claim of this creditor is not in any real sense founded upon such instruments, but may be proved without their production and regardless of their existence. This contention is plainly without merit. This applies, also, to the note of the bankrupt indorsed by the claimant, payments on which to the payee therein are included in the proof of claim. Furthermore, such note was duly filed in the cause in connection with the proof of claim of such pavee, and the payments made by claimant were found to be indorsed thereon. As this note could not be filed by both the payee and the indorser, it must be held to have been filed on behalf of both of them within the meaning of the statutory provision applicable.
- [4, 5] What has just been said, however, does not apply to the claim for rent due and payable on the lease from the claimant to the bankrupt. While the proof of claim did not mention such lease, it appeared from the testimony of the claimant that such rent was due on a written lease. It is therefore plain that this portion of the claim is founded upon an instrument of writing. Such instrument, however, was not filed or produced, nor was a verified statement of its loss or destruction filed with the claim. Section 57b of the Bankruptcy Act, already referred to, is as follows:

"Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim."

The provisions of this section are clear, positive, and mandatory, and, in my opinion, must be strictly followed. To entitle a claim to payment out of the bankrupt estate, it must first be proved and then allowed. Moreover, it seems apparent that the proof of any such claim

must be made in accordance with the requirements of the Bankruptcy Act. I know of no other method of making such proof, and none has been suggested by counsel. As was pointed out in the case of In re Hudson Porcelain Co. (D. C.) 225 Fed. 325:

"Claims which do not comply with the requirements of the statute are not 'duly proved.' They are not, therefore, entitled to allowance."

While perhaps in the present case, in view of the positive character of the testimony on this point, this objection is somewhat technical, the trustee seems to be within his rights in making it. As, however, a properly verified claim was filed by claimant within the statutory period, he is entitled to now amend such claim, if he so desires. Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20; In re Standard Telephone & Electric Co. (D. C.) 186 Fed. 586.

The matter will be remanded to the referee for further proceedings in conformity with the terms of this opinion. Upon the amendment, within a reasonable time, to be fixed by the referee, of the proof of claim, so as to comply with the requirements of section 57 of the Bankruptcy Act, the order allowing the claim in full will stand affirmed.

## UNITED STATES v. MOTION PICTURE FILM "THE SPIRIT OF '76."

(District Court, S. D. California, S. D. November 30, 1917.)

WAR &4-Interference with Prosecution of WAR-Motion Picture Calculated to Work Dissension Among Allies.

Where a motion picture film relating to Revolutionary subjects portrayed false and exaggerated scenes of British cruelty in such a manner as was calculated to cause dissension between the United States and Great Britain, who are allies in the present war, held, that a motion for the return of the film, which had been seized by the United States, should be denied, and the original seized; it appearing that, when the film was exhibited before governmental representatives, the objectionable scenes were deleted and then reinserted.

At Law. Proceeding by the United States against the Motion Picture Film "The Spirit of '76." On motion for return of film. Motion denied, without prejudice.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal.

I. R. Rubin, of Los Angeles, Cal., for Robert Goldstein.

Joseph Scott, of Los Angeles, Cal., for certain stockholders of Continental Producing Co.

BLEDSOE, District Judge. The facts developed in this proceeding show that this photoplay, "The Spirit of '76," attempts to portray some of the more important phases of the American War for Independence, and special scenes, like Paul Revere's Ride, the signing of the Declaration of Independence, and the like, are given particular mention and prominence. In addition—and these are the parts of the film inveighed against—scenes purporting to illustrate the Wyoming Valley Massacre are shown. A British soldier is pictured impaling on a bayonet a baby

lying in its cradle and then whirling it around his head so impaled. Other unspeakable atrocities committed by British soldiers, including the shooting of harmless women, the dragging off, sometimes by the

hair of the head, of young American girls, etc., are exhibited.

Because of adverse criticism and objection, before the scheduled initial performance a private exhibition of the picture was had, attended by divers local and governmental representatives. At this performance none of the objectionable features above mentioned were shown, and in consequence no open objection to the proposed run of the play was voiced. Immediately following this preliminary presentation, though, the director, Goldstein, inserted into the film in appropriate places the scenes of the Wyoming Massacre just referred to, and proceeded to show them at the ensuing evening performance. This he did, he says, "to excite the audience" and attract greater attention to his production.

The film is owned by a corporation, but seems to be and to have been managed by Goldstein, the man who wrote the scenario and who has "produced" the picture. As is usual in such cases, a good many thousands of dollars, probably in excess of \$100,000, have been expend-

ed in the work of such production.

I have listened very carefully to the statement of Mr. Scott, counsel for the stockholders in the film company, and I sympathize with them for having made an investment in this film with no knowledge of its true character. The various stockholders, of course, I do not know, and, in consequence, cannot know their attitude toward the presentation of this film. I have given careful consideration to the suggestion made by counsel with respect to the possibility, and even probability, of financial losses inuring to the stockholders-perhaps of some considerable consequence. Bearing all this in mind, however, and assuming that they and their associates are going to suffer some considerable loss, this court at this time is in no mood to weigh the financial losses of a few individuals as against possible detriment to the United States of America. If it be that some will have to suffer loss, yet it is only a financial loss, and, at worst, will be only a fractional part of the loss that others are going to have to suffer—some even of their lives—because of the war in which we are now engaged.

History is history, and fact is fact. There is no doubt about that. At the present time, however, the United States is confronted with what I conceive to be the greatest emergency we have ever been confronted with at any time in our history. There is now required of us the greatest amount of devotion to a common cause, the greatest amount of co-operation, the greatest amount of efficiency, and the greatest amount of disposition to further the ultimate success of American arms that can be conceived, and as a necessary consequence no man should be permitted, by deliberate act, or even unthinkingly, to do that which will in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact and the

righteousness of our cause shall have been demonstrated.

We are engaged in a war in which Great Britain is an ally of the

United States. It is a fact that we were at war with Great Britain during the Revolutionary times, and whatever occurred there is written upon the page of history and will have to stand, whomsoever may be injured or hurt by the recital or recollection of it. But this is no time, in my judgment (this is the thought that controls me in this matter), whatever may be the excuse, whether it be a financial return or otherwise, for the exploitation of those things that may have the tendency or effect of sowing dissension among our people, and of creating animosity or want of confidence between us and our allies, because so to do weakens our efforts, weakens the chance of our success, impairs our solidarity, and renders less useful the lives we are giving, to the end that this war may soon be over and peace may soon become a thing substantial and permanent with us. I am in no mood, either, particularly after having listened to the testimony of this man Goldstein, to consider the suggestion that the film be returned, and so much of it be permitted to be exhibited as has not met with special objection.

It is a fair inference from the circumstances, considering the hearing had in Chicago, the objections then made, the language used in characterizing its scenes of atrocity as being "reprehensible" and as evidencing "malice," that the disposition and purpose of the whole play in its deeper significance is to incite hatred of England and England's soldiers. And it is not at all necessary that it should be shown to have such effect; it is enough if it is calculated reasonably so to excite or inflame the passions of our people, or some of them, as that they will be deterred from giving that full measure of co-operation, sympathy, assistance, and sacrifice which is due to Great Britain, simply because of the fact that Great Britain, as an ally of ours, is working with us to fight the battle which we think strikes at our very existence as a nation.

Ordinarily the exploitation of such harmless, in one sense, highly inspiring, in another sense, scenes as Paul Revere's Ride, which is one of the most beautiful things in history, could not be detrimental or distasteful to anybody. Ordinarily it could be put on in such a way as to be a source of unending delight and gratification to any man, be he American or be he English; but that is not the point. There are interspersed in this play those things which tend to appeal to the passions of our nature, which tend to arouse our revenge and to question the good faith of our ally, Great Britain, and to make us a little bit slack in our loyalty to Great Britain in this great catastrophe or emergency. Therefore, as I say, this is no time or place for the exploitation of that which, at another time or place, or under different circumstances, might be harmless and innocuous in its every aspect. It is like the "right of free speech," upon which such great stress is now being laid. That which in ordinary times might be clearly permissible, or even commendable, in this hour of national emergency, effort, and peril, may be as clearly treasonable, and therefore properly subject to review and repression. The constitutional guaranty of "free speech" carries with it no right to subvert the purposes and destiny of the nation.

In addition, this man, by his own admission, knew that these things the bayoneting of the babe and the like—had been severely criticized and were inhibited. He knew that objection had been made to them. He knew, just as well as he knows we are sitting here now, that the private presentation of this film on last Tuesday morning was for the purpose of seeing if there was anything objectionable in it. To fit it for such private presentation it was gone over by him with a fine tooth comb, no doubt; but immediately thereafter a sedulous effort was indulged in by him to insert those things which would tend to "excite" and to create a prejudice against Great Britain. This demands an inquiry into the ultimate motives and purposes of this man, and no doubt justifies other and different action against him. But in any event, referring to the special problem now before us, and considering only the harm not to come to us, I feel that I can do no less than to say that, so far as it is within the power of this court, this thing has got to stop.

I have no disposition, of course, to confiscate any one's property. There may come a time and place where this play, devoid of some of its horror, which never ought to be in it at any time, and devoid of its immorality, which is and ought to be shocking to any man who possesses a respectable quantum of decency in his makeup, devoid of those things, the time may come when it could be put on, and put on entertainingly and refreshingly before an audience of American people. The fact is, however, that the film is of such a character that it can be used to our national disadvantage in time of national emergency, and this cannot be allowed. If the result be to bring a loss upon those who are financially interested, so be it. It is merely a loss they must sustain because of the unwisdom they have demonstrated in trusting their financial affairs to one who possesses such a slight modicum of appreciation of the eternal fitness of things as does this man who is presenting and claiming the right to present this picture at this time.

The motion for the return of the film will be denied without prejudice. It will be held in the possession of the marshal until such time as, under changed conditions, it may properly be presented, and the district attorney is directed to prepare for the court a warrant for the seizure of the original, which is within the jurisdiction of this court, as shown by the testimony given here, and that will be put in the same

place and kept under the same surveillance.

### In re NATIONAL PIANO CO.

(District Court, D. Massachusetts. August 22, 1918.)

No. 23729.

1. Corporations ← 426(5)—Contracts—Ratification of Unauthorized Contract.

If a contract, not ultra vires, is made in the name of a corporation by an officer assuming to act for it, and is known to and approved by the persons intrusted with the management of its affairs, the corporation is bound without any formal vote.

2. Corporations \$\iff 426(10)\$—Contract—Ratification.

Ratification by a corporation of a contract not previously authorized is more easily inferred where the corporation receives and retains property under it.

In Bankruptcy. In the matter of the National Piano Company, bankrupt. On review of order of referee disallowing claim. Reversed.

Percy A. Atherton and Swift, Friedman & Atherton, all of Boston, Mass., for trustees,

Samuel D. Elmore, of Boston, Mass., for creditor.

MORTON, District Judge. The facts are stated in the referee's certificate. Except as herein otherwise indicated, I agree with his conclusions. It is unnecessary to restate all the somewhat complicated facts, and I shall only refer to such as are significant on the view of the case which seems to me to be the correct one.

By a written contract dated February 3, 1913, and executed in the bankrupt's name by Jewett, its president, the bankrupt agreed with the claimant, Kilmer, to purchase from him 318 shares of its own preferred stock at par. Deliveries were not to begin until July, 1916 (more than three years ahead), and were then to be at the rate of 3 shares per month; payment being due on delivery. The claimant agreed to hold his stock and to make deliveries as specified. This contract was part of a much larger transaction, or series of transactions, whereby Kilmer, who up to that time had held the largest single interest in the bankrupt company and had been its treasurer, was eliminated from its management, and the company's affairs were put into the hands of a group of younger men. Kilmer transferred to the company his entire stock holdings, 710 shares, and received in return the new preferred stock and the contract to repurchase it here in question. He also resigned as treasurer and director.

At this time the company was not merely solvent; it was decidedly prosperous, and its common stock appears to have been worth par. All the stockholders, except possibly those owning a few scattering shares, knew of the contract and made no objection to it. All the directors knew about it, and apparently approved of it; certainly none of them objected at any time. There never was any vote of

the directors authorizing or ratifying the contract; and on this ground the learned referee has found that it was not binding on the bank-

rupt company.

[1, 2] With this finding (or ruling) I am unable to agree. The corporation was a close one, in which but few persons were interested, nearly all of whom were actively connected with its manage-Such concerns frequently act informally—as this one had constantly done—and are careless about their votes and records. If action, not ultra vires, is taken in the name of the corporation by an officer or agent assuming to act for it, and is known to and approved by the persons intrusted with the management of its affairs, the corporation is bound, without any formal vote. "Authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection, as well as in the case of individuals." Wells, J., Sherman v. Fitch, 98 Mass. 59, 64 (quoted with approval in York v. Mathis, 103 Me. 67, 79, 68 Atl. 746). See, too, North Anson Lumber Co. v. Smith, 209 Mass. 333, 337, 338, 95 N. E. 938. Such authority or ratification is more easily inferred where, as here, the corporation receives and retains property under the contract in question. Kelley v. Newburyport Horse Railroad Co., 141 Mass. 496, 6 N. E. 745.

[3] The contract itself says explicitly that the corporation is to repurchase the preferred stock. The learned referee finds, however, that it was understood by the parties in interest that the purchase was in fact being made by certain individuals connected with the company, and that it was known to Kilmer not to be "a bona fide purchase by this corporation" of the stock. Just what this finding means, when applied to the facts, is not entirely clear. A lack of bona fides usually implies deception practiced on somebody to his loss. That was not true in this case. The persons assenting to the contract comprised, as has been said, everybody substantially interested in the National Piano Company. There is no finding that, at the time when the contract was made, anybody expected the corporation to become insolvent, or had any intention of thereby defrauding its creditors, nor that the contract had that result. No objection is made by persons who afterwards bought stock in the corporation, and nobody ever disputed the validity of the contract before the trustees in bankruptcy did so. The few stockholders, not explicitly or tacitly assenting, never made any objection to it. Neither the corporation nor its trustees in bankruptcy can now avail themselves of rights which such stockholders might have had. Merchants' Bank v. Citizens' Gaslight Co., 159 Mass. 505, 511, 34 N. E. 1083, 38 Am. St. Rep. 453. Even if the contract results in a large claim which is proved in competition with the merchandise creditors, it is not on that account invalid or unenforceable. Wm. Filene's Sons Co. v. Weed et al., 245 U. S. 597, 38 Sup. Ct. 211, 62 L. Ed. 497.

The learned referee was apparently of the opinion that through the contract Jewett and his associates intended and expected eventually to acquire personally the stock which Kilmer transferred to the company, and to use the company's assets in paying him for such

stock, and that this purpose was known to Kilmer and rendered the transaction invalid. The corporation being solvent at the time, and the effect of the transaction not being to make it insolvent, it is difficult to see who, excepting other stockholders, could object to such an arrangement. Abele v. Meagher Co., 41 Am. Bankr. Rep. 638, 227 Mass. 427, 116 N. E. 805. Jewett and his associates owned most of the other stock. Whether they bought in the Kilmer stock and kept it in the company's treasury, or whether they bought it and afterwards distributed it by a stock dividend or distribution of property in specie, makes, under the circumstances, very little difference.

It does not seem to me that Kilmer understood he was selling to Jewett and his associates, and not to the corporation. Admittedly Kilmer's common stock was transferred directly to the company; the contract to repurchase the preferred was made with him in its name, as part of the consideration for his common stock; other parts of the transaction not necessary to describe were to be, and were, carried out by the corporation itself. Many facts might be referred to, all showing clearly that Kilmer was dealing with the bankrupt corporation, not with Jewett and his associates, as the learned referee intimates. The corporation had power to buy its own stock (Dupee v. Boston Water Power Co., 114 Mass. 37), and I see no sufficient reason why, if all parties in interest chose to make such a transaction, they were not free to do so.

Kilmer's proposition to sell his stock to Jewett after the corporation had got into financial difficulties was obviously predicated upon the supposition—although there is no categorical evidence to that effect—that the company (which Jewett was then attempting to reorganize) would be glad to release Kilmer from his obligations thereunder. Certainly it does not in my opinion warrant disregarding, not only the explicit language of the contract as the parties made it, but also the fundamental character of the transaction in which they were engaged.

It is true that at the time of the contract Kilmer was one of the directors; but it is equally true that he had then agreed to sell out, and immediately afterwards ceased to be an officer of the corporation. Its management was left in the hands of the men who had arranged with him to retire. The contract originated in their suggestions and was made with their full approval. For three years nobody connected with the corporation took any steps to have it disaffirm its action. It allowed Kilmer to hold his preferred stock during that time, supposing that he had a valid contract. Meanwhile, largely through the mismanagement of the company's affairs by Tewett and his associates, the stock became worthless. Kilmer had nothing to do with the mismanagement, and there is no reason why he should shoulder loss occasioned by it. If it was desired to have the company relieved of the contract—and there is no evidence that it was ever so desired—prompt steps to that end should have been taken in justice to Kilmer.

The findings of the learned referee, so far as inconsistent with this opinion, are set aside; his decree is vacated, and one may be entered allowing the claim.

### THE ADELINE.

## (District Court, N. D. Florida. July 8, 1918.)

- 1. JUDICIAL SALES 50(1)-PERISHABLE PROPERTY-TITLE.
  - Sale of property as perishable under order of court, pursuant to statutes authorizing such sales to avoid deterioration and accumulation of costs, will confer a good title in the purchaser, without regard to the title or interest of the defendant, or the extent of liens fastened thereon by the common or statutory law.
- 2. MARITIME LIENS \$\sim 48\$\$—Perishable Property—Sales by Order of State Court.

The sale of a boat subject to admiralty jurisdiction under process of a state court, under statutory provisions, as perishable property, does not extinguish a maritime lien for supplies advanced prior to the proceedings and sale, especially in view of Const. U. S. art. 3, § 2, relating to admiralty jurisdiction.

In Admiralty. Libel by A. M. Hyer, trading as the Hyer Launch Company, against the gasoline launch Adeline, for supplies and materials furnished. Exceptions to answer sustained.

John P. Stokes, of Pensacola, Fla., for libelant. Watson & Pasco, of Pensacola, Fla., for respondent.

SHEPPARD, District Judge. This case involves the question of whether or not the sale of a boat, the subject of admiralty jurisdiction, under a state statute, as perishable property, would extinguish a maritime lien for supplies. The Hyer Launch Company libeled the launch Adeline for supplies furnished the launch, which was employed in the usual commerce of such craft in the harbor of Pensacola. Before admiralty process was run against the launch, it was seized under an attachment issued out of the justice of the peace court of Escambia county, Fla., at the suit of James Johnson against the Pensacola Fertilizer & Oil Company, as the property of the latter. In the proceedings in the state court an order for the sale of said launch as perishable property and liable to deterioration was obtained, and the boat was sold in conformity to the statute of Florida in such case pro-The sale was had in due course, and the claimant took possession under a bill of sale, pursuant to the purchase at public sale according to law. In addition to the facts here summarized, the answer alleged that the lien of libelant, if any, existing prior to the sale of the launch as perishable property, was by such sale forever released and discharged.

[1] It is alleged, and not denied, that the libelant had knowledge of the proceedings and sale under the process of the state court, but deferred taking any action until the launch was delivered to the possession of the purchaser, when the libelant caused the admiralty process out of the United States District Court to issue against the Adeline for materials and supplies. Consequently there is submitted by this record the question: Does the sale of a boat subject to the ad-

miralty jurisdiction, under process of a state court under statutory provisions, as perishable property, extinguish a maritime lien for supplies advanced prior to the proceedings and sale under order of the state court? That a sale of property as perishable under order of court, pursuant to statutes authorizing such sale to avoid deterioration and accumulation of costs, will confer a good title in the purchaser, without regard to the title or interest of the defendant, or extent of claims or liens fastened thereon by common or statutory law, is very well settled. Young v. Kellar, 94 Mo. 581, 7 S. W. 295, 4 Am. St. Rep. 405; Meyer v. Sligh, 81 Tex. 336, 16 S. W. 1022; Partin & Orendorff v. Howard, 16 S. W. 861; Jones v. Springer, 15 N. M. 98, 103 Pac. 265.

[2] The case of Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028, wherein the Supreme Court reviewed the same case from the Supreme Court of the state of Pennsylvania, which inferentially approved the doctrine of the state court that admiralty liens might be discharged from the ship and transferred to the proceeds, is urged by claimant as authority that the maritime lien reattaches to the proceeds, or whatever is substituted for it, and it also is argued, by analogy to the rule which allows the master, in case of necessity, to sell his ship in a foreign port, and pass good title to the purchaser, that, when a court of competent jurisdiction adjudicates the sale of a boat as perishable property, such sale divests the maritime lien against the thing itself, and substitutes the proceeds therefor. The real question, however, decided, and the law upheld by the decision, in Taylor v. Carryl, is the well-established rule of comity, that the court first acquiring jurisdiction has the right to maintain it against any other jurisdiction until the first jurisdiction is exhausted or voluntarily released. Anything more is expressly disclaimed by the court in that case, in the conclusion of the opinion, where it is said:

"The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them."

In the dissenting opinion by Chief Justice Taney in the same case, supra (20 How. text 585, 15 L. Ed. 1028), is announced the correct doctrine as to the exclusive jurisdiction of the admiralty in the enforcement of maritime liens. Said the Chief Justice:

"The Constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the courts of the general government; and admiralty and maritime liens are therefore outside the line which marks the authority of a common-law court of a state, and excluded from its jurisdiction. And if a common-law court sells the vessel to which the lien has attached, upon condemnation, to pay the debt, or on account of its perishable condition, it must sell subject to the maritime liens, and they will adhere to the vessel in the hands of the purchaser, and of those claiming under him."

This view has since been adopted and consistently followed by the federal courts, notably in The Lottawanna, 21 Wall. 558, 22 L. Ed.

654; The Elexea (D. C.) 53 Fed. 364; The Chapman (D. C.) 62 Fed. 939. Moreover, section 2 of article 3 of the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. It has been repeatedly held that, in the absence of any legislation on the subject by Congress, the general maritime law as recognized by the federal courts constitutes a part of the national law, applicable to matters within the admiralty and maritime jurisdiction. The Lottawanna, supra; Butler v. Boston S. S. Co., 130 U. S. 552, 9 Sup. Ct. 612, 32 L. Ed. 1017; Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

In the recent case of Southern Pacific Company v. Marie Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, where was brought under review the applicability of the Employes' Compensation Act of New York for injuries sustained while loading a ship in the harbor of New York, the court, after conceding that the maritime law may be changed or affected to some extent by state legislation, citing, for example, a lien by state statute upon a vessel for repairs in her home port, imposing pilotage fees, the right to recover in cases of death,

concludes:

"Equally well established is the rule that state statutes may not contravene an applicable act of Congress, or affect the general maritime law beyond certain limits. \* \* \* And plainly, we think, no such legislation is valid, if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

Const. art. 3, invests the federal District Courts with exclusive cognizance of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases, the right of the common-law remedy when the common law is competent to give it." The remedy by sale of boat property given by state statute on the theory of necessity is inapplicable, and cannot be said to be an appropriate common-law remedy, to say nothing of its invasion of the admiralty jurisdiction of the federal courts, which demonstrates its repugnancy to the Constitution.

It follows that the exceptions to the answer must be sustained.

## In re DRIVER.

(District Court, D. New Jersey. September 16, 1918.)

1. BANKRUPTCY \$\infty\$91(1)—Person Subject to Adjudication—Burden of Proof.

Petitioning creditors have the burden of showing that the debtor did not fall within the classes exempted by Bankruptcy Act, § 4b (Comp. St. 1916, § 9588); but proof that practically all of the indebtedness arose from ventures having no connection whatever with the farm industry cast on debtor, who contended that he was a person engaged chiefly in farming, the burden of establishing that fact.

2. Bankruptcy ⇐=68—Persons Subject to Adjudication—Person Chiefly "Engaged in Farming."

A so-called retired farmer, who incurred considerable indebtedness in indorsing notes in purely commercial ventures, *held* not a person chiefly "engaged in farming," within Bankruptcy Act, § 4b (Comp. St. 1916, § 9588), so as to be exempt from involuntary petition, even though he at times assisted his son, to whom he had rented his farm.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Engage.]

In Bankruptcy. In the matter of Franklin Driver, an alleged bankrupt. On motion to confirm the special master's report recommending adjudication. Motion granted.

Wilson & Carr, of Camden, N. J., for petitioning creditor. John B. Avis, of Woodbury, N. J., and E. C. Waddington, of Woodstown, N. J., for debtor.

RELLSTAB, District Judge. The question to be determined is whether Franklin Driver was "a person engaged chiefly in farming or the tillage of the soil," so as to bring him within the exemption of section 4b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 547 [Comp. St. 1916, § 9588]). The special master, to whom the issues raised by the creditor's petition and the debtor's answer were referred, concluded that he was not, and recommended that he be adjudicated a bankrupt. The debtor has but little interest in these proceedings. The contest really is between his secured and unsecured creditors. If the master reached the right conclusion, all creditors will share alike; otherwise, those who obtained judgments (some on confession) will take to the exclusion of the others. Whether a debtor is within the exempted class is a question of fact, to be determined in each case on its own facts.

A careful reading of the testimony in this case leads me to adopt the master's recommendation. The debtor was the owner of three farms, and at one time was unquestionably a farmer. In 1912 he moved from the farms he had theretofore occupied to a dwelling which he had built in a town near by, where he has since lived. He sold all his stock and farming implements and rented his farms on shares. Two of these

were so rented by his youngest son at and for some time before these proceedings were begun. During the last two years of the period that the debtor rented his farms, he indorsed a number of notes used by others in the promotion of several commercial ventures. What Driver expected to realize from these ventures is not clear. He, though prodded to do so, could not or would not give an intelligent account why he indorsed such notes, or what he was to get for thus lending his credit. He held stock in one of the enterprises thus aided, and he admits that he expected to gain something by reason of his indorsements. These notes were not paid at maturity, and Driver found himself obligated to pay sums aggregating an amount far exceeding the value of his property. He admits that he has practically no other debts, so that, except for his ventures into fields foreign to farming or tilling the soil, he would be substantially free of all indebtedness. However, that fact is not controlling upon the question of the bankruptcy court's jurisdiction, any more than is the fact that, unless the court can administer his property, some creditors will be favored over others.

[1] But such facts are not to be ignored, as not possessing any persuasive force. The latter is contrary to the manifest purpose of the Bankruptcy Act, and the former is so exceptional as to suggest that it is not likely to exist when the debtor is chiefly engaged in farming or tilling the soil. In re Leland (D. C.) 185 Fed. 830, 832, 25 Am. Bankr. Rep. 209. While, on the question of jurisdiction, the burden is on the petitioning creditors to show that the debtor is not within the exempted class, that burden is fully met when, as in this case, it is shown that practically all the indebtedness arose from ventures having no connection whatever with the farming industry. After such a showing, the burden shifted to the debtor, to prove that he was within the exempted

[2] Has he met this burden? During the period that the son rented these farms, the debtor occasionally helped him in working them. This service and a little gardening, which the debtor carried on for the benefit of his own table, constitute all the tilling of the soil which he has performed since he retired from active farming in 1912. Except for so helping his son, there would be nothing to support the debtor's claim that he was exempt from involuntary bankruptcy, for surely mere gardening for his own use would not entitle him to exemption. He had no control over the operations of any of his farms, and he had no responsibility for their management. His service to his son was rendered during a period when farm labor was abnormally scarce, and, although both father and son say that the father was to render such help as a part of the agreement under which the son rented his two farms, such services in the related circumstances must be considered as an accommodation, given in case of necessity, rather than a definite employment as a farmer or tiller of the soil. From the time that the debtor sold his stock and farming implements, and rented his farms, he became what is popularly known as a "retired farmer." His raising garden products for his own use did not keep him within the exempted class, nor was he restored thereto because he subsequently, under the

stress of labor shortage, occasionally helped his son in the planting or

marketing of the crops.

The father's help at these times, in principle, differs in no way from that rendered by his daughter during the same period. What more natural than that they should come to the son's and brother's rescue when labor was needed and could not be had from outside sources. Could the daughter be held to be exempt because she rendered such service? Manifestly not. Why, then, the father? Paternal interest in his youngest son's farming venture and solicitude for the crops, lest they should suffer from lack of help, sufficiently account for the father's aid in this case. That such shortage of labor was anticipated when the agreement to rent these farms was made shows foresight, but does not require a different conclusion. That paternal interest did not furnish the only motive for making the promise or rendering the help, and that the father, in helping out his son, was also helping himself, through his share of the crops, do not change the character of the service thus rendered by him, and bring him within the exempted class.

In view of Driver's retirement from active farming and his entrance into the field of speculative financial ventures, from which ventures resulted practically his entire indebtedness, the occasional services rendered by him on the farms rented to his son cannot be said to stamp him as "a person engaged chiefly in farming or the tillage of the

soil," within the meaning of the Bankruptcy Act.

A decree adjudicating Driver a bankrupt will be made.

In re WEBSTER LOOSE LEAF FILING CO.

(District Court, D. New Jersey. September 19, 1918.)

BANKRUPTCY \$\infty 365-Trustee-Account-Surcharging.

A trustee's paramount duty is to conserve and advance the interests of the bankrupt estate, and if he fails to keep himself clear of alliances which tempt to make the estate's interest subordinate to his own, he must account, not only for losses suffered, but for gains made by him; hence, where trustee, through the medium of his wife as a dummy, entered into a partnership with a salesman and made profits in dealing with the trust estate, he must account therefor.

In Bankruptcy. In the matter of the bankruptcy of the Webster Loose Leaf Filing Company, bankrupt. On review of referee's order refusing to surcharge the trustee's account. Reversed. See, also, 240 Fed. 779.

Wm. Huck, Jr., of New York City, for objecting creditor. Raymond, Mountain & Marsh, of Newark, N. J., for trustee.

RELLSTAB, District Judge. The refusal of the referee to surcharge the account of the trustee is here for review. The trustee had been previously removed by this court. The referee found that, under cover of his wife, he had entered into partnership with a salesman employed by him while he was continuing the bankrupt's business; that he paid to such copartnership considerable sums of money as commissions, of which there had been paid to his wife the sum of \$610. The referee considered this arrangement as one for the benefit of the trustee, and an effort on his part to secure more compensation for his services than could be allowed him under the Bankruptcy Act. For this reason he denied him any commissions, but declined to surcharge his account with the moneys so paid to his wife. In his certificate, after giving his reasons for disallowing commissions, the referee said:

"That leaves one question, and that is, in addition to being deprived of his commissions as trustee, should he be surcharged with the amount that he or his wife, which, of course, means himself under the findings, received from the copartnership of Mrs. Moeller and Mr. Hobbie? I have not been able to reconcile my mind upon that one point, and I shall reserve decision upon that. If counsel wish to furnish me with any further authorities as to the law upon that subject, I shall be very glad to get them. The surcharge, if any, will be fixed at \$610, instead of \$960. At a later date, both counsel for the trustee and counsel for the objecting creditors filed briefs, which are herewith inclosed and made a part of this report. An order was then made that no surcharge be made, and from this order the objecting creditors have filed a petition for review."

The referee gave no reasons for refusing to surcharge, and the only reason assigned by counsel for the trustee, on the argument hereof, was that as the estate suffered no loss no surcharge could be made. However, this, even if true, as pointed out by the court on the argument, is not the test in matters of this character. The trustee's paramount

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

duty is to conserve and advance the interests of the estate intrusted to him. This he can do only by keeping himself clear of alliances which tempt him to make the estate's interest subordinate to his own. If he fails in this particular, he must account, not only for losses sustained by the beneficiaries, but for gains made by him in dealing with the trust estate. Michoud v. Girod, 4 How. (45 U. S.) 503, 555, 11 L. Ed. 1076; Barney v. Saunders, 16 How. (57 U. S.) 535, 14 L. Ed. 1047; Magruder v. Drury, 235 U. S. 106, 119, 35 Sup. Ct. 77, 59 L. Ed. 151; In re Frazin & Oppenheim (C. C. A. 2) 181 Fed. 307, 104 C. C. A. 529, 24 Am. Bankr. Rep. 598; Hill v. Hill, 79 N. J. Eq. 521, 526, 549, 82 Atl. 338, et seq. The rule is a strict one, and there will be no relaxation in aid of an unfaithful trustee in bankruptcy. The statute fixes the maximum compensation that can be allowed trustees, and no subterfuge, by which an increase is sought, will be permitted. See sections 48, 62, and 72 (Act July 1, 1898, c. 541, 30 Stat. 557, 562, 800 [Comp. St. 1916, §§ 9632, 9646, 9656]).

In the instant case the wife was made a member of the copartnership as the representative of the trustee. She was not a business woman and performed no service for the copartnership. The salesman—a Mr. Hobbie, the other member of the copartnership—solicited the trade and the trustee furnished the office and kept the accounts. The commissions, viz. 30 per cent. to 40 per cent., were allowed on all sales made in certain territories, whether secured through the efforts of the copartnership or not. Whether these commissions were excessive is not material, but the willingness of Hobbie to share them with the wife or the trustee is indicative that they were. But if they were no more than would have been allowed, if paid to others, that would not justify their allowance in the trustee's account. As was said in Magruder v. Drury, supra, 235 U. S. 120, 35 Sup. Ct. 82, 59 L. Ed. 151:

"It makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself."

The wife was but the trustee's "dummy," to secure a share of the commissions which he bargained for and allowed, and they must be treated as paid to himself. The item of \$610, being the aggregate amount paid to the trustee's wife, cannot be allowed him as "necessary expenses incurred \* \* \* in the administration" of this estate, and his account must be surcharged by that sum.

The referee's order, refusing to so surcharge, is reversed.

## WISE v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

(Circuit Court of Appeals, Eighth Circuit, August 26, 1918.)

No. 5127.

1. Appeal and Error \$\infty\$673(2)—Record—Evidence—Claim of Appellee.

Defendant's claim, that there was no proof of authority in its president and secretary to render it liable for libel in their letters giving reason for rejecting claim under one of its accident certificates, is unavailing on error to direction of verdict for it; only part of all its constitution in evidence being in bill of exceptions, and that part giving them broad power in the premises.

2. LIBEL AND SLANDER 534-"PRIVILEGED COMMUNICATION."

A communication is privileged, if made bona fide by one having an interest in the subject-matter to another also having an interest in it, or standing in such a relation that it is a reasonable duty, or is proper, for the writer to give the information.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

3. APPEAL AND ERROR \$\infty 695(3)\$—RECORD—EVIDENCE.

Defendant's constitution, in evidence in action for libel based on letters of its president and secretary to one of its local lodges, giving reason for rejecting plaintiff's claim under an accident certificate, not being in the record, it cannot be said there was no evidence of the members addressed having an interest in the subject-matter, relative to it, and the occasion being privileged.

4. APPEAL AND ERROR €==673(2)—RECORD—EVIDENCE.

Relative to claim in action for libel based on letters of defendant's president and secretary, communicated to a local lodge, rejecting plaintiff's claim on an accident certificate and giving reason, that the occasion called for mere rejection of claim, the form of certificate not being in the record, it cannot be said the statements did not relate to defenses provided for by it.

- 5. Libel and Slander \$\iff 51(1)\$—Conditional Privilege—Malice.

  Though communication be conditionally privileged, one defamed thereby may recover, if the statement was made with express malice.
- 7. LIBEL AND SLANDER \$\infty\$=123(8)—MALICE—QUESTION FOR JURY.
  Evidence in libel based on conditionally privileged communications of defendant's president and secretary rejecting plaintiff's claim under accident certificate, and giving reason therefor, held to make question of malice one for the jury.
- 8. COURTS \$\iiii 315\$—Federal Jurisdiction—Citizenship Unincorporated Society.

If defendant is an unincorporated society, the citizenship of its members determines the jurisdiction of the federal court.

9. Courts 5-280-Federal Courts-Jurisdiction-Determination.

That diversity of citizenship of the parties, necessary to give a federal court jurisdiction, has not been established as it should be, may be noticed by the court of its own motion.

Stone, Circuit Judge, dissenting.

 $<sup>\</sup>mbox{\constant}$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 252 F.—61

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by Frank M. Wise against the Brotherhood of Locomotive Firemen and Enginemen. Verdict was directed for defendant, and plaintiff brings error. Reversed.

Humphrey Barton, of St. Paul, Minn. (John H. Kay, of Chicago, Ill., and E. L. Carroll, of Creston, Iowa, on the brief), for plaintiff in error.

D. W. Higbee, of Creston, Iowa, for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER. District Judge. In an action for libel a verdict was directed for defendant at the close of the evidence and plaintiff brings error. The parties will be designated as plaintiff and defendant, as they appeared in the district court. The plaintiff was a member of the Brotherhood of Locomotive Firemen and Enginemen, belonging to a local lodge in Iowa, and was the holder of a certificate issued by the society promising to pay him \$3,000 if he lost, by accident, a hand at or above the wrist. The plaintiff was a fireman on a railway engine, and lost his hand because it was run over by the wheel of the engine tender. He applied to the society for the payment of the \$3,000. The officer of the society who held the position of secretary and treasurer (hereafter called secretary) was charged with the duty of examining and passing upon the proofs of loss in such cases, and the president of the society had the decision of appeals made to him by subordinate lodges or members. The secretary, after receiving proofs of loss from the plaintiff, made some investigations as to the cause of the injury, including a visit to the scene of the injury, in company with the plaintiff, and heard the plaintiff's narrative of the manner in which the injury was inflicted. The plaintiff told him that he was standing on the step on the left side of the tender, when a sudden movement of the engine forward threw him from the step, and his trousers leg was caught by some protruding part of the step and he was dragged on his back in this manner, as the engine went forward 2½ car lengths, and then his trouser leg let loose and the tender ran over his hand, so that amputation was necessary. The plaintiff told him he received no injuries other than to his hand. After these investigations the secretary wrote plaintiff a letter, declining to pay him for the loss of his hand, and added:

"My reason for declining to make payment of the amount of certificate is that I am fully satisfied that the loss of your hand was not an accident, but was a self-inflicted injury for the purpose of trying to collect the amount of the beneficiary certificate held by you in the Brotherhood of Locomotive Firemen and Enginemen."

The secretary at the same time sent a copy of this letter to the secretary of the local lodge to which plaintiff belonged, with a note that the letter was self-explanatory, and the letters were read before the members at a meeting of the lodge. Many of the local lodge

members united in a petition of protest and appeal to the president, and the secretary then stated to the president the facts as he understood them, and the president wrote the secretary of the local lodge a letter which contained the following statement:

"Your letter of July 29th, with the 'petition' or 'protest' signed by a considerable number of members of Lodge 640 in the Wise case, has been received, and an investigation conducted by the general secretary and treasurer, accompanied by the general medical examiner, leads to the belief that Brother Wise has deliberately attempted to defraud this Brotherhood. The facts appear to be that before he lost his hand he had but recently increased his insurance to \$3,000, he had insurance in the Fidelity & Casualty Company, he had insurance in the 'Relief Department' of the C., B. & Q. R. R., he has entered suit against the C., B. & Q. R. R. Co. and has now employed an attorney to enter suit against this Brotherhood. These circumstances, taken collectively, lead us to believe that there was a deliberate purpose on the part of Brother Wise to defraud this Brotherhood. \* \* \* They probably cannot conceive how a man would deliberately sacrifice a hand for \$6,000, or \$8,000. You would be surprised how many members do sacrifice hands and feet for less money than this, in several of which cases we have defeated the cases in court. \* \* \* I urge upon the members of your lodge to not join, even unconsciously, in any possible attempt on the part of any one to defraud this Brotherhood."

The plaintiff subsequently brought suit against the Brotherhood for the amount payable by his certificate, and the defendant's answer alleged as one defense that the injury was not suffered accidentally, but intentionally. At the time of trial judgment was entered in favor of plaintiff, by consent of the parties, for the amount prayed. The libels charged are the statements set forth in the letters which have been quoted. The answer of the defendant pleaded qualified

privilege and lack of malice.

[1] There is no contest made as to the defamatory character of the letters, but there is a claim made by the defendant that there was no proof of authority of the writers of these letters to render the society liable for libelous words contained in them. The constitution of the defendant was offered in evidence, but only a portion of it is contained in the bill of exceptions. That portion gives broad power to the president and secretary in managing the business of the society and in passing upon claims of loss under its certificates. In the absence of the remaining portions of the constitution, it cannot be said that these officers may not have had express authority to write these letters, and to state the reasons to the local lodge for declining to make payment.

[2, 3] The main question in the case is whether, as a matter of law, the evidence shows that the defendant is excused from liability because the communications were privileged and made in good faith. A communication is privileged if made bona fide by one who has an interest in the subject-matter to one who also has an interest in it or stands in such a relation that it is a reasonable duty, or is proper, for the writer to give the information. Massee v. Williams, 207 Fed. 222, 124 C. C. A. 492; National Cash Register Co. v. Salling, 173 Fed. 22, 97 C. C. A. 334; Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19; Locke v. Bradstreet Co. (C. C.) 22 Fed. 771; Erber & Stickler v. R. G. Dun & Co. (C. C.) 12 Fed. 526; Newell

on Slander and Libel (3d Ed.) §§ 493, 607; Odgers on Libel and Slander (5th Ed.) 280. The letters related to a claim of liability by the plaintiff against the defendant, and the evidence offered may have shown that the members of the local lodge had a financial interest in question of the validity of plaintiff's claim. Ouite commonly such claims are paid by an assessment levied on all the members of such society, and, in the absence from the record of the constitution, it cannot be said that the court did not have evidence before it showing that the members addressed had an interest in the subject-mat-

ter, and that the occasion and subject-matter were privileged.

[4] It is claimed that the occasion did not call for more than a mere refusal to make payment of plaintiff's claim and that the reasons given for such refusal were not pertinent to the refusal and therefore the jury should have been allowed to say that the protection of privilege was taken from the defendant. Without deciding that a fair statement of the reasons for making such a decision may not be given instead of the bare announcement of the result reached (see Merchants' Ins. Co. v. Buckner, 98 Fed. 222-232, 39 C. C. A. 19), it cannot be said on this record that the statements did not relate to legitimate defenses claimed by the society. The form of certificate issued by defendant to plaintiff was not in the printed record. It is therefore impossible to say that the statements made did not relate to conditions and defenses provided for by the certificate.

[5, 6] Did the court err in failing to submit to the jury the question of malicious publication? Although a communication may be conditionally privileged, the one defamed may recover if the statement was made with express malice. White v. Nicholls, 3 How. 266, 11 L. Ed. 591; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439; Massee v. Williams, 207 Fed. 222, 124 C. C. A. 492; Odgers on Libel and Slander (5th Ed.) 342; Newell on Slander and Libel (3d Ed.) §§ 391, 396, 496; Folkard on Slander and Libel (7th Ed.) 194. The proof of malice in such cases may be made by showing personal feeling between the parties or may be shown by the violence of the language used and the manner of its publication. Newell on Slander and Libel (3d Ed.) § 397; Folkard on Slander and Libel (7th Ed.) 193; Odgers on Libel and Slander (5th Ed.) 345.

[7] In the case of White v. Nicholls, supra, it was said, referring

to privileged communications:

"And we think that, in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice."

The evidence in this case shows that the secretary knew plaintiff's statement of facts showing an accidental injury. He had made some independent investigation also, but he did not disclose all that he had learned by such inquiries. He testified that he had observed the nature of the ground over which plaintiff said he had been dragged; that he had learned there was some doubt that the car step had been broken as plaintiff claimed; that the plaintiff had recently increased his insurance with defendant. He also believed that in many other cases members of his order had suffered voluntary loss of a hand or foot in order to receive the insurance. There was no proof that any witness saw the accident except the plaintiff. The secretary testified that he believed the statements made in his letter were true. There was evidence from which the jury could have found them, or some of them, to be false, and on that hypothesis it was a question for the jury whether they were made without probable cause. The evidence that the jury might consider as showing malice was stronger in the case of the president's letter, for he did not testify whether he believed his statements to be true or otherwise. For this reason, the judgment must be reversed.

[8, 9] A question of jurisdiction is also suggested by the record. The amended petition states that the plaintiff is a citizen of Iowa, and that the defendant is a fraternal beneficiary society having its principal place of business in Illinois, and not incorporated or organized under the laws of Iowa. The answer asserts that the defendant is an unincorporated society. The proofs do not show whether or not the defendant is a corporation. If the defendant is an unincorporated society, the citizenship of its members determines the jurisdiction of the federal court. Irving v. Joint Dist. Council, U. B. of Carpenters (C. C.) 180 Fed. 896; Taylor v. Weir, 171 Fed. 636, 96 C. C. A. 438; Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Fred Macey Co. v. Macey, 135 Fed. 725, 68 C. C. A. 363; 5 Corp. Jur. 1334-1365. The membership of citizens of Iowa in the society is indicated by the testimony. The question was not presented by counsel but is one that the court may notice. Chicago, R. I. & P. Ry. Co. v. Stephens, 218 Fed. 535, 134 C. C. A. 263; Fred Macey Co. v. Macey, supra; La Belle Box Co. v. Stricklin, 218 Fed. 529, 134 C. C. A. 257; Chicago & A. R. Co. v. Allen, 249 Fed. 280, — C. C. A. —. Diversity of citizenship should be established. Reversed, with costs.

STONE, Circuit Judge (dissenting). The circumstances under which the letters were written created a privilege. In my judgment, the evidence is clear that the privilege was honestly exercised, with no ill feeling toward plaintiff in error, and under conditions which prevented the statements from being regarded as reckless utterances. They were genuine opinions, honestly expressed, and based upon an honest attempt and investigation to ascertain the truth.

FIRST TRUST CO. v. ILLINOIS CENT. R. CO. SAME v. CHICAGO & N. W. RY. CO. SAME v. NORTHERN PACIFIC RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

Nos. 5062-5064.

1. Courts \$\iff 347\)—Federal, Practice—Intervention—Amendment.

Where, after decree foreclosing a trust deed on the property of a rail-road company, interveners who asserted that their claims were entitled to priority filed intervening petitions under Equity Rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), they cannot thereafter amend the petitions and attack the validity of the trust deed.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. Receivers = 157-Priority of Claims.

The holders of bonds secured by a trust deed on railroad property held not to have operated the property during the time that the indebtedness due interline carriers arose, so as to give such carriers priority on the ground that the indebtedness was that of the bondholders.

3. Receivers \$\infty\$-Priority-Diversion of Income.

Where no interest was paid on bonds secured by a trust deed on the property of a railroad company during the period when the claims of interveners based on interline freight, etc., arose, interveners are not entitled to priority under the usual six months' rule; there having been no diversion of income.

Appeal from the District Court of the United States for the North-

ern District of Iowa; Henry T. Reed, Judge.

Bill by the First Trust Company, as trustee, against the Crooked Creek Railroad & Coal Company, in which the Chicago & Northwestern Railway Company, the Illinois Central Railroad Company, and the Northern Pacific Railway Company separately intervened. From decrees for the interveners (243 Fed. 450), complainant appeals. Reversed in part, and in part affirmed.

D. M. Kelleher, of Ft. Dodge, Iowa (B. J. Price and Clarence M. Hanson, both of Ft. Dodge, Iowa, on the brief), for appellant.

James C. Davis, of Chicago, Ill., for appellees Chicago & N. W. Ry.

Co. and Northern Pac. Ry. Co.

F. H. Helsell and Charles A. Helsell, both of Ft. Dodge, Iowa, for appellee Illinois Cent. R. Co.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. The appellant in each of the abovementioned cases on July 21, 1915, commenced an action against the Crooked Creek Railroad & Coal Company to foreclose a trust deed executed by the railroad company to the predecessor of the appellant, namely, the Milwaukee Trust Company, on January 3, 1911, to secure the payment of 328 bonds executed by the railroad company on the previous day. On February 8, 1916, a decree of foreclosure in the usual form was entered in said action. The decree established the validity of the lien of the trust deed as of January 3, 1911, on the property described therein, found the amount due on the bonds which the trust deed secured to be \$116,500 as principal and \$6,524.12 as interest, and ordered a sale of the property described in the trust deed. The property conveyed by the trust deed was a line of railroad extending from Webster City, Iowa, to Lehigh, Iowa, a distance of about 18 miles, together with appurtenant property, including certain real estate holdings. The decree also contained the following paragraph:

"It is ordered, adjudged, and decreed that in the sale and conveyance of the property described in the said indenture of trust and first mortgage and in this decree described, the purchaser thereof shall take and receive his conveyance pursuant to the sale herein ordered, subject to the requirements of this decree that the demands of all persons who have or may file claims and petitions of intervention and whose demands shall be determined to be prior and paramount to the lien of the mortgage herein foreclosed, shall be paid by such purchaser or purchasers into the registry of the court upon the determination by the court that such claims have priority to said mortgage. The purpose and effect of this provision of this decree shall be to prevent this decree from operating as a defense to any claims or demands against the said Crooked Creek Railroad & Coal Company, which demands are entitled to priority to the lien of the said mortgage, and such prior rights, if any there are, as the same may be finally adjudicated and determined, are reserved to such preferred claimants."

The mortgaged property was sold pursuant to the decree of foreclosure March 16, 1916, to one Walter R. Dyer, for \$112,300.00. On April 29, 1916, the sale was confirmed. On October 11, 1915, November 8, 1915, and April 24, 1916, the Chicago & Northwestern Railway Company, the Illinois Central Railroad Company, and the Northern Pacific Railway Company, respectively, by leave of court, filed their intervening petitions in the foreclosure suit, praying that certain indebtedness of the railroad company to said petitioners be allowed and declared to be liens on the mortgaged property prior to the lien of the mortgage. On April 25, 1916, after the decree of foreclosure had been entered, the Chicago & Northwestern Railway Company was allowed to file an amended petition in intervention. One of the amendments to the petition set forth facts which it was claimed showed that the trust deed was ultra vires and void. On April 26, 1916, after the decree of foreclosure had been entered, the Illinois Central Railroad Company amended its petition, by leave of court, by setting forth the same facts as the Chicago & Northwestern Railway Company with reference to the invalidity of the trust deed. In regard to the intervening petition of the Northern Pacific Railway Company, it was stipulated by counsel that the evidence and testimony taken in behalf of either the Illinois Central Railroad Company or the Chicago & Northwestern Railway Company might be offered, read, and received upon behalf of the Northern Pacific Railway Company, and its petition was treated as amended The three petitions in intervention were answered by appellant, and testimony was taken. At the time the testimony was taken, and at the hearing, appellant objected to the introduction of any evidence tending to impeach the validity of the trust deed, as those matters were res judicata by reason of the decree of foreclosure. On June 18, 1917, the trial court entered decrees on the three intervening petitions, which established the claims of the three interveners as liens on the proceeds resulting from the sale of the mortgaged property, paramount and superior to the lien of the trust deed, and also provided that if the claims were not paid within 60 days the mortgaged property should be again sold for the purpose of paying the claims. The decrees entered did not specify the grounds upon which the priority of the claims was based. The trial court made no findings of fact except by way of certain statements found in a memorandum opinion which the court filed at the time the decrees were entered and except the findings in the decrees themselves. The only matters discussed in the memorandum of opinion as a reason for holding the claims of the interveners prior to the lien of the mortgage was the invalidity of the trust deed for want of consideration, and the fact that it appeared to the trial

court that during the time the indebtedness of the several interveners arose the bondholders operated the railroad. The usual grounds for declaring preferences as to claims originating within six months prior to the appointment of a receiver were not mentioned. The reservation in the decree above quoted was made with reference to the intervening petitions then on file, and, whatever effect may be claimed for it, it did recognize the lien of the trust deed; otherwise there could have been no foreclosure.

[1] It remains to be determined, therefore, whether, in view of the decrees and the status of interveners, the intervening petitions filed for the purpose of securing priority in the payment of claims could be amended so as to be for all practical purposes creditors' bills, seeking to subject a fund to the payment of the indebtedness mentioned. We are of the opinion that, in view of the decrees already entered and the status of interveners, they could not attack the validity of the trust deed as ultra vires. It was the trust deed which had produced the fund in court. The property was not sold generally subject to such liens as might exist thereon, but was sold because of the lien of the trust deed which was foreclosed. The interveners could not claim an interest in a fund which the trust deed had produced and at the same time wreck the whole foreclosure proceeding. Equity Rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

This rule fixes the general status of an intervener, and, with the decree of foreclosure, precluded the interveners from asserting a preference to the lien of the trust deed by showing that such lien was void. An attack by the interveners which destroyed the trust deed would not establish priority, because priority recognizes the lien of the trust deed, and the interveners did not occupy the position of judgment creditors. We conclude therefore that the priority of interveners' claims could not be based on the invalidity of the trust deed.

[2] We come now to the other proposition discussed by the trial court, in regard to which it seemed to be of the opinion that the bondholders were operating the railroad at the time the indebtedness of the interveners arose. We do not think the evidence sustains the charge made. In the agreement of August 18, 1910, between George E. Burnham and Charles L. Burnham, president and secretary of the Crooked Creek Railroad & Coal Company, representing the stockholders of said company, and Homer Loring, the latter agreed to: (1) Electrify the Crooked Creek Railroad & Coal Company's properties. (2) Build an extension and effect a junction with the Ft. Dodge, Des Moines & Southern Road. It was also provided in this agreement that the Burnhams might designate a majority of the directors of the Crooked Creek Railroad & Coal Company, its successor or assigns, and two of the general officers, to wit, president and secretary, and that Loring would elect or cause to be elected such of the directors and officers so nominated.

The evidence in the record shows that the last provision of the contract was carried out by Loring, but it also clearly appears that the bondholders did not operate the Crooked Creek Railroad during the time the indebtedness of the interveners arose. We think the evidence establishes the fact without much dispute that Loring, through the Ft. Dodge, Des Moines & Southern Railway, operated the road during the time the interveners' indebtedness arose, so that it cannot be said on the record that the indebtedness of the Crooked Creek Road to the interveners is the indebtedness of the bondholders. It is suggested that the bondholders were also the stockholders. We do not think that under the contracts in evidence this can be true; but, whatever may be the fact, the bondholders in fact did not operate the road. So we find no reason for holding the claims of interveners superior to the mortgage on this ground.

[3] The next contention is that there was a diversion of income which ought to have been applied to the payment of the claims of interveners. This diversion of income is said to have arisen because the corporation took money from income that ought to have gone to the payment of interveners' claims and used it to pay interest on the bonds. Of the amounts found due to the several interveners, the following amounts arose within six months prior to the appointment of the receiver: Chicago & Northwestern \$3,929.36; Illinois Central,

\$1,264.95; Northern Pacific, \$256.56.

The indebtedness due to the interveners arose from many different causes. The amount due for each cause is not readily found in the record, but the following is a sample of the items which appear in the accounts: Interline freight, lease claims, overcharge claims, apparatus, per diem, water furnished engines, rentals, miscellaneous, loss, damages, etc. These are not items generally classed as operating expense, and we do not decide that question, but conceding that they are, there was no interest paid during 1915 on the bonds, so that there was no diversion of income during the time the indebtedness arose. Therefore we do not find any ground for establishing the amounts which arose within the six months' period as preferences. In the case of Chicago & A. R. Co. v. U. S. & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64, Judge Sanborn, in delivering the opinion of this court, laid down the following rules of law governing the matter of preferences in cases like the one under consideration and cited all the cases existing at that time upon the subject:

"It is true that a mortgagee of the property and income of an operating railroad company impliedly agrees that the current expenses of the ordinary operation of the railroad for wages, supplies, materials, and such necessities of operation for six months before the impounding of the income for its benefit, may be first paid out of the gross income of operation, before that net income arises which the mortgagee's lien holds fast, and that a court of equity administering railroad property in a foreclosure suit may prefer unpaid claims for such current expenses incurred within six months before the impounding of the income to the claims of bondholders secured by a prior mortgage in its distribution of the surplus income of the property, and that if income has been diverted from the payment of such current expenses, leaving some of them unpaid, to the payment of other debts of the mortgagor not in this preferential class, the court may restore from the proceeds of the corpus of

the property the amount thus diverted and apply it to the payment of such current expenses. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion."

The discussions of counsel on both sides of the questions involved on this appeal have taken a wide range; but, in view of the record, we are of the opinion that we cannot go into matters of general equity as we might do on a general creditor's bill.

It results from what we have said that the decrees below, in so far as they decree a priority in favor of the claims of interveners over the lien of the trust deed, must be reversed, but otherwise affirmed; and it is so ordered.

FIRST TRUST CO. v. OGDEN CONSOL. COAL CO. (and five other cases).

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

Nos. 5065-5070.

JUDGMENT \$\infty 714(3)\$—Conclusiveness—Res Judicata.

A decree, finding that certain claims against a railroad company were entitled to priority over a mortgage, is not a conclusive adjudication that other and possibly similar claims were entitled to priority, but that question is open for adjudication.

Appeal from the District Court of the United States for the Northern District of Iowa.

Suit by the First Trust Company against the Crooked Creek Railroad & Coal Company, in which the Ogden Consolidated Coal Company, the Ft. Dodge, Des Moines & Southern Railroad Company, James E. McGrath, the Charles Younkee Lumber Company, G. W. & J. D. Fortney, and the National Sewer Pipe Company separately intervened. From decrees for interveners, complainant appeals. Reversed in part, and otherwise affirmed.

D. M. Kelleher, of Ft. Dodge, Iowa (B. J. Price and Clarence M. Hanson, both of Ft. Dodge, Iowa, on the brief), for appellant.

B. B. Burnquist and Frank Maher, both of Ft. Dodge, Iowa (Max

Hemingway, of Webster City, Iowa, on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. These are appeals from decrees entered establishing the claims of the several appellees as prior liens to the lien of the trust company in a mortgage foreclosure case. By stipulation of counsel, they have been submitted on one record and have been briefed as one case.

An inspection of the record shows that there was no evidence offered tending in any way to establish the priority of the claims, except the decrees in cases Nos. 5062, 5063, and 5064, appealed to this court and this day decided. 252 Fed. 965, — C. C. A. —. The decrees that were offered in evidence were not res judicate of the questions involv-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ed in these cases. The fact that the Chicago & Northwestern Railway Company, the Illinois Central Railroad Company, and the Northern Pacific Railway Company had obtained a decree establishing the priority of the claims of said roads as against the lien of the trust company, did not determine the question as to whether there ought to be a priority allowed as to these claims. Of course, if the facts were the same, the court would probably follow its decision in the other cases; but no one could tell prior to the trial of these actions whether the facts would be the same or not. The trust company was entitled to defend each case as it came along. Moreover, we have this day decided in the other appeals that no reason existed for declaring priority as to the claims of the other roads, so the evidence in these cases failed for two reasons, first, the decrees were not res judicata, second, the portion of the same declaring a priority has been reversed, so it results that the decrees in the present cases must be reversed so far as they decide the claims of appellees to be superior to the lien of the trust company and otherwise affirmed, and it is so ordered.

#### NORTHERN WYOMING LAND CO. v. BUTLER et al.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1918.)

#### No. 5057.

1. VENDOR AND PURCHASER \$\infty 140-Contracts-Construction.

An offer by defendants to purchase lands from plaintiff on certain conditions *held* to obligate plaintiff, which accepted the same, to furnish an abstract showing good merchantable title before defendants should be required to do anything thereunder.

2. Contracts \$\infty 238(2)\$—Written Contracts—Modification.

A written contract can be modified by another written contract, or by an executed oral agreement made upon a good consideration.

3. VENDOR AND PURCHASER \$2-Contracts-Breach.

In an action by plaintiff, the vendor of lands, based on an accepted written proposal by defendants to purchase certain lands, *held*, that the condition in the proposal as to the furnishing of an abstract by plaintiff showing good merchantable title was not modified by subsequent agreements, so as to warrant recovery by plaintiff which had not furnished the required abstract.

4. VENDOR AND PURCHASER @=130(8)—CONTRACTS—COMPLIANCE.

Where the proposal of the purchaser required the vendor to furnish an abstract showing good merchantable title, an abstract showing that the lands were subject to a mortgage, which gave the vendor the privilege of securing the release of the lands involved, *held* not to show a good merchantable title: there being no agreement that the lands would be freed from the mortgage.

Sanborn, Circuit Judge, dissenting,

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by the Northern Wyoming Land Company, a corporation, against Harry Butler and Viola Butler. Judgment for defendants, and plaintiff brings error. Affirmed.

Irving F. Baxter, of Omaha, Neb. (Alden, Latham & Young, of Chicago, Ill., and Brown, Baxter & Van Dusen, of Omaha, Neb., on the brief), for plaintiff in error.

T. J. Doyle, of Lincoln, Neb. (Matt Miller, of David City, Neb., on

the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

CARLAND, Circuit Judge. The Land Company, as plaintiff, brought this action against the Butlers as defendants, to recover damages for the breach of a contract for the sale of land. The complaint contained five causes of action. The first cause of action was for money expended in attempting to remove, at defendants' request, certain defects in the so-called Canadian lands which were to be deeded to plaintiff in part payment of the lands agreed to be sold to the defendants. The second cause of action was for money expended by the officers and agents of plaintiff in going to Manitoba to examine the Canadian lands and in going to Bellwood, Neb., to confer with defendants. The third cause of action was for moneys expended in paying the expenses of one Vincent D. Durmoody for trips from Omaha, Neb., to Bellwood, Neb., and to Buffalo, Wyo. The fourth cause of action was for moneys expended in the employment of attorneys to examine defendants' abstract of the Canadian lands. The fifth cause of action alleged a breach of the land contract and resulting damages.

[1] The trial court directed a verdict against the plaintiff on the last four causes of action. One of the reasons for the ruling of the court on the fifth cause of action was that the evidence showed that the plaintiff itself had breached the contract of sale by failing to furnish to defendants an abstract showing a good merchantable title to the lands which the plaintiff had agreed to sell and convey to the defendants. The court ruled, as to causes of action numbered 2, 3, and 4, that they were matters for which the defendants could not be held liable, especially in view of the ruling of the court that plaintiff had breached the contract first. The contract of sale related to certain lands located in Wyoming, and arose out of the acceptance by the plaintiff of an offer made by defendants November 21, 1913, and modified December 23, 1913. The following are material portions of the offer of defendants accepted by the plaintiff:

"Harry Butler and Viola Butler hereby offers and agrees to purchase from the Northern Wyoming Land Company the following described property \* \* \* in Johnson county Wyoming, together with all water rights appertaining thereto, and to pay therefor the sum of \$48,000, as follows: Cash on delivery of contract for a deed to the above land; \$31,000 balance to be paid in three equal annual payments, in one, two, and three years, at 6 per cent. interest, and to take a contract for a deed, and when there has been 75 per cent. of the purchase price paid, a warranty deed shall be furnished to purchaser by the company. \* \* \* In the event this offer to purchase is not accepted or that the title to said lands cannot be made a good merchantable title, then said sum so paid as earnest money is to be repaid to the said. In case of acceptance of this offer the performance of the terms hereof is conditioned upon said Northern Wyoming Land Company furnishing an abstract showing a good, merchantable title, and thereafter tendering a warranty deed to the said Harry Butler and Viola Butler at Bellwood, Nebraska, both par-

ties paying all taxes due or delinquent prior to this date. This offer is to remain open until the 28th day of November, A. D. 1913, at 12 o'clock p. m. and acceptance thereof may be made at any time prior to said date and hour by mailing notice thereof to Harry Butler and Viola Butler at Bellwood, Nebraska, or by other personal notification."

The time for the acceptance of defendants' offer was extended to Tanuary 31, 1914. Tanuary 29, 1914, the plaintiff accepted defendants' offer. One might draw the conclusion from the main brief of counsel for plaintiff that they claimed that the provision of the contract relating to the furnishing of an abstract of title by plaintiff was waived by defendants by their subsequent acts and declarations, but in counsel's brief in reply, it is denied that such is the position of the plaintiff and it is explained that the plaintiff's position is that the contract arising from the offer and acceptance fixed no time when the plaintiff was required to furnish defendants with an abstract showing a good merchantable title, and therefore, plaintiff was only required to furnish the same within a reasonable time before the defendants were entitled to a deed, which would be when 75 per cent. of the purchase price had been paid. This being the situation, it is further contended that it was competent for the parties to fix a new time within which the abstract should be furnished, and that the evidence shows that this was done. It is clear, we think, that on the face of the offer the abstract was to be furnished before the defendants should be required to do anything thereunder. The abstract to be furnished was not merely an abstract of title, or a complete abstract of title, but an abstract showing a good merchantable title. And such an abstract was of great importance to defendants before they should execute a formal land contract for the purchase of the land, as they were required by the offer to pay \$17,000 in cash "on delivery of a contract for a deed to the above land."

[2, 3] The written contract could be modified, however, by another written contract or an executed oral agreement made upon good consideration. There is no claim that the contract was modified by written agreement, so we must turn to the evidence to see whether there was an executed oral agreement made between the parties, changing the time when the abstract should be furnished. The plaintiff called as a witness one George C. Belt, who testified that as the agent and employé of the plaintiff, he called upon the defendants at Bellwood, Neb., in May, 1914; that, at this time witness had a contract for a deed with him drawn in accordance with the offer of defendants: that Mr. Butler made some objections to the contract, especially with reference to the language thereof relating to water rights. In reply to these objections, witness said he would take them up with the attorneys of plaintiff and see if they could be removed. The contract presented at the May meeting contained the following language with reference to the abstract:

"It is further understood and agreed, by and between the parties hereto, that the said party of the first part shall at the time of the execution and delivery of the said warranty deed, also deliver or cause to be delivered to the said parties of the second part, or their attorney, within 30 days from

date, a complete merchantable abstract of title to said lands and premises, showing title to said premises to be in the said party of the first part, or the grantor in said warranty deed, free from all liens and incumbrances, but subject to all easements, rights of way, and reservations hereinbefore mentioned, and furnish a complete abstract within 30 days from date."

Witness called again upon defendants the last of June or the first of July, 1914, and had with him a redraft of the proposed contract for a deed. With reference to the abstract, the redrawn contract contained the following provision:

"It is further understood and agreed, by and between the parties hereto. that the said party of the first part is now having prepared through its attorney and the Johnson County Abstract Company of Buffalo, Wyoming, a complete abstract of title to said lands and premises and that as soon as said abstract is finished and printed or typewritten (and if possible within 30 days from the date hereof) the said party of the first part shall deliver to the said parties of the second part or their attorneys a copy of such abstract, showing the fee-simple title to said premises vested in the said party of the first part, and shall at or before the time of the execution and delivery of the said warranty deed cause such copy of said abstract to be continued and brought down to such date and shall thereupon deliver or cause to be delivered to the said parties of the second part, or their attorney, such abstract and continuance thereof, and the said party of the first part does hereby covenant and agree and warrant that such abstract shall and will be a complete merchantable abstract of title to said lands and premises and that the same will show title to said premises as of such date to be in the said party of the first part, or the grantor in said warranty deed, free from all liens and encumbrances, but subject to all easements, rights of way, and reservations hereinbefore mentioned."

Mr. Butler told witness at this meeting in June that he was through with the deal. Witness could not give Butler's language in detail. The provisions of the redrawn contract were not discussed. Neither the original contract presented to the Butlers nor the redraft were ever signed or executed by them. Witness was interrogated with reference to the first contract presented to the Butlers and testified as follows:

"The words on page 3, 'within thirty days from date,' pertaining to the time for furnishing an abstract—is that one of the things he objected to? A. That is one of the things he asked, and I think afterwards we put it in down there, to furnish a complete abstract. I think that is the same thing; that we were to furnish that abstract."

The witness was subsequently recalled and asked the following question:

"What, if any, conversation did you have at that time (the meeting in June) with the Butlers with regard to closing the transaction? A. Well, we came out for the purpose of closing it, and they declined to close it. I don't recall just what the conversation was."

Vincent D. Durmoody, a witness called by the plaintiff testified that he was present when Belt presented the first contract to the Butlers. He was then asked the following question:

"What did the Butlers say, if anything, they were willing to do as soon as a corrected contract should be brought to them? A. Mr. Butler said that when they got a corrected contract, and would have a deed from the Northern Wyoming Company, and also an abstract, then they were ready to close up."

Witness met the Butlers again with Belt in June, 1914. The redrawn contract for the deed and abstract was tendered to the Butlers and witness was asked this question:

"What did they say with respect to going on with the deal? A. Mr. Butler told Mr. Belt he would not accept it at all, and he turned the deal down."

Then the following questions were asked and answers given:

"You and Mr. Belt left together, did you? A. Yes. Q. Did you return later on to see them again? A. I would not say. I gave Mr. Butler the abstract and was to return the next day, and I called up from Schuyler that evening and was told by Mr. and Mrs. Butler that they would not accept it at all under any consideration; they would not accept the abstract. The next morning it was mailed, or that afternoon, I believe, it was mailed; mailed from a small town, I think named Edholm, to Omaha, because it was in Omaha the next morning."

The plaintiff introduced in evidence certificates of the Johnson County Abstract Company which were attached to the abstract, which plaintiff furnished the defendants: but the abstract itself was not offered in evidence until later, so there was no evidence at this time that the abstract tendered showed a good merchantable title to the land in controversy. The uncontradicted evidence also showed that the land, at the time plaintiff refused to enter into the land contract, was incumbered by a mortgage in excess of \$67,000. This was the state of the evidence when the plaintiff rested, and the defendants moved for a directed verdict. Subsequently the plaintiff was allowed to withdraw its rest and to introduce additional evidence. As bearing upon the question under discussion, the plaintiff introduced the full abstract of title, which showed that the mortgage for \$67,000 contained a release provision to the effect that the land which was to be conveyed to the defendants could be released from the mortgage upon payment of \$55 per acre; the mortgage covering other lands than those in controversy. The plaintiff also introduced a letter written by Matt Miller, dated March 11, 1914, in which certain objections were made to the abstract furnished by the plaintiff, but no mention was made of the particular mortgage now in question. Plaintiff also recalled for the fourth time the witness Belt. The witness testified that at the meeting in May between himself and the Butlers there was a discussion about a mortgage existing upon the Wyoming land. The mortgage was spoken of in going over the contract, and the witness explained to the Butlers the partial release clause in the mortgage, and he made a memorandum at the time. The witness was then asked the question.

"What did Mr. Butler say about that matter? A. Well, that was our final conference; this is the way I thought, that it was perfectly satisfactory and I made this minute here. Q. Not the way you thought, but what you said. We do not want what you thought. What did Mr. Butler say, after you explained to him about that mortgage and the release clause in it? A. It was satisfactory. Q. Did you at the time correct that paragraph in accordance with what you and Mr. Butler had said at that time? A. Yes; the corrections are here. Q. And you made those corrections right there in Mr. Butler's presence? A. Yes. Q. And Mrs. Butler's? A. Yes. Q. And, as corrected, was the paragraph read to them? A. They were right there. I do not know as I read it aloud but they saw the corrections after they were made. Q. After

the corrections were made, did they raise any objection to it? Did they raise any objection to the first contract after all these corrections were made by you, after having gone over the matter with them? A. No."

On cross-examination, the witness was asked:

"Now, what was Mr. Butler's specific objection to Exhibit I (the first contract) on page 3, the part that pertains to the abstract? A. Well, the specific objection was that we were not to furnish him an abstract according to this thing, the abstract itself, until 75 per cent. was paid, until we furnished the warranty deed there, and we agreed here to furnish it right away."

We understand the effect of the testimony of Belt as thus detailed to be that the original or first contract that he presented to the Butlers provided that the abstract should not be furnished until the time of the delivery of the warranty deed; that the Butlers made objection to this and the contract was changed, so as to provide that the abstract should be delivered within 30 days from the date of the contract. The provision of the first contract in relation to the abstract as heretofore quoted is unintelligible when standing alone, but, taken in connection with the evidence of Belt, it appears that the language of the excerpt referred to was caused by the request of the Butlers that the 30-day clause should be added. The second contract, however, in that portion of the same heretofore quoted as referring to the matter of the abtract, is a clear departure from the corresponding clause in the first contract, and the fact that Belt, as the agent of the company, presented the second contract to the Butlers for signature shows conclusively that, even if it be conceded that the Butlers requested the addition of the 30-day clause to the first contract, this was never agreed to by the company, because, when the contract was redrafted, an entirely different provision was inserted therein. So the claim that the minds of the parties met as to what should be done concerning the abstract wholly fails. The Butlers wanted one thing and the company another. The Butlers objected to the first contract on other grounds than that of the abstract, and there is no evidence that they ever agreed to the provisions in regard to the abstract as it stood in the second contract. It results from this state of the case that the language of the original offer must stand, and determine the rights of the parties, and, as we have said before, the offer required that the abstract should be furnished before the Butlers should be required to do anything thereunder. In reaching the conclusion that we have, we have not considered the question whether the written offer of the Butlers could be modified by evidence of a subsequent oral contract upon which neither party had acted.

[4] We are further of the opinion that the abstract which the evidence shows was furnished by the plaintiff to the defendants did not show a merchantable title to the land in controversy. There was a mortgage upon the land in controversy for over \$67,000. The mortgage, it is true, covered other lands, and there was a clause therein that the plaintiff might have released from the lien of the mortgage certain lands, which we understand included those in controversy, upon the payment by the company to the mortgagee of the sum of \$55 per acre. This was a privilege that the plaintiff could exercise or not, as

it might choose, and there is no evidence of any agreement between the plaintiff and the defendants that the cash part of the purchase price of the lands in controversy should be used to release them from the mortgage, nor is there any agreement that the plaintiff agreed to do so. Cases are cited by counsel for plaintiff to the effect that a mortgage on the estate of a vendor of land will not justify the purchaser in refusing to accept the deed and enable him to recover back the part of the purchase money already paid if the vendor at the time is able and willing to have the mortgage discharged. No fault can be found with such decisions, but each case must stand upon its own facts. In this case the plaintiff agreed to furnish an abstract showing a merchantable title before the defendant should do anything, and it was incumbent upon the plaintiff to allege and prove that it had substantially performed its part of the contract. And in this case, although it alleged it had performed the contract on its part, it clearly failed in its proof in respect to the matter under discussion.

The judgment below should therefore be affirmed; and it is so

ordered.

SANBORN, Circuit Judge (dissenting). My understanding of Mr. Belt's uncontradicted testimony in this case is that at the May meeting between him and Mr. Butler he told Mr. Butler that the \$67,000 mortgage, which they both knew was upon the title to the Wyoming land and other lands, contained a provision in it to the effect that the mortgagee would release the land described in the contract upon payment of \$55 an acre; that he then proposed to Mr. Butler that the \$67,000 mortgage should remain on the land until the time for the delivery of the warranty deed, when the company should furnish an abstract of title showing a perfect merchantable title free from that mortgage, and that meanwhile, and within 30 days from the date of this May conference, it should furnish an abstract of title showing a perfect merchantable title with the exception of the \$67,000 mortgage; that Mr. Butler accepted this offer, and declared that arrangement satisfactory, and that within 30 days from that date the company did furnish the latter abstract, but Mr. Butler absolutely refused to perform the contract. Here, as it seems to me, was substantial evidence that the first breach of the contract was committed by Mr. Butler, and not by the company and for that reason I am unable to resist the conclusion that this evidence and the question which party committed the first breach should have been submitted to the jury, and that the court was in error in refusing to do so.

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#### THE WELBECK HALL

#### DYASON v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1918.)

#### No. 1553.

Cross-Appeals from the District Court of the United States for the Dis-

trict of Maryland, at Baltimore; John C. Rose, Judge.
Suit in admiralty by Edwin Dyason, master of the steamship Welbeck Hall and bailee of her cargo, against the Pennsylvania Railroad Company and the Central Elevator Company. From decree for libelant, come these cross-appeals. Affirmed in part, and reversed in part.

For opinion below, see 242 Fed. 285.

H. N. Abercrombie, of Baltimore, Md., and James Keith Symmers, of New York City, for appellant and cross-appellee.

Shirley Carter, of Baltimore, Md. (Bernard Carter & Sons, of Baltimore,

Md., on the brief), for appellees and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. This case is controlled by the opinion rendered in case No. 1552, Naam Looze Vennoot Schap, S. S. Willem Van Driel, Sr., a Corporation, as Owner of S. S. Willem Van Driel, Sr., v. Pennsylvania Railroad Company, a Corporation, and Central Elevator Company of Baltimore City, a Corporation, 252 Fed. 35, — C. C. A. —; and accordingly the decree of the District Court is affirmed as to the liability of the Central Elevator Company, and reversed as to the liability of the Pennsylvania Railroad Company.

# SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(District Court, N. D. California, Second Division. July 13, 1918.)

Nos. 14,275, 14,735, 14,892, 15,131, 15,344, 15,569, Circuit Court; Nos. 26 and 96, District Court.

1. EQUITY \$\infty 409-Findings of Master-Weight.

In a case involving the constitutionality of a state law, statutory or municipal, the court will not be bound by the findings of a master.

2. WATERS AND WATER COURSES \$==203(11)—WATER COMPANIES—VALUATION OF PROPERTY.

Findings of a master as to the value of property used by a water company, and necessary for the furnishing of water to a city and its inhabitants, and on which it was entitled to earn dividends, reviewed.

3. Waters and Water Courses &= 203(12)—Water Companies—Regulation of Rates.

A court is without power to revise rates to be charged by a water company as fixed by a municipal board within its authority, nor may it enjoin their enforcement merely because they are deemed unjust or unreasonable, but only on the ground that they are so low as to be clearly confiscatory and unconstitutional.

4. Waters and Water Courses \$==203(10)—Water Companies—Regulation of Rates.

Earnings of 6 per cent. on the capital invested by a California water company held a fair return, but ordinances fixing rates under which it could not make such earnings held confiscatory and unconstitutional.

In Equity. Suit by the Spring Valley Water Company against the City and County of San Francisco and others. On final hearing. Decree for complainant.

E. J. McCutchen, Warren Olney, Jr., and A. Crawford Greene, all of San Francisco, Cal., for plaintiff.

George Lull, Robert M. Searles, and Jesse H. Steinhart, all of San Francisco, Cal., for defendants.

RUDKIN, District Judge. For more than 60 years last past the Spring Valley Water Company, a California corporation, and its predecessors in interest, have been engaged in the public service of supplying the city of San Francisco and its inhabitants with water for domestic and other purposes. To enable it to discharge the duties thus assumed, the company has acquired lands and water rights, and has constructed dams, reservoirs, pipe lines, and the usual facilities for conserving, impounding, conducting, and delivering the water thus supplied. Section 1 of article 14 of the state Constitution provides as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law: Provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city, or

town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter."

Pursuant to this constitutional requirement the board of supervisors of the city and county of San Francisco, in the month of February, 1907, passed an ordinance fixing the rates or compensation to be charged by the plaintiff for the use of water for the year commencing on the 1st day of July, 1907, and ending on the 30th day of June, 1908, and in the month of February of each succeeding year thereafter, until and including the year 1914, a similar ordinance was passed fixing the rates or compensation to be charged for the use of water for the ensuing year. Soon after the passage of the ordinance of February, 1907, the plaintiff instituted suit No. 14,275 in the Circuit Court of the United States for the Northern District of California to restrain the city and county of San Francisco and the board of supervisors from enforcing the rates or compensation fixed by the ordinance, invoking the jurisdiction of that court on the ground that the rates or compensation thus fixed were noncompensatory, and that the ordinance took the property of the plaintiff for a public use without making just compensation therefor, and deprived the plaintiff of its property without due process of law, in violation of the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States. Similar suits were instituted in the same court, and in the United States District Court, which succeeded to its jurisdiction in 1912, to enjoin the enforcement of the rates or compensation fixed by the ordinances passed in the ensuing years for the like reason. After the issues were made up the several cases were referred to the standing master by consent of parties, with directions to take the testimony and report his findings and conclusions to the court. The testimony has been taken, the master's report has been filed, exceptions to the report have been saved, and the case is now before the court for final disposition.

[1] At the threshold of the case the court is met with the objection that, inasmuch as the reference was by consent, the findings of the master are conclusive upon the court, unless there has been manifest error in the consideration given the testimony or in the application of governing principles of law. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, Davis v. Schwartz, 155 U. S. 636, 15 Sup. Ct. 237, 39 L. Ed. 289, and kindred cases are cited in support of this proposition. That rule, however, has but a limited application to a case of this kind.

In Knoxville v. Knoxville Water Co., 212 U. S. 1, 7, 29 Sup. Ct. 148, 150 (53 L. Ed. 371), the court said:

"At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that under these circumstances the findings are conclusive in this court, unless they are without support in the evidence or were made under the influence of erroneous views of the law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of this suit is to arrest

the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of rate making is purely legislative in its character, and this is true whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature and must be re-\* \* There can be at garded as an exercise of the legislative power. \* this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and, where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases, it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question, sometimes be regarded as conclusive. All that is intended to be said is that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit."

But in Chicago, Milwaukee, etc., Ry. Co. v. Tompkins, 176 U. S. 167, 180, 20 Sup. Ct. 336, 341 (44 L. Ed. 417), the court said:

"We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that, in view of the difficulties and importance of such a case, it is imperative that the most competent and reliable master, general or special, should be selected; for it is not a light matter to interfere with the legislation of a state in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

This ruling was reaffirmed in Lincoln Gas Co. v. Lincoln, 223 U. S. 349, 362, 32 Sup. Ct. 271, 56 L. Ed. 466, and it must be presumed that the court had this rule in mind in ordering the reference, and the parties in consenting thereto.

In this case the master examined the lands, reservoirs, and properties of the company, viewed other lands used as a basis of comparison for the purpose of fixing land values, heard the witnesses testify, observed their demeanor, and otherwise enjoyed opportunities for weighing and applying testimony which are denied to the court; and for that reason I must accept his finding as to the properties used and useful, and in general his findings on questions of land values, construction cost, depreciation, and expense of maintenance and operation, because such findings are amply supported by the testimony. But where the findings are in the nature of conclusions from undisputed facts I will be guided by my own conceptions of right and justice. In the light of these considerations I will refer, briefly as may be, to the findings relied on to support the conclusion of the master that the rates established by the board of supervisors for each of the several years in question are confiscatory and therefore void.

At the commencement of the trial the parties agreed that the case involving the 1913 rates should be deemed the principal one; that the value of the property and property rights of the plaintiff should be ascertained and fixed as of December 31st of that year; and that the value for the other years should be ascertained by deductions and additions to the inventory, aided by certain stipulated percentages. No objection has been urged by either party to the deductions or additions made to the 1913 valuation for the purpose of ascertaining and fixing the value for the remaining years, so that for the present we need only concern ourselves with the 1913 valuation. This statement. of course, has no application to the so-called Pleasanton Ranch Lands, which were not acquired until 1912. The master found that the value of all property of the company, used and useful as of December 31, 1913, was \$39,000,000; that the net revenue for the year 1913-14, based on the ordinance of February, 1913, was \$1,531,385.16, or 3.93 per cent.; and that a fair rate of return on the invested capital was 7 per cent. Speaking roughly, and without going into unnecessary details, the items going to make up the 1913 valuation are as follows:

Lands in the city of San Francisco	1,015,290	00
Merced watershed lands	3,242,160	00
Peninsular watershed lands	2,027,649	00
Miscellaneous peninsular lands		~
Alameda lands		- 0
Rights of way	250,000	
Reservoir lands		
Water rights		
Structures, less depreciation		
Partially constructed Calaveras dam	514,304	
Inventory and working capital	390,000	
Going concern value	3,400,000	00

-which the master reduced to \$39,000,000.

For reasons already stated, I adopt the finding of the master that all the above properties are used and useful. The finding is fully warranted by the testimony, and is further warranted, if not impelled, by the acts and conduct of the city and its representatives, extending over a period of years, in the matter of fixing rates, and in the condemnation suit instituted by the city to condemn the water system now in question. For the like reason I accept the valuations placed on the San Francisco lands, the Peninsular watershed lands, the Peninsular miscellaneous lands, the Alameda lands, the rights of way and structures, and the finding as to the necessary amount of working capital. The valuation placed on the reservoir lands seems somewhat fanciful and arbitrary, but I would not feel warranted in making a reduction that would make a difference in the final outcome of the case. The valuations placed on the other properties call for special consideration.

[2] First. As to the Merced watershed lands: Merced Lakes, containing an area of 336 acres, furnish at present a part of the city water supply. During the year 1913 the total water supply of the city from all sources was 39.7 million gallons daily, or 88 gallons per capita. Of this total 3.4 million gallons daily, or less than one-tenth of the

whole, was taken from the lakes in question. In addition to the ownership of the lakes the plaintiff owns 2,482.71 acres of adjacent watershed lands. The parties are not agreed as to the necessity for maintaining this watershed. The watershed lands are situated from 4½ to 7 miles from the civic center of the city, and are separated from the city by the range of hills dominated by the Twin Peaks. The lands are chiefly valuable for residential purposes, and the plaintiff contends that they cannot be safely used for these purposes so long as the water of the lakes is used for domestic purposes; that it will be necessary to abandon the use of the lakes as a source of supply for domestic purposes at an early date, and that thereafter the lake water will only be used in case of emergency. The defendants, on the other hand, contend that the maintenance of this watershed is unnecessary; that the water of the lakes can be adequately protected from pollution by the maintenance of a narrow margin or strip of land around the lakes. The master found that the maintenance of the watershed was necessary to protect the water of the lakes against pollution as long as the lake water is used for domestic purposes, and in that conclusion I concur. The question remains, however, what valuation should be placed upon these lands for rate-making purposes? The master found that the market value of the lands in the year in question was \$5,532,-231.50, but that for rate-making purposes the value was only \$3,242,-160, as already indicated. Both parties have excepted to the valuation thus fixed, the plaintiff contending for the full market value, the defendants insisting upon a still further reduction. Manifestly these watershed lands are not worth their full market value for rate-making or water-supply purposes; for if the lands are placed at their full market value of approximately five and one-half million dollars, and there is then added thereto the sum of \$336,000, the value placed on the lakes for reservoir purposes, and the further sum of \$315,000, the value placed upon the water rights in the lakes, the result is a capital investment of upwards of \$6,000,000 for lands, reservoirs, and water rights, furnishing less than one-tenth of the total water supply of the city. It must be at once apparent that no such valuation can be considered or accepted. What valuation should, then, be adopted? In my opinion, the valuation fixed by the master is too high and unwarranted. If we accept his valuation of almost three and a quarter million dollars as of December 31, 1913, and add thereto the valuation placed on the lakes for reservoir purposes, and on the water rights in the lakes, we still have a capital investment of almost \$4,000,000 for lands. reservoirs, and water rights, furnishing less than one-tenth of the total water supply, and this without dams, conduits, pipe lines, and all that goes to make up a complete system. In other words, on this basis the company would have upwards of \$40,000,000 invested in lands, reservoir sites, and water rights alone, or more than the value of its entire system as found by the master. For the purposes for which these lakes and watershed lands are used, they are of no greater value than the lands and reservoir sites which go to make up the balance of the system. Indeed, they are perhaps of less value, because of the somewhat doubtful quality of the water furnished from this source.

If the use of these lands was necessary or indispensable to the maintenance of the system, a different question would be presented; for in that event the plaintiff would probably be entitled to a reasonable return on their full market value, whatever that value might be. But these lands are not indispensable to the maintenance of the system, and for water-supply and rate-making purposes are worth only the reasonable cost of obtaining an equivalent supply from an alternative source, which is conceded to be accessible. If it be said that the company is entitled to a reasonable return on the full value of these lands until water can be brought in from an alternative source, the answer is that practically the same conditions have existed for a long period of years, and the necessity for a change should have been anticipated and the change provided for. For these reasons I am of opinion that there should be a further deduction of \$1,500,000 from the value of these watershed lands.

Second. As to the value of water rights. The master found that these water rights had a value of \$90,000 per million gallons daily for the years 1913–14 and 1914–15 and a somewhat lesser value for the earlier years. If the water supply owned and controlled by the plaintiff was drawn from a stream or other definite source, I am not prepared to say that this valuation is excessive or unsupported by the testimony. But the San Francisco water supply is peculiar in this respect. As said by the master:

"There is no need of detailed description of the works. Unlike other localities, where water is available in adequate quantities from nearby rivers or lakes, San Francisco must rely chiefly upon the collection and storage of the winter flood waters of distant streams, whose flow largely diminishes or disappears during our rainless summers. This has required, in addition to the usual engineering structures needed for the diversion and distribution of water, the provision of large areas for impounding reservoirs, surrounding watershed lands to prevent habitation and its resulting pollution, and water rights to assure the ability to divert the water elsewhere."

Under such circumstances, to allow the company the full value of watershed and storage reservoirs, and add thereto the value of the water when collected and stored, is to place a double burden on the rate payers. The plaintiff is undoubtedly entitled to the full value of its storage facilities, but in addition to this it is only entitled to the fair value of the water rights in their natural state. And I am far from convinced that these winter flood waters flowing wildly to the bay and sea are worth \$90,000 per million gallons daily, or even a small part of that sum. Of course all the water rights of the plaintiff are not of this character, but, making due allowance for its claims of every kind, I am of opinion that \$1,500,000 should be deducted from the value of the water rights as found or fixed by the master.

Third. The next item is for construction cost of the Calaveras dam. The facts in relation to this partially constructed dam are these: Construction work commenced about 1910, or at least the first item of construction cost appears in the findings of the master for the year 1910–11. The master found that the dam should be completed some time during the present year or next year, unless construction work is delayed by the present war or other causes. When completed the

reservoir resulting from the construction of the dam will furnish fortyfive million gallons daily to the city water supply, or more than the entire supply for any of the years in controversy here. The items allowed for this dam in the several years are, in round numbers, as follows:

1910-11	\$113,000	00
	197,000	
	514,000	
1914-15	672,000	00

These several items are made up of the cost of preliminary investigations, engineering, construction work, and interest. It is conceded that these several sums were actually expended, and that the construction of the dam is a necessary addition to the water system; but it is likewise conceded that for the years now in controversy the dam added nothing to the city water supply. For this latter reason the defendants contend that the money thus expended should be omitted from property values for rate-making purposes. The plaintiff is entitled to a reasonable return upon its invested capital, and whether it receives that return from time to time as money is expended in the acquisition of property or in the construction of works, or whether it receives a higher rate of return when the works are completed and in use, to make up for interest and other charges during construction, is a matter of form rather than of substance. Perhaps the rule adopted by the master is the more equitable, because it obviates the necessity for any considerable increase in rates in any given year. The chief importance of the items, as I view them, is the bearing they have on the next item to be considered by the court, namely, the going concern value. I will therefore allow the items to stand, stating, as I did in regard to reservoir values, that their omission will not change the final result.

Fourth. The next item is the going value, or going concern value, of the plant or system, fixed by the master at \$3,400,000. Such value is defined by the Supreme Court in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165, 35 Sup. Ct. 811, 815 (59 L. Ed. 1244), as the value which inheres in a plant where its business is established as distinguished from one which has yet to establish its business. In further discussing the question in that case the court said:

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned, although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the master sufficiently include this element in determining the value of the property of this company for rate-making purposes?

"Included in going value, as usually reckoned, is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had

long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business."

It appears from the record that for a great many years last past the plaintiff has wisely anticipated its future needs, and has acquired property and rights long before there was an actual necessity therefor, and long before such property or rights were put in actual use. I also think it sufficiently appears that the value of the property and rights thus acquired was added to the value of the plant or system at the earliest opportunity, and that later rates were based thereon. At least there is nothing in the record to indicate the contrary. And the plaintiff now asserts the right to have the value of works under construction added to the value of the system, and to collect returns thereon, long before the works are actually completed or put in use, and we have a right to assume that the same course has been pursued in the past. For instance, in the case of the Calaveras dam, under the findings of the master the rates of the company will be based in part on money invested in the construction of the dam for many years before the dam is completed or put in use, and long before the rate payers derive any benefit therefrom. In the light of this practice, is it just or proper to add another percentage to the cost of the dam when put in actual use on the theory that it is then a going concern? It may be urged that the present value of the plaintiff's property does not depend upon past practices, and that such past practices cannot be taken into consideration, but, as said by the Supreme Court, every case is controlled by its own circumstances, and, under the circumstances disclosed by this record, I feel that past practices are a safer and more equitable guide than dogmatic theories and assumptions not justified by the record. No doubt the company has sustained losses by way of interest on investments in property and in construction work before receiving returns thereon, and probably losses in preliminary investigations and in establishing its business which have not been fully compensated for as operating expenses or otherwise; but, in view of all the circumstances, I deem the allowance of the master excessive, and deduct therefrom the sum of \$2,000,000.

Fifth. Reference has already been made to the Pleasanton Ranch lands. For many years the company owned land in the vicinity of these lands, and pumped water for the system from the underlying gravel. These pumping operations lowered the water table under adjoining lands to such an extent that some time prior to the year 1912 the company was threatened with litigation by adjoining landowners. To avoid injunction suits or actions for damages, or perhaps both, the company deemed it advisable to purchase the lands outright and did so about the latter year. It thus acquired approximately 4,500 acres of land, at a cost of approximately \$1,500,000. The value of these lands was included by the master in the rating base, and to such

inclusion the defendants have excepted. I am inclined to the opinion that the exception is well taken. However desirable the acquisition of these lands may have been from a business standpoint, the fact remains that they are not necessary to the maintenance of the system, and are not used or useful in connection therewith. It seems to me that the correct basis would be to ascertain as nearly as possible the value of the right or interest in these lands which is actually used for public purposes, and base the rate of return on that valuation. However, the master has allowed nothing for the water rights from these lands, and the rents and profits, amounting to about \$40,000 annually at the time of the trial, have been accounted for as a part of the revenues of the system; and if the court should now undertake the difficult task of determining the value of the right or interest actually used for public purposes, and base the returns thereon, after deducting from the net revenues the rentals accounted for, the difference would be inconsiderable; at least, the difference would not be determinative of the case.

[3] Sixth. The master found that the plaintiff was entitled to a return of 7 per cent. on its invested capital during the several years in controversy here. If this is to be deemed a mere finding that such a rate of return was fair and reasonable as between the company and the water consumers, I have no comment or criticism to make. If, on the other hand, it is to be deemed a finding or conclusion that any less rate of return was confiscatory and violative of the Constitution of the United States, I must dissent therefrom. This court has no jurisdiction to review the action of the board of supervisors in the matter of fixing rates, and no jurisdiction to enjoin the enforcement of rates which are lower than the court itself would fix after full investigation. Any such attempt on the part of the court would be usurpation in its worst form. In Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116, the court said:

"When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty.

"But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

This language was quoted with approval by the Supreme Court in San Diego Land Co. v. National City, 174 U. S. 739, 750, 19 Sup. Ct. 804, 810 (43 L. Ed. 1154), and in the same case Mr. Justice Harlan said:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that

is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

[4] Cases may doubtless be found in which trial courts have found that public service corporations were entitled to a return of 7, or even as high as 8, per cent. on the capital invested in certain enterprises; but I have found no case where the court has held that a less rate of return than 7 per cent. is confiscatory or violative of the Constitution. A return of 6 per cent. was approved by the Supreme Court in Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R A. (N. S.) 1134, 15 Ann. Cas. 1034, and I think the concensus of opinion favors the view that such a rate of return is not confiscatory or violative of the Constitution. In Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201, 213, 24 Sup. Ct. 241, 246 (48 L. Ed. 406), the court had under consideration a California statute fixing the net annual receipt or return for furnishing water at not less than 6 nor more than 18 per cent., based on the value of the property used and useful. And in discussing the validity of such a statute the court said:

"It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 per cent. upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it 1½ per cent. a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to 6 per cent. upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."

The reasonableness of a return depends in a measure on local conditions, on the risks assumed, and other considerations. But it is a matter of common knowledge that interest rates vary almost as much in the same locality at different times as they do in different localities at the same time, and in an enterprise of this magnitude the question of locality, while entitled to consideration, is not controlling. At least, the Supreme Court did not so consider it in the case just cited arising in the same state. For these reasons I am of opinion that a return of as high as 6 per cent. on the invested capital or value of property devoted to the service of the public is not confiscatory, and violates no constitutional right of the plaintiff.

After a most careful and painstaking examination of the voluminous record before me, I do not feel that I would be warranted in making other or further changes in the master's report. Perhaps I might allow an item here or disallow an item there; but the changes would be inconsequential and of doubtful propriety. As said by the court in Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 Sup. Ct. 389, 390 (56 L. Ed. 594):

"An adjustment of this sort, under a power to regulate rates, has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be met."

In the course of the opinion I have not referred to the voluminous exceptions taken, and this for obvious reasons. The exceptions reserved by the defendants are more than 100 in number, with subheads and subdivisions, and cover 57 closely typewritten pages. Many of the exceptions relate to reasons assigned by the master for his conclusions rather than to his findings on ultimate or material facts. Suffice it to say that in so far as the findings here made differ from the findings of the master the exceptions are sustained, but in all other respects the exceptions on the part of the defendants are overruled. Certain exceptions were reserved by the plaintiff, but all save one have been sufficiently answered. The plaintiff owns rights of way through Mt. Olivet, Cypress Lawn, Greenlawn, and Woodlawn cemeteries. The testimony tends to show that lands in these cemeteries are worth from \$1 to \$1.50 per square foot for burial purposes. The plaintiff insists that the rights of way through these cemeteries should be valued on that basis. In that conclusion I cannot agree. No such price was paid for the rights of way, and the mere presence of the cemeteries adds nothing to their value for water supply purposes. Certainly the fortuitous fact that pipe lines pass through these cemeteries adds nothing to the value of the system as a whole, and affords no reason why water rates should be based on the price the citizen is willing or compelled to pay for the six feet of earth that will mark his last resting place.

Much has been said by counsel representing the city about the original cost theory and its adoption by the California Railroad Commission. In answer to that argument it need only be said that the theory thus advocated has been repudiated time and again by the Supreme Court of the United States and the question is not an open one.

It remains to apply the conclusions thus announced to the facts of the several cases. Fortunately the court is relieved from one of the chief difficulties which usually arise in cases of this kind; that is, the return that may be expected under the regulations in question. No such difficulty can arise here, because the ordinance for each year expired with the year, the rates have already been collected, and the return is a mere matter of computation. The valuation fixed by the master varies from \$32,900,000 in 1907-08 to \$39,000,000 in 1913-14 and 1914-15. The net revenue varies from \$696,648.74, or 2.1 per cent., in 1907–08, to \$1,654,589.87, or 4.24 per cent., in 1914–15. The highest rate of return was therefore during the last year, and, if the ordinance for that year is declared noncompensatory and void, the same conclusion must follow in each of the earlier cases as a matter of course. The valuation for the year 1914-15 has been reduced from \$39,000,000 to \$34,000,000. A net return of 6 per cent. on that valuation is \$2,040,000, or approximately \$385,000 in excess of the ordinance rates. During each of the years in question a temporary restraining order was granted by the court, and the plaintiff was permitted to and did collect approximately 15 per cent. in excess of the ordinance rates. The actual net return during the year 1914–15, with this 15 per cent. added, was \$2,011,903.97, or less than 6 per cent. on the valuation as found and fixed by the court. For these reasons I feel constrained to hold that each and all of the several ordinances are violative of the Constitution of the United States, and therefore void. Let decrees be entered accordingly.

### MEMORANDUM DECISIONS

A. B. DICK CO. v. UNDERWOOD TYPEWRITER CO., Inc. (Circuit Court of Appeals, Second Circuit. May 2, 1918.) No. 234. Appeal from the District Court of the United States for the Southern District of New York. Bill in equity by the A. B. Dick Company against the Underwood Typewriter Company, Incorporated. From a decree (246 Fed. 309), in part for complainant and in part for defendant, defendant appeals. Decree affirmed. Arthur v. Briesen, Hans v. Briesen, and Fred A. Klein, all of New York City, for appellant. Samuel Owen Edmonds, of New York City (J. Edgar Bull, of New York City, of counsel), for appellee. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

CHARLES W. LEWIS TOWING & LIGHTERAGE CO. v. CORBIN et al. (Circuit Court of Appeals, Fourth Circuit. April 19, 1918.) No. 1590. Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge. Action by Catherine E. Corbin, individually and as mother and next friend of Roy A. Corbin, and another, against the Charles W. Lewis Towing & Lighterage Company. Judgment for plaintiffs, and defendant appeals. Affirmed. William C. Coleman, of Baltimore, Md. (Semmes, Bowen & Semmes, of Baltimore, Md., on the brief), for appellant. George T. Mister and Harry B. Wolf, both of Baltimore, Md., for appellees. Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This is an appeal in admiralty from a decree of the District Court of the United States for the District of Maryland. A collision occurred on the 2d of June, 1916, between the tug J. W. Thompson and the launch Dreamland, in the waters of Curtis creek, in the District of Maryland. In consequence of the collision one Roy Corbin, who was a passenger on the Dreamland, was thrown into the water and drowned. Thereupon this proceeding was brought on behalf of his wife and child against the owners of both the tug Thompson and the launch Dreamland, and by the decree of the District Court it was found that the casualty was due solely to the negligence of the tug J. W. Thompson, which was owned by the appellant herein, and damages decreed against appellant in favor of the libelant. The assignments of error are very general in character, but practically the only question argued before the court and discussed under these assignments of error was whether or not the launch Dreamland was also guilty of negligence, so as to require that the damages awarded should be divided be-tween the owners of the J. W. Thompson and the owners of the launch Dreamland. This is a conclusion of fact, which was decided by the District Judge, who heard all the witnesses and took all the testimony, adversely to the appellants. Upon consideration of the whole testimony, we do not find that the conclusion of the learned judge, who tried the cause below and heard the testimony, can be said to be manifestly against the evidence on the question of fact involved as to the concurring negligence of the launch, but that as a whole there is sufficient evidence to support it, and the decree below is accordingly affirmed. Affirmed.

HILLS v. HAMILTON WATCH CO. (Circuit Court of Appeals, Third Circuit. May 25, 1918.) No. 2353. Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge. Suit by Edward R. Hills against the Hamilton Watch Company. From a decree dismissing the bill (248 Fed. 499), plaintiff appeals. Affirmed. Cyrus N. Anderson, of Philadelphia, Pa., and Max W. Zabel, of Chicago, Ill., for appellant. Charles J. Williamson, of Washington, D. C., and William Steell Jackson, of Philadelphia, Pa. (Charles L. Miller, of Lancaster, Pa., of counsel), for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. We do not think it necessary to discuss again the questions that the District Court has already considered at length. 248 Fed. 499. The patent has expired, and nothing is now involved, except the right to an account. Accordingly we express no opinion concerning laches or validity; it is enough to say that we do not find infringement. On this point we regard the prior art as limiting the patent so narrowly that the defendant is free to use the two barrels that have been attacked.

The decree is affirmed.

END OF CASES IN VOL. 252